IN RE ROGERS CORPORATION

TSCA Appeal No. 98-1

FINAL DECISION

Decided November 28, 2000

Syllabus

The Rogers Corporation ("Rogers"), a manufacturer of polyurethane elastomers and foams, appeals two rulings issued by Administrative Law Judge Barbara A. Gunning, the Presiding Officer in this case: (1) an interlocutory order granting the U.S. Environmental Protection Agency ("EPA") Region I's motion for accelerated decision as to liability; and (2) a subsequent Initial Decision as to penalty. The rulings held Rogers liable for violating section 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, and assessed a $281,400 administrative penalty. The Presiding Officer found that over the course of 268 days in mid-to-late 1993 and early 1994, Rogers failed to dispose of polychlorinated biphenyls ("PCBs") in a lawful manner.

Rogers raises a number of arguments on appeal, many of which are premised on an inference Rogers would have the Environmental Appeals Board ("Board") draw from the undisputed fact that Rogers ceased using heat transfer oil containing PCBs in its polyurethane manufacturing machine in 1972. Rogers suggests an inference that since it terminated use of PCB oil in 1972, any releases of PCBs at its facility must have occurred prior to or during 1972 and thus could not possibly have occurred in 1993-1994, as the Presiding Officer found. The PCB regulations in effect at the time the PCB releases occurred and the time this case was brought contained an explicit exemption for PCB spills and other releases that occurred prior to the enactment of the initial PCB regulations in 1978. Thus, by means of its inference, Rogers asks the Board to find that Rogers is exempt from the PCB regulations and therefore is not liable for the alleged violations.

Rogers' position on appeal raises the following salient issues. First, Rogers argues that in reviewing the earlier accelerated decision as to liability, the Board should consider all the evidence in the administrative record — including evidence received at the subsequent penalty hearing — as part of its *de novo* review of the Presiding Officer's accelerated decision as to liability. Second, Rogers charges that the Presiding Officer erroneously refused to consider certain evidence and testimony proffered at the penalty hearing relative to Rogers' liability. Third, Rogers argues that Region I had the burden of proving that PCB disposal took place in 1993, and that the Presiding Officer erred in finding that Rogers failed to carry its burden of proving that the PCB releases occurred prior to 1978. Fourth, Rogers contends that the Presiding Officer favored an explanation for the source of the PCBs that had no support in the record, was contradicted by an EPA witness, and was based on speculative comments by Rogers' employees. Fifth, based on its contention that this was an historic (i.e., pre-1978) spill, Rogers claims that revised PCB regulations made final in 1998 preclude the imposition of any penalty for the spills at issue here, that it is a violation of due process to penalize it for historic spills, and that Region I's case against it

is barred by the statute of limitations because the alleged PCB disposal took place more than five years before the complaint was filed. Sixth, Rogers contends that TSCA is remedial legislation that cannot be applied punitively.

Held: The Presiding Officer's accelerated and Initial Decisions are affirmed and the penalty of $281,400 is upheld. The Board rejects all of Rogers' arguments, finding:

- Board review of a Presiding Officer's accelerated decision will generally be limited to the evidence and arguments that were in the administrative record at the time the accelerated decision was made.

- The doctrine of "law of the case," which prevents the relitigation of settled rulings, supports the Presiding Officer's determination not to revisit her liability decision.

- The historic disposal site exemption must be raised by a respondent as an affirmative defense. Both the burden of production and the burden of persuasion with respect to the exemption lie with Rogers, and Rogers failed to carry these burdens.

- The little evidence in the record at the time the Presiding Officer made her liability ruling supports her findings, even when Rogers, treated as the nonmoving party, is given the benefit of any "reasonably probable" or "permissible" inferences drawn therefrom.

- EPA's policy with respect to pre-1978 spills/releases of PCBs, as expressed in the proposed and final rules governing the disposal of PCBs, does not apply to this enforcement action, which was filed and decided before the new regulations went into effect on August 28, 1998.

- Rogers was not denied due process of law in this case. Rogers' arguments regarding retroactive application of laws and purported lack of fair notice fail because they rely on the unproven assertion that the PCB spills in this case were historic spills. Similarly, because Rogers failed to establish that its releases of PCBs occurred prior to 1978, its statute of limitations defense fails.

- The imposition of a civil penalty is not punitive in this case, despite the fact that Rogers is incurring separate cleanup costs. Civil penalties serve the important purpose of deterring future behavior of like kind, both by the violator and others.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

The Rogers Corporation ("Rogers") appeals two rulings issued by Administrative Law Judge Barbara A. Gunning, the Presiding Officer in this case: (1) an interlocutory order granting the U.S. Environmental Protection Agency ("EPA" or "Agency") Region I's motion for partial accelerated decision as to liability; and (2) a subsequent Initial Decision as to penalty. The rulings held Rogers liable for violating section 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, and assessed a $281,400 administrative penalty. The Presiding

Officer found that over the course of 268 days in mid-to-late 1993 and early 1994, Rogers failed to dispose of polychlorinated biphenyls ("PCBs") in a lawful manner. For the reasons set forth below, we affirm the Presiding Officer's rulings and uphold the $281,400 penalty.

I. *BACKGROUND*

A. *Statutory and Regulatory Background*

PCBs are chemically stable, fire-resistant compounds that have been used since the 1920s in electrical equipment (e.g., transformers, capacitors) and as plasticizers, adhesives, and textile coatings. Once released into the environment, PCBs are extremely persistent (they resist biological degradation) and tend to bioaccumulate in the fatty tissues of humans and other animals. *See*, *e.g.*, *Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1270-71 (D.C. Cir. 1980); *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1346-47 (S.D.W.V. 1990), *aff'd sub nom. Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); 63 Fed. Reg. 35,384, 35,385 (June 29, 1998); Rogers Corp. Penalty Hearing Transcript at 113 (Apr. 22-24, 1998) ("Tr."). Due to the extensive use and indiscriminate disposal of PCBs over the years, PCBs have become widely dispersed in the environment and are frequently detected at low levels in human beings, as well as in foods such as milk and fish. 44 Fed. Reg. 31,514, 31,516 (May 31, 1977); Tr. at 112.

PCBs are classified as probable human carcinogens. *See*, *e.g.*, *Envtl. Def. Fund*, 636 F.2d at 1270; 63 Fed. Reg. at 35,385; U.S. EPA, Office of Research & Development, *PCBs: Cancer Dose-Response Assessment and Application to Environmental Mixtures* 6 (Sept. 1996); Tr. at 110-12, 130-31, 141-42. PCBs have also been found to cause a wide variety of noncarcinogenic illnesses in humans, particularly with respect to the skin, eyes, and nervous system. *Dow Chem. Co. v. Costle*, 484 F. Supp. 101, 102 (D. Del. 1980); *see* 64 Fed. Reg. 69,358, 69,362 (Dec. 10, 1999) (PCBs "have significant non-carcinogenic effects, including neurotoxicity, reproductive and developmental toxicity, immune system suppression, liver damage, skin irritation, and endocrine disruption").

When Congress enacted TSCA in 1976, it singled out PCBs for special attention (the only chemical/class of chemicals so treated) in recognition of evidence showing PCBs to be both widespread and highly toxic. Congress placed explicit restrictions on the manufacture, processing, distribution, and use of PCBs in the United States. *See* TSCA § 6(e)(2)-(3), 15 U.S.C. § 2605(e)(2)-(3). Congress also explicitly directed EPA to promulgate regulations prescribing acceptable methods for disposing of PCBs and for marking PCBs with warning and instructional labels. *Id.* § 6(e)(1), 15 U.S.C. § 2605(e)(1). Congress made it un-

lawful for any person to fail or refuse to comply with any requirement set forth in EPA's PCB rules. *Id.* § 15(1)(B), 15 U.S.C. § 2605(1)(B).

On February 17, 1978, EPA promulgated its initial PCB disposal and marking rules in fulfillment of TSCA's section 6(e)(1) directive. *See* 43 Fed. Reg. 7150 (Feb. 17, 1978). The rules, which have been revised numerous times over the years,[1] regulate a host of substances that contain or can become contaminated with PCBs, such as oils, waste oils, heat transfer fluids, soils, and other materials. 40 C.F.R. § 761.1(b) (1994). In recognition of the pervasive nature of PCBs in the environment, caused largely by the dumping of hundreds of millions of pounds of PCBs in uncontrolled fashion, *see* 44 Fed. Reg. at 31,516, EPA chose in the regulations to take a broad view of the term "disposal":

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

40 C.F.R. § 761.3. EPA then established, in section 761.60(a), very specific requirements for disposing of various kinds of PCB materials. For instance, in the case of liquid materials such as oils and heat transfer fluids (but excluding mineral oil dielectric fluid), the Agency specified that any such materials containing less than 500 parts per million ("ppm") of PCBs but at least 50 ppm PCBs must be disposed of in an approved incinerator, chemical waste landfill, high efficiency boiler, or alternative combustion process.[2]*Id.* § 761.60(a)(3)(i)-(iv). Other types of materials with PCB concentrations of 50 ppm or greater must also be disposed of in approved incinerators, landfills, and other facilities. *See*, *e.g.*, *id.* § 761.60(a)(4) (contaminated soil, rags, and debris), .60(a)(2) (mineral oil dielectric fluid), .60(a)(5) (dredged materials and sewage sludge).

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[1] *See*, *e.g.*, 49 Fed. Reg. 25,239 (June 20, 1984); 44 Fed. Reg. 31,514 (May 31, 1979); 43 Fed. Reg. 33,918 (Aug. 2, 1978). EPA's most recent amendments to the PCB rules took effect on August 28, 1998, during the pendency of this action. *See* 63 Fed. Reg. 35,384 (June 29, 1998) (codified in scattered sections of 40 C.F.R. pt. 761 (2000)). The 1998 rules made a number of changes to the PCB disposal requirements. *See*, *e.g.*, 63 Fed. Reg. at 35,401-02, 35,444-48. As will be explained further below, one of the disputes in this case is the question of which set of regulations properly apply to the TSCA violation allegedly committed by Rogers in 1993-1994. In this decision, all references to the part 761 regulations will be to the regulations that were in effect in the 1993-1994 time frame, unless otherwise specified.

[2] The new PCB rules, effective August 28, 1998, alter the acceptable disposal methods for liquid materials contaminated with 50 to less-than-500 ppm PCBs. *See* 63 Fed. Reg. at 35,445 (codified at 40 C.F.R. § 761.60(a)(2)-(3) (2000)) (liquids generally must be disposed of in a high efficiency boiler, but liquids from certain "incidental" sources, such as precipitation, condensation, leachate, or load separation, must be disposed of in a chemical waste landfill).

In other portions of the PCB rules, EPA attempted to be very explicit with respect to the applicability of its PCB disposal program. For example, in the case of PCB spills and leaks, EPA specified that "[s]pills and other uncontrolled discharges of PCBs at concentrations of 50 ppm or greater constitute the disposal of PCBs." *Id.* § 761.60(d)(1). Moreover, "PCBs resulting from the clean-up and removal of spills, leaks, or other uncontrolled discharges, must be stored and disposed of in accordance with [the requirements of section 761.60(a)]." *Id.* § 761.60(d)(2). EPA also included a prefatory note regarding the scope of the PCB disposal restrictions. The note provided for an "historic use" exemption from regulation for PCBs "placed in a disposal site" or "landfilled" prior to February 17, 1978, the date EPA issued its initial TSCA section 6(e)(1) regulations:

> [The PCB storage and disposal rules] do[] not require removal of PCBs * * * from service and disposal earlier than would normally be the case. However, when PCBs * * * are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) * * * [that] have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this subpart. This subpart does not require PCBs * * * landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs * * * are removed from the disposal site, they must be disposed of in accordance with this subpart.

Id. § 761.60 prefatory note.

B. *Factual Background*

Rogers manufactures polyurethane elastomers and foams at a facility in East Woodstock, Connecticut for use as shoe inserts, tool handles, and sporting equipment grips, as well as in many other applications. Tr. at 302-04; Joint Stipulations ¶ 3 (July 3, 1997) ("Stips."); *see* Affidavit of Gerry L. Langelier in Support of Respondent's Motion for Accelerated Decision ¶ 2 (Sept. 11, 1997) ("Langelier Aff. 1"). From 1968 through 1995, Rogers used a heat transfer system known as "HTS 975" to cast its foam materials. Tr. at 302, 305, 320; Stips. ¶ 4. The system used oil as a heat transfer medium, and the HTS 975's pumps were equipped with "wet seals," which leaked or "wept" small quantities of oil on a continuous basis while operating. Tr. at 313-16, 441. A shallow concrete-lined, bermed containment area underneath the pumps captured the discharged oil and prevented it from flowing into other areas of the basement room in which the HTS 975 pumps and related equipment were installed. Tr. at 312-13.

As part of its routine operations at the East Woodstock facility, Rogers periodically pumped waste oil from the containment berm into drums for off-site disposal. For many years, Rogers used a stem drum pump system to transfer oil from the berm into waste oil drums. The drum pump sat in a five- to six-inch-deep

sump within the bermed area, and Rogers employees "squeegeed" oil in the berm toward the sump for collection. Tr. at 314, 335-36, 347. In July 1992, Rogers retired its stem drum pump system, filled in the sump in the bermed area, and began to use a new vacuum pump system to remove waste oil from within the berm. The drum pump had apparently always left a residual oil behind on the surface of the concrete berm floor, so Rogers switched to the vacuum pump to improve the efficiency and cleanliness of the operation. Tr. at 369. The vacuum pump system removed all visible oil from the surface of the berm floor. *Id.*

When it began operations at the East Woodstock facility in 1968, the heat transfer oil Rogers used in the HTS 975 contained PCBs. In mid-1972, however, due to the lack of future availability of the PCB oil,[3] Rogers drained and flushed out the system's PCB oil and replaced it with a non-PCB oil. Tr. at 323-34. From that point forward, Rogers used only non-PCB oils in the HTS 975. Rogers drained, flushed, and completely replaced the oil used in its system three more times over the course of the years: in 1977, 1988, and 1995.[4] Tr. at 328.

In 1982, Rogers began to take samples of oil from the HTS 975 system and the berm and send them out for analysis of PCB content. Tr. at 339-40. According to testimony from Rogers' management at the penalty hearing, the company began testing for PCBs in 1982 because:

> [W]ith the passage of TSCA and the passage of the EPA's regulations regarding handling, storage and disposal of [PCB] material, it became a requirement to test systems that had previously held PCBs to verify they did not exceed regulatory limit[s].

Tr. at 340 (testimony of Robert F. Lee, Corporate Manager, Environmental and Safety Engineering, Rogers Corporation). All samples taken between 1982 and April 1993 were determined to contain less than 50 ppm PCBs. Tr. at 348. The highest PCB concentrations found during this time frame were 23 ppm in 1988, 33 ppm in 1989, and 45 ppm in the HTS 975 aeration tank and 25 ppm in the berm in 1990. *See* Stips. ¶ 4(f) & attachs. 4-5.

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[3] In January 1972, Monsanto Corporation, the manufacturer of Therminol FR, the PCB oil Rogers had used since the East Woodstock facility's inception, sent Rogers a letter informing it that Therminol FR was no longer available for purchase. Tr. at 323-24. Rogers chose at that time to replace the Therminol FR product with another Monsanto product, Therminol 55, which did not contain PCBs. Tr. at 324.

[4] In 1977, Rogers transitioned from Monsanto's Therminol 55 oil to Sun Oil Company's Heat Transfer Oil No. 21. In 1988, Rogers switched to Luscon Industries Corporation's Hydralube DC-46, and in 1995, Rogers changed to Paratherm NF. Stips. ¶ 18 & attach. 5; Tr. at 326-27. These changes from one type of non-PCB oil to another were purportedly motivated by Rogers' desire to take advantage of improvements in oil technology. *See* Tr. at 327.

In April 1993, Rogers had accumulated sixteen drums of waste oil from the berm underneath the HTS 975 unit. Rogers sent samples from these drums to Averill Environmental Laboratory, Inc. for analysis. In a letter dated June 16, 1993, which Rogers received on or about June 21, 1993, Averill reported that nine of the sixteen drums contained PCBs in excess of 50 ppm. Stips. ¶¶ 5, 17 & attach. 4; *see* Tr. at 348; Initial Decision on Penalty at 20. After receiving this letter, Rogers embarked on a search for the source of the PCB contamination. Rogers spent approximately two or three weeks checking that Averill's results were accurate, another two weeks or so investigating whether the drums were contaminated prior to waste oil being pumped into them, and yet another several-week period obtaining a certification from its oil supplier that the oil put into the HTS 975 was PCB-free. Tr. at 348-51. In late August 1993, Rogers held an internal meeting to discuss the PCB issue. Tr. at 351-52. At that time, Rogers management recommended (but did not mandate) that maintenance workers use protective clothing (e.g., disposable gloves, booties, coveralls) when accessing the HTS 975 room. Tr. at 353-54. Rogers also directed its engineering and maintenance staffs to take steps to stop the HTS 975 system from weeping oil and to review maintenance records and trace through all the piping in the building to determine whether the PCBs might be coming from an abandoned pipe or other source that inadvertently might have been reconnected to the 975 unit. Tr. at 353-55. "During these initial investigations[,] Rogers continued to believe that the PCB results must be due to residual PCBs in HTS 975." Affidavit of Gerry Langelier in Support of Respondent's Response to Complainant's Motion for Accelerated Decision and to Memorandum in Opposition to Respondent's Motion for Accelerated Decision ¶ 6 (Oct. 1, 1997) ("Langelier Aff. 2").

On September 10, 1993, Rogers shipped the sixteen drums of waste oil off-site for disposal in accordance with the PCB regulations. Stips. ¶ 6. Janet Kwiatkowski, an environmental analyst employed by the Connecticut Department of Environmental Regulation ("CT-DEP"), reviewed Rogers' September 10, 1993 PCB shipment manifest and realized CT-DEP had never conducted a TSCA inspection of the East Woodstock facility. Tr. at 38. Accordingly, on November 5, 1993, Ms. Kwiatkowski went to the facility to conduct such an inspection. Stips. ¶ 7.

Rogers employees escorted Ms. Kwiatkowski to the heat transfer room in the basement of the facility. Ms. Kwiatkowski noted that the door to the room was unmarked but locked and that no safety equipment, such as gloves, goggles, respirators, or change of clothing, was present outside the door, nor was there a decontamination area either inside or outside the door. Tr. at 45-46. Ms. Kwiatkowski observed "dark, heavy, black oil" in the berm underneath the HTS 975 pumps, and she also noted that the heat transfer room was very warm (80-100˚F), humid, and appeared to be unventilated. Tr. at 47-48. Ms. Kwiatkowski took a Polaroid photograph in the heat transfer room, which shows oil in the bermed area as well as oily footprints and Speedi-Dri (an absorbent material used to soak up oil) on the

floor outside the berm. Tr. at 49-52; Stips. ¶ 15 & attach. 2. During the inspection, Tim Gauthier, Rogers' certified industrial hygienist, told Ms. Kwiatkowski that the PCBs in the waste oil Rogers had shipped off-site possibly leaked out of seals in the HTS 975 unit that could not be cleaned. Tr. at 53, 62-64.

On December 1, 1993, Ms. Kwiatkowski, along with her supervisor Lori Saliby, conducted another inspection of the Rogers facility. Stips. ¶ 8. Ms. Kwiatkowski observed the same conditions in and around the HTS 975 room that she had on November 5th, although this time there was "a little more oil" in the berm. Tr. at 67; *see* Stips. ¶ 16 & attach. 3. Ms. Kwiatkowski also observed about twenty-five drums in the room, some of which contained new oil for use in servicing facility equipment, while about three contained waste oil and others were empty. Tr. at 67-68. Photographs taken during the inspection show oily footprints and stains, as well as Speedi-Dri, on the concrete floor outside the HTS 975 berm. Stips. ¶ 16 & attach. 3; Tr. at 71-73. During the inspection, William Whiteley, Rogers' manager of environmental engineering, told Ms. Kwiatkowski that the PCBs in the waste oil may have appeared there because Rogers introduced a higher temperature to the HTS 975, which may have caused PCBs to leave the system. Tr. at 68.

Lori Saliby took five samples of oil from the HTS 975 room during the December 1993 inspection. *See* Stips. ¶ 8(b); Tr. at 76-77. Ms. Saliby took one sample of oil in the berm using a "scoopula," a V-shaped piece of metal that can be used to collect oil that cannot be suctioned up because it is too heavy. Tr. at 85. Ms. Saliby took another of the samples, this time of oily Speedi-Dri outside the berm, using a plastic scoop. Tr. at 93-94. Ms. Saliby also took duplicates of the five samples and provided them to Rogers for its own analysis. Tr. at 77. Both CT-DEP and Rogers (through Averill) found that two of the five samples (the ones collected with the metal scoopula and plastic scoop) had PCB concentrations in excess of 50 ppm. Stips. ¶ 8(d)-(e); *see id.* ¶ 9(d).

By the end of 1993, Rogers completed its physical trace of all piping in the HTS 975 building without finding anything to explain the increase in PCB concentration in the berm oil. Tr. at 359, 363. Rogers also designed and began installing larger drip pans to catch oil weeping from the seven pumps associated with the HTS 975. These pans were installed one at a time, as individual pumps were pulled for repair, and Rogers completed the pans' installation by the end of the first quarter of 1994. Rogers thenceforth pumped waste oil directly from the drip pans into drums, and oil apparently no longer overflowed from the pumps onto the berm floor. Tr. at 367, 398-99, 406, 461. In January 1994, Rogers posted PCB warning signs in the HTS building, made protective disposable clothing mandatory for persons accessing the heat transfer room, instituted a PCB-training program, and mandated such training before employees could enter the HTS 975 room. Tr. at 463-64.

In early March 1994, Rogers still lacked a definitive explanation for the PCB concentrations Averill and CT-DEP had measured. Thus, Rogers hired Laidlaw Environmental Services to help pinpoint the source of the PCBs. Tr. at 398, 457. Sometime during the week of March 15, 1994, Laidlaw chemically cleaned the floor of the bermed area. In so doing, Laidlaw discovered three lengthy cracks in the concrete, which it subsequently patched and sealed. Laidlaw later drilled core samples through the concrete and into the soil. Tr. at 399-400. The core samples revealed PCB concentrations of up to 15,000 ppm in the concrete berm and 36,000 ppm in the underlying soil. Tr. at 400.

On May 26, 1994, William Whiteley, Rogers' manager of environmental engineering, sent CT-DEP a letter in response to requests for information. Among other things, Mr. Whiteley stated:

> It is only speculation on my part, but I would have to say that it was during that time period (1964 — 1972), when there were no regulations on PCB use, that the concrete floor in the containment area became contaminated with PCB's. Heat transfer oil pump seals have a tendency to weep fluid which ended up on the concrete floor in the basement containment area contaminating the concrete with PCB oil over approximately an eight year time frame (1964 — 1972). When we switched to non PCB oil in the system the pumps still weeped oil which went onto the same concrete floor. This oil was collected, tested for PCB's and until 1993 contained PCB levels less than 50 ppm * * *. In 1992, our production rate increased dramatically to the point where we were operating this equipment 24 hours a day 7 days a week 52 weeks a year with no shutdowns. This continued through 1993 and into 1994. The longer operating hours resulted in more circulating pump leakage onto the concrete floor in the containment area which required more frequent collection. It is our belief at this point that the increased quantity of leakage, caused by the greater run time, resulted in extracting more old PCB oil from the concrete than during our lean years.

Stips. ¶ 19, attach. 6.

C. *Procedural Background*

On September 23, 1994, EPA Region I commenced this action by filing an administrative complaint pursuant to TSCA § 16(a), 15 U.S.C. § 2615(a), alleging that Rogers had violated the PCB disposal rules found at 40 C.F.R. § 761.60 and the PCB Spill Cleanup Policy, 40 C.F.R. pt. 761, subpt. G, and proposing a penalty of $226,750. Region I reduced its proposed penalty to $182,700 in an amended and supplemental prehearing submission dated April 18, 1997. On September 12, 1997, three years after the filing of the complaint, Rogers filed a mo-

tion for accelerated decision, claiming there was no genuine issue of material fact for trial, and on September 22, 1997, Region I counterfiled for partial accelerated decision as to liability. The Region's motion also included a request to amend the complaint and prehearing memorandum and thereby increase the proposed penalty to $300,300.

On November 13, 1997, the Presiding Officer issued an interlocutory order that, among other things, granted Region I's motion for partial accelerated decision as to liability, granted Region I's motion to amend the complaint and prehearing memorandum, and denied Rogers' motion for accelerated decision. *See* Order Granting Complainant's Motion to Amend the Complaint, Denying Respondent's Motion for Accelerated Decision, Granting Complainant's Motion for Partial Accelerated Decision as to Liability, and Scheduling Hearing ("Acc. Dec."). Rogers then filed a motion for reconsideration of the interlocutory order on December 4, 1997, which the Presiding Officer denied on December 18, 1997.

On April 22-24, 1998, the Presiding Officer held a hearing regarding the penalty in this case. During that hearing, Rogers attempted to introduce evidence and testimony pertaining to the allegedly historical (i.e., pre-1978) source of the PCBs at the East Woodstock facility, which the company believed would exonerate it from the earlier finding of liability. The Presiding Officer informed Rogers that she would not admit evidence or testimony as to liability because that issue had already been litigated and decided, but Rogers insisted that it was not seeking to relitigate liability. Instead, Rogers contended that it was attempting merely to establish other matters relative to the penalty calculation, such as its culpability (state of mind) and the reasons why its investigation and cleanup of the PCBs took such a long period of time. The Presiding Officer received the evidence and testimony for these limited purposes only. *See*, *e.g.*, Tr. at 319, 322-23, 338, 378, 391, 401, 407, 409-17, 500-01, 509-12. On July 28, 1998, the Presiding Officer issued an Initial Decision as to penalty, assessing a $281,400 fine. *See* Initial Decision on Penalty ("Pen. Dec."). Rogers filed an appeal of both the liability and penalty decisions with this Board on August 17, 1998. Region I filed a reply to Rogers' appeal on August 31, 1998, and Rogers filed a response to the Region's reply on September 17, 1998.

II. *DISCUSSION*

The Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. § 22.30(f) (2000) (the Board shall "adopt, modify, or

set aside" the Presiding Officer's findings and conclusions);[5] *see* Administrative Procedure Act § 8(b), 5 U.S.C. § 557(b) ("[o]n appeal from or review of the initial decision, the agency has all the powers [that] it would have in making the initial decision except as it may limit the issues on notice or by rule"). Matters in controversy must be established by a preponderance of the evidence. 40 C.F.R. § 22.24(b); *see In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 217 (EAB 1997).

In the pages below, we begin by examining issues related to Rogers' liability for the alleged violation. First we delineate the scope of the administrative record for our appellate review of the liability question, and then we move on to a review of the Presiding Officer's treatment of liability and Rogers' challenges thereto, which include: (1) an argument that the Presiding Officer erred by declining to consider evidence presented at the penalty hearing for the purpose of reconsidering her liability determination; (2) a burden of persuasion argument regarding use of the historic disposal site exemption from disposal requirements; and (3) arguments that the Presiding Officer's favored explanation for the source of the PCBs had no support in the record, was contradicted by an EPA witness, and was based on speculative comments by Rogers' employees.

Next, we address four further challenges to liability raised by Rogers. These challenges consist of arguments that: (1) revisions to the PCB rules proposed in 1994 and made final in 1998 govern this proceeding and preclude the imposition of liability for the historic spills allegedly at issue here; (2) it is a violation of due process to penalize Rogers for historic spills; (3) TSCA is remedial legislation that cannot be applied punitively, as Region I purportedly attempts here; and (4) the general federal five-year statute of limitations bars prosecution of spills that occurred in 1972 and earlier.

Next, we examine Rogers' contentions regarding the penalty imposed by the Presiding Officer. Rogers claims that the PCB Penalty Policy should not have been used to calculate the penalty in this case because the PCB releases were historic and because the human health and environmental risks underlying the Policy were not present. Rogers also argues that the Presiding Officer ignored significant evidence in the record that shows no penalty, or possibly a much-reduced penalty, is warranted. We end by disposing of Rogers' late-filed motion for leave to file a supplemental memorandum regarding EPA regulations allegedly relevant to the issues raised on appeal.

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[5] A revised version of the Consolidated Rules of Practice governing these proceedings became effective on August 23, 1999. These procedural rules apply to all administrative proceedings commenced on or after August 23, 1999, and they also apply to proceedings commenced before that date unless their use "would result in substantial injustice." 64 Fed. Reg. 40,138, 40,138 (July 23, 1999). In this case, use of these revised rules would not result in substantial injustice, and thus all references to the 40 C.F.R. part 22 regulations in this decision will be to the 2000 version of these rules.

A. *Accelerated Decision as to Liability*

1. *Scope of Record Review on Appeal*

At the outset, Rogers argues that the Board should consider all the evidence in the administrative record — including evidence introduced or proffered at the penalty hearing — as part of its *de novo* review of the Presiding Officer's accelerated decision as to liability. Appellant's Brief in Support of Notice of Appeal at 5 ("App. Br."); Rogers' Response to EPA Region I's Reply Brief at 3-4 ("Resp. Br."). Rogers cites several cases as support for this proposition, *see* Resp. Br. at 4, and argues that it would be incorrect as a matter of law for the Board to limit its review to only those materials in the record at the time the Presiding Officer issued her accelerated decision. *Id.* at 3-4. Rogers hinges much of its appellate case on our acceptance of this position.

The Board has never explicitly spoken to the question of the scope of review of partial accelerated decisions as to liability where evidence or testimony produced during later proceedings could possibly have affected the earlier ruling if proffered earlier. The Consolidated Rules of Practice ("CROP") governing these proceedings also provide little guidance on this specific issue. *See*, *e.g.*, 40 C.F.R. § 22.30(c) (2000) ("[t]he parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction"). The accelerated decision provisions found in the CROP, however, are similar to the summary judgment provisions of the Federal Rules of Civil Procedure. *Compare* 40 C.F.R. § 22.20 *with* Fed. R. Civ. P. 56. In such situations, we have looked to the federal courts for guidance in charting an appropriate course. *See*, *e.g.*, *In re BWX Techs., Inc.*, 9 E.A.D. 61, 74 (EAB 2000); *In re Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 524 n.10 (EAB 1993).

Federal appellate case law on district court summary judgment dispositions is extensive. That case law indicates, first, that federal appellate courts review district courts' grants of summary judgment on a *de novo* basis, applying the same standards that govern the district court rulings (i.e., determining whether there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law). *See*, *e.g.*, *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340, 343 (3d Cir. 2000); *Greer v. United States*, 207 F.3d 322, 326 (6th Cir. 2000); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998); *Crawford v. Lamantia*, 34 F.3d 28, 31 (1st Cir. 1994), *cert. denied*, 514 U.S. 1032 (1995); *United States v. Rode Corp.*, 996 F.2d 174, 178-79 (7th Cir. 1993). Second, appellate courts generally hold that their review of a summary judgment decision is limited to the record — including factual evidence and arguments — as it stood before the district court at the time the summary judgment decision was rendered. *See*, *e.g.*, *Adler*, 144 F.3d at 671; *McClendon v. Ind. Sugars, Inc.*, 108 F.3d 789,

795 (7th Cir. 1997); *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1250 (1st Cir.), *cert. denied*, 519 U.S. 823 (1996); *Schneider v. County of San Diego*, 28 F.3d 89, 92 (9th Cir. 1994), *cert. denied*, 513 U.S. 1155 (1995); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 268-69 (8th Cir. 1994); *Harkins Amusement Enters. v. Gen. Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied sub nom. United Artists Theatre Circuit, Inc. v. Harkins Amusement Enters.*, 488 U.S. 1019 (1989); *Fassett v. Delta Kappa Epsilon (N.Y.)*, 807 F.2d 1150, 1165 (3d Cir. 1986), *cert. denied sub nom. Turgiss v. Fassett*, 481 U.S. 1070 (1987); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985), *cert. denied sub nom. Town of Saugus v. Voutour*, 474 U.S. 1100 (1986); *Garcia v. Amer. Marine Corp.*, 432 F.2d 6, 8 (5th Cir. 1970). This general rule, and two exceptions thereto, are explained as follows:

> In most cases, appellate review of the lower court's determination is limited to the record before the district court. As a general rule, arguments and evidence not presented in the district court in connection with a summary judgment motion are waived on appeal and the appellate court will be unable to consider these materials in its review of the district court's decision. However, an appellate court is not without discretion in its review. The rule that an argument not raised in the lower court is waived on appeal is one of discretion, rather than appellate jurisdiction. Appellate courts have carved out two commonly used exceptions to this general rule. The appellate court may consider issues raised for the first time on appeal (1) if the issues solely involve questions of law; or (2) if injustice would result if these arguments were not considered.

11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.41[3][c] (3d ed. 2000) (footnotes omitted); *see Joseph P. Caulfield & Assocs., Inc. v. Litho Prods., Inc.*, 155 F.3d 883, 888 (7th Cir. 1998) (review of grant of summary judgment is limited to record presented to district court at that time; if it were not so, "partial summary judgment rulings [could not] serve the important functions of narrowing issues for trial and requiring parties to come forward with substantial evidence in accordance with the schedule the trial judge has set").

We know of no reason why the federal courts' rule should not be applied in the administrative context before us. Our review on appeal is *de novo*, as is the federal appeals courts' with respect to summary judgments. 40 C.F.R. § 22.30(f). The federal cases clearly establish that a *de novo* review is not, as Rogers suggests, a license to second-guess a judge on matters not before her at the time of her decision. To find otherwise would undermine the deliberative process of lower tribunals and lead to endless attempts by litigants to introduce new evidence and raise new arguments long after the time to do so is fairly past.

The three cases Rogers relies on to make its legal point do not convince us otherwise. Two of the cases are not contextually parallel to the case before us: they do not deal with accelerated decision/summary judgment situations but rather involve federal court review of agency decisionmaking. *See Blackburn v. Martin*, 982 F.2d 125, 128 (4th Cir. 1992), *quoted in* Resp. Br. at 4 (court of appeals review of Secretary of Labor's decision awarding employee damages for wrongful termination); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), *cited in* Resp. Br. at 4 (Supreme Court review of Second Circuit order enforcing National Labor Relations Board cease-and-desist order). The third case, a pre-Board case, does not address the issue at hand. *See* Resp. Br. at 4.[6] To avoid undermining the process by which administrative law judges may narrow issues for trial by setting time frames within which parties must come forward with evidence of genuine issues of material fact, and to preserve scarce administrative resources, we hold, consistent with federal case law, that our review should be limited to the record before the Presiding Officer at the time she rendered her accelerated decision.

As for the two exceptions to the rule in the federal case law, neither applies in this case. Rogers hopes to establish, by use of evidence and arguments not before the Presiding Officer at the time of the accelerated decision, that the PCBs in the waste oil came from the contaminated concrete and soil beneath the HTS 975 unit. In particular, Rogers would like the Board to consider evidence that it "switched to a more powerful wet/dry vac in about 1992 for its berm oil collection method, which likely resulted in taking up bits of contaminated concrete and residue from the concrete and concrete cracks," ultimately contaminating the waste oil drums from which samples were taken in April 1993. *See* App. Br. at 15. Rogers would also like the Board to consider the testimony of its consultant Robert Potterton, proffered at the penalty hearing, that "the method of sampling used by Connecticut employees in the December 1993 testing (a metal scoopula and a plastic scoop) resulted in scraping up concrete and other particles contaminated with PCBs [that] in turn contaminated the berm oil." *Id.* Rogers intends by this evidence to establish that the PCB spills or leaks at its facility occurred in 1972 and/or earlier, and not in 1993, and thus that Rogers qualifies for the historic ex-

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[6] In its Response Brief, Rogers cites "*In re City of Detroit Pub. Lighting Dept.*, 1991 WL 195728, *5, 3 E.A.D. 514 (EPA, 1991)," as supporting the proposition that "in deciding if Rogers is liable, the Board should examine the entire record." Resp. Br. at 4. The Westlaw citation Rogers provides (i.e., 1991 WL 195728) does not exist, so we are left to speculate as to what *City of Detroit* vehicle the company is relying upon. It may be that Rogers means to refer to 1991 WL 165728, which is a Chief Judicial Officer order issued in the *City of Detroit* case on July 9, 1991. *See In re City of Detroit Pub. Lighting Dep't*, Order on Motion for Reconsideration & on Motion to Supplement the Record, TSCA Appeal No. 89-5, 1991 WL 165728 (CJO July 9, 1991). Alternatively, Rogers may mean to refer to the February 6, 1991 *City of Detroit* decision. *See In re City of Detroit Pub. Lighting Dep't*, 3 E.A.D. 514 (CJO 1991). In either event, the cases do not persuade us that it is appropriate to consider the entire record in our *de novo* review of the accelerated decision here.

emption from the PCB disposal regulations set forth in the prefatory note. *See* 40 C.F.R. pt. 761.60 prefatory note; *supra* Part I.A.

These issues are not solely ones of law but rather are highly fact-specific, and thus the first exception to the general rule, for solely legal issues, does not apply.[7] Second, injustice will not result if, in reviewing the liability decision, we do not consider the evidence and arguments now urged upon us by Rogers. Rogers initially learned in April 1994 that PCBs were highly concentrated in the concrete and soil beneath the HTS 975. Tr. at 400. However, despite being a sophisticated corporate entity represented by legal counsel, Rogers did not advance its new vacuum pump and scoopula/scoop theories of the case until well after it had contended, in September 1997, that there were no genuine issues of material fact and had asked for accelerated decision as to liability. Notably, shortly after Rogers put liability into play on an accelerated basis, it stated, "Why PCBs suddenly showed up in 1993 berm samples is a matter of speculation and in any case is irrelevant to this case." Rogers' Response to Region I's Motion for Partial Accelerated Decision and to Memorandum in Opposition to Rogers' Motion for Accelerated Decision at 3 n.2 ("Resp. to Partial Acc. Dec. Mot."). There can be no injustice in such circumstances in a decision to limit appellate review of the liability decision to the evidence and arguments before the Presiding Officer at the time of the partial accelerated decision. Accordingly, we move on to consider Rogers' arguments with respect to the liability decision itself, based on the record at the time the accelerated decision was issued.

2. *Liability*

a. *Burdens of Proof on Accelerated Decision*

Under the Consolidated Rules of Practice that govern this proceeding, an administrative law judge may issue an accelerated decision if he or she finds that no genuine issue of material fact exists and one side in the dispute is entitled to judgment as a matter of law. 40 C.F.R. § 22.20 (2000). In deciding whether a genuine factual issue exists, a judge "must consider whether the quantum and

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[7] This is not to suggest that we would, as a general matter, accept any new legal issue raised for the first time on appeal. Instead, review of such issues would be a matter of our discretion, which we would expect to exercise quite narrowly. In any event, our exercise of discretion would have to be consistent with the limitation in 40 C.F.R. § 22.30(c), which provides, in relevant part:

> The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument.

40 C.F.R. § 22.30(c) (2000).

quality [of] evidence is such that a finder of fact could reasonably find for the party producing that evidence under the applicable standard of proof." *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).

More explicitly, in filing a motion for accelerated decision (which is the functional equivalent of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure):[8]

> The movant assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor. If the movant has the burden of persuasion at trial, the movant must present evidence that is so strong and persuasive that no reasonable jury is free to disregard it, and that entitles the movant to a judgment in his favor as a matter of law.
>
> In contrast, the summary judgment movant who does not carry the burden of persuasion on this issue at trial has the lesser burden of "showing" or "pointing out" to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue and that the movant is entitled to judgment in its favor as a matter of law. Once this showing has been made, the burden of production shifts to the nonmovant having the burden of persuasion. The nonmovant's burden of production in these circumstances is considerably more demanding than the movant's with respect to the issues upon which the nonmovant bears the burden of persuasion at trial. This burden of production requires the nonmovant to identify specific facts (with or without affidavits) from which a reasonable factfinder, applying the appropriate evidentiary standard (i.e., a preponderance of the evidence here), could find in its favor on each essential element of its claim.
>
> As a corollary of the foregoing, parties opposing summary judgment must provide more than a scintilla of evidence on a disputed factual issue to show their entitlement to a trial or evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case. In considering whether a nonmovant has met this standard, courts are not supposed to engage in the

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[8] The Federal Rules of Civil Procedure do not apply to these administrative proceedings, but, as mentioned in Part II.A.1 above, we have in the context of accelerated decisions often looked to federal court Rule 56 jurisprudence for guidance in charting an appropriate course under the Consolidated Rules of Practice applicable here.

> jury function of determining credibility or weighing facts; instead, courts are to view the record in the case and submissions in the light most favorable to the nonmovant (including the nonmovant who bears the burden of persuasion on an issue), and are to believe all evidence offered by it. However, this indulgent standard of review does not require courts to find a genuine dispute and deny summary judgment where evidence is legally insufficient to support an essential element of a case or not significantly probative.

In re BWX Techs., Inc., 9 E.A.D. 61, 76-77 (EAB 2000) (citations omitted).

In cases where parties rely on circumstantial rather than direct evidence to plead their cause, a judge may draw inferences therefrom, as he or she may from direct evidence. Any such inferences, however, must be reasonably probable. *Id.* at 78-79 n.22 ("[a]s a general matter, a court on summary judgment need not favor a party whose evidence is too lacking in probative value"; instead, " a court need only draw favorable inferences as to a fact at issue if such inferences are reasonably probable"). We also emphasized that inferences must be "reasonable" in *Clarksburg Casket*, where we stated:

> It is well established that on a motion for summary judgment, a court must "'draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion.'" *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 817-18 (4th Cir. 1995) (quoting *Tuck v. Henkel Corp.*, 973 F.2d 371, 374 (4th Cir.), *amended*, No. 91-2591 (4th Cir. Sept. 3, 1992), *cert. denied*, 507 U.S. 918 (1993)). However, in order for an inference to be *permissible* it must be *reasonable*. *Id.* at 818. "Whether an inference is reasonable cannot be decided in a vacuum; it must be decided 'in light of the competing inferences' to the contrary. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

In re Clarksburg Casket Co., 8 E.A.D. 496, 507 (EAB 1999). Notably, it is not an administrative law judge's function to weigh and decide among competing reasonable or permissible inferences at this stage in the proceedings. Rather, the judge must give the benefit of the doubt in such cases to the nonmoving party.

b. *Presiding Officer's Decision*

At the time the Presiding Officer decided Rogers was liable for violating the PCB disposal rules, the evidence before her pertaining to the source of the PCBs was very limited. The record consisted primarily of the complaint, the answer, prehearing memoranda and attachments, the joint stipulations of July 3, 1997, and

attachments, and the two Gerry Langelier affidavits.[9] The affidavits stated that Rogers had not used PCB-containing heat transfer fluids since June 5, 1972. Langelier Aff. 1 ¶ 3; Langelier Aff. 2 ¶ 2. The joint stipulations included documentation of measurable PCB levels in HTS 975 waste oil ranging at the high end from 25 to 45 ppm, but never at 50 ppm or more, in the years prior to 1993. Stips. ¶¶ 4(f), 17-19 & attachs. 4-6. The stipulations also included documentation of the April and December 1993 oil samples that contained more than 50 ppm PCBs, as well as a 1994 Rogers letter to CT-DEP explaining that Rogers had "dramatically increased" its production rate in 1992 through 1994 and that the "longer operating hours resulted in more circulating pump leakage onto the concrete floor" under the HTS 975. Stips. ¶¶ 17, 19-20 & attachs. 4, 6-7.

On the basis of this record, the Presiding Officer began her analysis of Rogers' situation by drawing an inference derived from three decisions issued by EPA's Judicial Officers: *In re City of Detroit Public Lighting Department*, 3 E.A.D. 514 (CJO 1991); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267 (CJO 1990); and *In re Electric Service Co.*, 1 E.A.D. 947 (JO 1985). In reliance on these cases, the Presiding Officer held that "[f]rom the unexplained presence of PCBs on the concrete floor, it can be inferred that one or more 'uncontrolled discharges' of PCBs took place." Acc. Dec. at 17. Under the PCB rules, an "uncontrolled discharge" is a "disposal" of PCBs. 40 C.F.R. § 761.60(d). Noting the existence of the historic disposal site exemption set forth in the prefatory note to the PCB rules, the Presiding Officer then observed that the exemption is treated as an affirmative defense under applicable precedent. Acc. Dec. at 18-20 (citing *Standard Scrap*, 3 E.A.D. at 272-73). As such, the Presiding Officer noted that the burdens of production and persuasion regarding the applicability of the exemption lie with the respondent, who must establish, by a preponderance of the evidence, that the PCBs were "placed in a disposal site" prior to February 17, 1978. *Id.* at 19-21 (citing *Standard Scrap*, 3 E.A.D. at 271-75).

The Presiding Officer found that Rogers had proffered no direct evidence or theories to explain the presence of PCB-contaminated waste oil beneath the HTS 975 in April and December 1993. *Id.* at 23. Instead, the company asked the Presiding Officer to accept the inference that PCBs could not possibly have come from a post-1978 discharge because: (1) Rogers had not used PCB-containing oil since June 1972; and (2) tests had shown that the HTS 975 had not contained PCBs in excess of 50 ppm since that date. The Presiding Officer rejected Rogers' inference, noting evidence of measurable quantities of PCBs in oil samples tested in the years after 1972. She stated:

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[9] The first Langelier affidavit was attached to Rogers' motion for accelerated decision, while the second accompanied Rogers' response to Region I's motion for accelerated decision and memorandum in opposition to Rogers' motion for accelerated decision.

> I attach some significance to the fact that PCBs were present, although at unregulated levels, well after the 1972 change over to non-PCB oil by the Respondent and a concomitant flushing of HTS 975. This presence of PCBs, in itself, contradicts the Respondent's assertion that the PCBs could not possibly have been spilled after June 5, 1972.

Id. After examining the evidence in the record at the time and considering the competing inferences that allegedly could be drawn from that evidence, the Presiding Officer concluded that "the only plausible explanation for the presence of PCBs at regulated levels in 1993 after years of lower levels, especially those reported by the Respondent as late as 1992, is that there was an uncontrolled discharge in 1993." *Id.*

The Presiding Officer then discussed two possible theories for the cause of Rogers' uncontrolled discharge of PCBs. First, she noted that Rogers had implied, in its brief responding to Region I's motion for partial accelerated decision, that PCBs, which had saturated the concrete berm floor and underlying soil from pre-1972 leaks, had leached upwards into the pool of waste oil in the berm and thereby increased the PCB concentration in the oil. *Id.* at 24. Second, the Presiding Officer acknowledged Rogers' letter to CT-DEP stating that it had increased production dramatically from 1992 through 1994, which increased the amount of oil weeping into the berm. The Presiding Officer found the first theory of causation to be highly unlikely, noting that it "strain[ed] the imagination to envision the amount of PCBs that would have to leach into the berm oil from the concrete in order to contaminate 9 drums of oil." *Id.* She found the second theory "far more likely" than the first because she thought the HTS 975 had likely accumulated "marked amounts of PCB residue within its intricate machinery," including its wet seals, that may not have been dislodged by the drain-flush-refill operations but may have broken loose when Rogers increased its use of the unit in 1992. *Id.* at 24-25.

On the basis of the evidence before her and the reasonable inferences drawn therefrom, the Presiding Officer concluded that Rogers failed to establish, as an affirmative defense, that it was more or even equally likely that the uncontrolled discharge occurred before February 17, 1978, and thus the disposal site exemption was not available for use by Rogers.[10] *Id.* at 25. As a separate ground for the failure of Rogers' historic disposal site defense, the Presiding Officer also found

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[10] In stating this "more or equally likely" test, the Presiding Officer was applying *City of Detroit*, which allows a party to rebut a showing of improper PCB disposal with more or equally likely evidence. *See* Acc. Dec. at 25; *In re City of Detroit Pub. Lighting Dep't*, 3 E.A.D. 514, 530 (CJO 1991). The Presiding Officer was not improperly weighing competing inferences but rather was applying this test to those inferences she found reasonable.

that the bermed area did not qualify as a "disposal site" under the Agency's interpretation of the PCB rules. *Id.* at 20-21 (citing *Standard Scrap*, 3 E.A.D. at 275-79).

c. *Rogers' Arguments Relating to Liability*

Rogers raises several challenges to the Presiding Officer's finding that the company violated the PCB disposal rules in 1993-1994. First, Rogers argues that the Presiding Officer erroneously disregarded evidence and testimony that tended to show the source of the PCBs discovered at the East Woodstock facility was leaks that occurred more than twenty years earlier, rather than contemporaneous spills or leaks from the HTS 975. Second, Rogers argues that Region I failed to sustain its alleged burden of proving that the PCB disposal took place in 1993. Third, Rogers contends that the Presiding Officer erroneously adopted a PCB-source explanation that had no support in the record, was contradicted by an EPA witness at the penalty hearing, and was based on speculative comments by several Rogers employees. Each of these arguments is addressed, and ultimately rejected, below.

i. *Relitigation of Liability and the "Law of the Case" Doctrine*

Rogers argues that the Presiding Officer erroneously refused to consider certain evidence and testimony proffered at the penalty hearing regarding the April and December 1993 samples that were found to contain regulated levels of PCBs. App. Br. at 14-15. The materials at issue pertain to Rogers' use of the vacuum pump to clean up berm oil, which presumably was the means by which oil was transferred into the sixteen barrels that were sampled in April 1993. They also pertain to CT-DEP's use of a metal scoopula and plastic scoop to collect the December 1993 samples. Rogers apparently takes the position that this evidence and testimony should have been used by the Presiding Officer to reevaluate her earlier finding that Rogers was liable for violating the PCB disposal rules. *See id.* (arguing that source of alleged disposal was a pre-1978 spill). This argument is, in essence, an argument that the Presiding Officer should have ignored the "law of the case" made in the partial accelerated decision as to liability and should have revisited that decision as part of the penalty analysis.

"The doctrine of law of the case prevents relitigation of settled rulings." *In re J.V. Peters & Co.*, 7 E.A.D. 77, 93 (EAB 1997), *aff'd sub nom. Shillman v. United States*, No. 1:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part & rev'd in part on other grounds*, No. 99-3215, 2000 WL 923761, at *7 (6th Cir. June 29, 2000). According to the Supreme Court:

> "As most commonly defined, the doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision

> should continue to govern the same issues in subsequent stages in the same case." This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988) (quoting *Ariz. v. Cal.*, 460 U.S. 605, 618 (1983) & 1B Moore's ¶ 0.404[1] (1984)); *see Ariz.*, 460 U.S. at 619 ("a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive"). The law of the case doctrine does not limit a court's power to revisit an issue it previously decided. *Ariz.*, 460 U.S. at 618 ("[l]aw of the case directs a court's discretion, it does not limit the tribunal's power"); *Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301, 312 (2d Cir. 1979) ("[i]t is well established that 'the law of the case' does not constitute a limitation on the court's power but merely expresses the general practice of refusing to reopen what has been decided"), *cert. denied*, 449 U.S. 981 (1980). However, even though a court has the power to revisit its own decisions, the Supreme Court has stated that the court "should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson*, 486 U.S. at 817 (quoting *Ariz.*, 460 U.S. at 618 n.8). Two other "extraordinary circumstances" in which departure from the law of the case may in some cases be appropriate include situations where "the evidence on a subsequent trial was substantially different" or where "controlling authority has since made a contrary decision of the law applicable to such issues." *White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967) (*cited in Ariz.*, 460 U.S. at 618 n.8).

These practical case- and resource-management principles are as relevant in the realm of EPA administrative decisionmaking as they are in the federal courts. *See*, *e.g.*, *In re SchoolCraft Constr., Inc.*, 8 E.A.D. 476, 482 (EAB 1999), (declining to revisit earlier Board ruling that SchoolCraft was an "operator" under the Clean Air Act and thus potentially liable for violations of rules governing asbestos handling and disposal); *In re Bethenergy*, 3 E.A.D. 802, 805-07 (CJO 1992) (noting that while law of the case doctrine is a "'heavy deterrent to vacillation on arguable issues, [it is] not designed to prevent the correction of plain error'"; reviewing earlier ruling and declining to alter it because no plain error found) (citing 1B Moore's ¶ 0.404[1] (2d ed. 1991)).

In this case, we find it entirely defensible that the Presiding Officer declined to consider evidence and testimony related to the liability determination after that determination had been made. *See Mont. v. United States*, 440 U.S. 147, 153-54 (1979) ("[t]o preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"). Moreover, there has been no showing, nor do we find, that the Presiding Officer's deci-

sion to stand fast on her liability determination fell into one of the "extraordinary circumstance" categories flagged by the federal courts as exceptions to the law of the case doctrine.

First, the accelerated decision was neither clearly erroneous nor worked a manifest injustice upon Rogers. Most significant in this regard is the fact that Rogers initiated the accelerated decision process itself, and even went so far as to take the position that the source of the PCBs was irrelevant to the liability determination. Resp. to Partial Acc. Dec. Mot. at 3 n.2. As Region I convincingly asserts, "[t]he respondent cannot be allowed to represent, as it did in its motion for accelerated decision of dismissal, that there are no disputed material issues of fact with respect to 'all issues and claims in this proceeding,' then later seek to present additional facts on the issue of liability. Judicial economy and efficient resolution of cases would be victims if such a practice were allowed." Reply Brief of Complainant-Appellee, U.S. EPA Region I at 21 ("Reply Br.").

Second, while the evidence proffered at the penalty hearing was substantially different in certain respects than that in the record of the accelerated decision, we can lay the discrepancies solely at the feet of Rogers. Since Rogers states that it ascertained the source of the high levels of PCBs in April 1994, App. Br. at 10, there is no reason for it not raising the theory that it wanted to present at the April 1998 hearing before the Presiding Officer rendered her accelerated decision in November 1997.

Third, no contrary authority applicable to the issues at hand came into play between the time of the accelerated decision and that of the penalty decision.[11] Thus, we reject Rogers' arguments that the Presiding Officer erred in choosing not to reconsider her liability determination in light of Rogers' new evidence and testimony.

ii. *Burden of Persuasion for Historic Disposal Site Exemption*

In the accelerated decision as to liability, the Presiding Officer found that Rogers failed to carry its burden of proving the applicability of the historic disposal site exemption because the company did not demonstrate, by a preponderance of the evidence, that the PCB spill occurred prior to February 17, 1978. Acc. Dec. at 21. On appeal, Rogers takes issue with this finding, arguing that Region I had the "ultimate burden of proof to show that the disposal took place in 1993," that

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[11] As discussed in Part II.B.1 below, EPA promulgated final revisions to the PCB rules on June 29, 1998, effective August 28, 1998. The revised PCB rules are not applicable to this case and thus do not qualify as "contrary authority" in accordance with this exception to the law of the case doctrine.

the Region did not meet that burden, and thus that the Presiding Officer erred in her analysis. *See* App. Br. at 16. In so arguing, Rogers misapprehends the allocation of the burden of persuasion regarding the timing of uncontrolled discharges.

Under pre-Board precedent, it has long been settled that the timing of an improper disposal of PCBs is *not* part of a complainant's *prima facie* case. Rather, timing is a component of the historic disposal site exemption, which must be raised as an affirmative defense. Both the burden of production and the burden of persuasion with respect to this defense rest with the respondent. *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272-74 (CJO 1990); *see In re City of Detroit Pub. Lighting Dep't*, 3 E.A.D. 514, 518 n.8 (CJO 1991); *see also Rushing v. Kan. City S. Ry. Co.*, 185 F.3d 496, 505 (5th Cir. 1999) (party that seeks summary judgment based on affirmative defenses bears ultimate burden of persuasion on such defenses), *cert. denied*, 120 S. Ct. 1171 (2000); 40 C.F.R. § 22.24(a) (2000) ("[t]he respondent has the burdens of presentation and persuasion for any affirmative defenses"); *cf.* 40 C.F.R. § 761.50(b)(3)(iii) (2000) (owner/operator of site containing PCB waste "has the burden of proving the date that the waste was placed in a land disposal facility, spilled, or otherwise released into the environment, and the concentration of the original spill"). Accordingly, to use the historic exemption successfully, Rogers "was required to establish by a preponderance of the evidence that the PCBs in the [berm] samples were 'placed in a disposal site' prior to February 17, 1978." *Standard Scrap*, 3 E.A.D. at 274.

Here, as in *Standard Scrap*, the respondent presented no direct evidence showing when the uncontrolled discharges took place, but rather attempted to convince the Presiding Officer that, because it had not used PCB-contaminated oil after June 1972, the spills must have occurred before that date. The Presiding Officer rightly followed the holding in *Standard Scrap* in determining that Rogers had the burden of proving that the PCB spills or leaks had occurred prior to February 17, 1978, and then concluded that Rogers had not met that burden.

iii. *Rogers' Criticisms of the Presiding Officer's Liability Decision*

Rogers argues that in her decision on liability, the Presiding Officer favored an explanation for the source of the PCBs that had "no support in the record," was "contradicted by EPA's own witnesses," and was "apparently based on admittedly speculative comments by several of Rogers's employees in 1993 and 1994, before the real source of the PCBs had been discovered." App. Br. at 15. The relevant portion of the Presiding Officer's opinion states as follows:

> The second theory [for the cause of the uncontrolled discharge of PCBs] is based on both parties' indication that the catalyst for the increase in PCB concentration was likely the increased production levels from 1992 until 1994. This theory is that the increased use of

> the HTS 975 le[]d to the dislodging of residual PCBs remaining in the equipment from the pre-1972 use of PCB oil and that these dislodged PCBs contaminated the non-PCB oil that then dripped into the berm. I also note that HTS 975 was equipped with "wet seals" which could have harbored PCBs until dislodged by the increased production.

Acc. Dec. at 24.

Despite Rogers' claims, the little evidence in the record at the time the Presiding Officer made her liability ruling supports her findings, even when Rogers is given the benefit of any "reasonably probable" or "permissible" inferences drawn therefrom. First, the joint stipulations included laboratory reports showing varying (albeit unregulated) levels of PCBs in HTS 975 waste oil in the 1980s and early 1990s. *See* Stips. attachs. 4-6. This direct evidence of PCB presence in the oil well after June 1972, combined with undisputed evidence that the HTS 975 continuously wept oil while operating, supports the Presiding Officer's determination that Rogers' proffered inference that PCBs derived solely from an historic (pre-1978) release or releases was implausible, particularly in light of the possible explanations set forth by Rogers.[12]

Second, the joint stipulations included a May 1994 letter to CT-DEP in which William Whiteley, Rogers' manager of environmental engineering, identified "dramatically increased" production levels as a possible source of the increased PCB levels in the oil. The letter stated:

> It is only speculation on my part, but I would have to say that it was during that time period (1964 — 1972), when there were no regulations on PCB use, that the concrete floor in the containment area became contaminated with PCB's. * * * In 1992, our production rate increased dramatically to the point where we were operating this equipment 24 hours a day 7 days a week 52 weeks a year with no shutdowns. This continued through 1993 and into 1994. The longer operating hours resulted in more circulating pump leakage onto the concrete floor in the containment area which required more frequent collection. It is our belief at this point that the increased quantity of leakage, caused by the greater run time, resulted in extracting more old PCB oil from the concrete than during our lean years.

Stips. ¶ 19, attach. 6. The Presiding Officer rejected this theory as "strain[ing] the imagination" as an explanation of how PCBs at regulated levels came to be found

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[12] The Presiding Officer stated, "I find that the only plausible explanation for the presence of PCBs at regulated levels in 1993 after years of lower levels, especially those reported by the Respondent as late as 1992, is that there was an uncontrolled discharge in 1993." Acc. Dec. at 23.

in nine barrels of oil in 1993. Notably, even if this theory could explain the increase in the volume of PCB-contaminated oil, it does not purport to explain the higher concentration of PCBs in the oil, which is at the heart of the liability finding. Rogers had not yet advanced its theories that the vacuum pump and scoopula/scoop had brought up contaminated concrete particles with the samples of waste oil, and by no reasonable stretch of the imagination could the Presiding Officer have inferred anything like that on the basis of the record before her. Instead, the Presiding Officer drew the most natural inference possible from Mr. Whiteley's statements — i.e., that the increased PCB levels measured in 1993 related in some fashion to the increased use of the HTS 975 in 1992-1993 and the resultant increase in oil weeping from the pumps during that time frame.[13]

Third, while the Presiding Officer did not explicitly mention it, Rogers' affiant stated, and Rogers argued in one of its briefs, that during its initial investigations of the PCB source, the company "continued to believe that the PCB results must be due to residual PCBs in HTS 975. It was only when the 975 room floor was cleaned and cracks were discovered in the sump area that Rogers discovered PCB contaminated soil underneath the floor." Langelier Aff. 2 ¶ 6; *accord* Resp. to Partial Acc. Dec. Mot. at 7 (citing Langelier Aff. 2 ¶ 6). Even accepting as true Rogers' contention that the soil under the factory floor was contaminated with PCBs, there is again no explanation in the record or other basis on which to conclude or even infer that PCBs somehow traveled, in 1993, from the contaminated soil into the berm oil in sufficient quantities to contaminate nine barrels of oil. After all, even assuming the soil and/or concrete underneath the HTS 975 had truly become contaminated with PCBs *prior* to June 1972, why did the PCBs in the berm oil not show up in regulated quantities until 1993? The absence of any attempt by Rogers to address this important question supports the Presiding Officer's rejection of the inferences Rogers would have her draw from the undisputed evidence and also supports the Presiding Officer's determination that the "only plausible" inference is that increased production beginning in 1992 and continuing through 1993 into 1994 led to increased weeping of oil and potential dislodgement of long-embedded PCBs in the HTS 975, just in time for the 1993 sampling sequences.

Here, the Presiding Officer was confronted with cross-motions for summary judgment, initiated by Rogers, and she also had before her Rogers' position that "[w]hy PCBs suddenly showed up in 1993 berm samples is a matter of speculation and in any case is irrelevant to this case." Resp. to Partial Acc. Dec. Mot. at 3 n.2. The Presiding Officer was free to rely on the parties' representations that no

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[13] We recognize that Mr. Whiteley set forth the theory about increased production while trying to explain the increased volume of "old PCB oil" found at the East Woodstock facility. However, in our view, the Presiding Officer did not err in accepting the evidence of increased production while rejecting the inference Rogers wanted her to draw from it.

genuine issues of material fact existed in this regard. *See Greer v. United States*, 207 F.3d 322, 326 (6th Cir. 2000) ("'cross motions for summary judgment * * * authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties'") (quoting *Harrison W. Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981)). At the time of her accelerated decision, the Presiding Officer knew only that, according to Rogers itself, production had dramatically increased in 1992 through 1994, which led to increased weeping of oil into the berm. She reasonably inferred, on the record before her, that the increased PCB levels likely came about as a result of residual PCBs in the HTS 975 being dislodged by increased production. Moreover, she clearly rejected Rogers' proffered inference (i.e., that PCB oil usage ending in 1972 meant any PCB releases occurred prior to 1978 and therefore qualified for the historic exemption from TSCA regulation) as implausible, and we concur that this proffered inference was not reasonable and thus not permissible. *See In re Clarksburg Casket Co.*, 8 E.A.D. 496, 507-09 (EAB 1999). We find that the Presiding Officer's conclusion as to liability was reasonably supported by the evidence in the record at the time of the accelerated decision.[14]

Next, Rogers claims that the causal theory favored by the Presiding Officer "is contradicted by EPA's own witness." App. Br. at 15. Rogers' position is apparently based on Maryanne Milette's testimony at the penalty hearing, which Rogers argues "clearly establishes that there is no basis for a finding that regulated levels of PCBs came from the HTS 975 unit." Resp. Br. at 5 (citing Tr. at 205). This argument is meaningless because the Presiding Officer did not have Ms. Milette's testimony before her at the time she decided the liability issue. Even if this testimony were in the liability record, Rogers overstates its case. Upon questioning about her estimation, for penalty purposes, of the amount of oil wept by the HTS 975, Ms. Milette stated:

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[14] Rogers argues that "there is no evidence in the record" to support the Presiding Officer's finding, in the accelerated decision, that there was a "pool" of PCBs in the berm underneath the HTS 975. App. Br. at 15 n.6. At the time of that decision, however, there was evidence in the record that waste heat transfer oil wept from pump bearings and "collected on the concrete floor beneath HTS 975." Stips. ¶ 4(c)-(d). Moreover, there was evidence that the waste oil was only periodically, not continuously, pumped out of the containment berm. *Id.* ¶ 4(e); Langelier Aff. 1 ¶ 6. This evidence naturally supports an inference that a "pool" of PCB-contaminated oil was present in the berm for much of the relevant time period in this case. Thus, Rogers' argument is meritless.

Moreover, the absence of a pool of PCB-contaminated waste oil in the berm would have made Rogers' unsupported implication (made at the time the Presiding Officer was deciding liability) that PCBs had somehow moved upwards from the PCB-saturated concrete into the oil in the berm even more unlikely than the Presiding Officer found it, at that time, to be. *See* Acc. Dec. at 24 ("it strains the imagination to envision the amount of PCBs that would have to leach into the berm oil from the concrete in order to contaminate 9 drums of oil").

> [W]e have no information to show that the oil in the machine contained 50 [ppm] or greater. We have information that the oil pumped out of the berm contained 50 [ppm] or greater, and that, because of the anti-dilution provision, anything added to that is part of the regulated material.

Tr. at 205. The focus of Ms. Milette's testimony was on oil quantity and the effects of the anti-dilution rule,[15] not on whether the PCBs originally derived from the HTS 975 unit or from the concrete berm. *See* Tr. at 200-05. The Region's case was premised on the oil in the berm. It had no obligation to determine the level of residual PCBs in the machine. Again, the Presiding Officer's findings with respect to causation were reasonable on the basis of the record before her. We see no reason to override them on the basis of Rogers' arguments and the evidence before us.

B. *Further Challenges to Finding of Liability*

Rogers raises four further challenges to the Presiding Officer's finding of liability, all of which are heavily reliant on Rogers' argument that its uncontrolled discharges of PCBs occurred in 1972 and before. First, Rogers argues that the revised PCB rules, which were proposed in 1994 during the pendency of this action and became final in 1998, preclude the imposition of any penalty for an historic spill. Second, Rogers contends that it is a violation of the Due Process Clause of the United States Constitution to penalize Rogers for an historic spill. Third, Rogers claims that TSCA is remedial legislation that cannot be applied punitively. Fourth, Rogers raises a statute of limitations defense, contending that Region I's case against it is barred because the alleged disposal took place more than five years before the complaint was filed. These arguments need not detain us long: none have merit. They are addressed in order below.

1. *1994 Proposed and 1998 Final PCB Rules*

On December 6, 1994, just over two months after Region I filed the complaint in this case, EPA issued proposed revisions to the PCB rules under which this case was brought. The proposed rules indicated that several commenters had asked for clarification of the disposal regulations and the prefatory note in light of the Chief Judicial Officer's ruling in *Standard Scrap*. 59 Fed. Reg. 62,788, 62,792 (Dec. 6, 1994). In response to that request, EPA specified that "PCBs spilled or

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[15] The anti-dilution rule provides:

> No provision [of 40 C.F.R. part 761] specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided.

40 C.F.R. § 761.1(b) (1994); *accord* 40 C.F.R. § 761.1(b)(5) (2000).

otherwise released to the environment, including areas contaminated by spills and releases such as sediments, prior to April 18, 1978, would [under the proposed rules] be presumed to be disposed of in a manner that does not present a risk of exposure, and would not necessarily require further disposal action." *Id.* The proposed rules then provided that if an EPA regional administrator found on a case-by-case basis that any particular pre-1978 disposal site presented a risk of exposure, cleanup and proper disposal would be required for the PCBs at that site. *Id.*

On June 29, 1998, approximately seven months after the Presiding Officer issued the partial accelerated decision as to liability and one month before she issued the Initial Decision as to penalty in this case, EPA published final revisions to the PCB rules with an effective date of August 28, 1998. 63 Fed. Reg. 35,384 (June 29, 1998) (codified in scattered sections of 40 C.F.R. pt. 761 (2000)). In the final rules, EPA deleted the prefatory note containing the historic disposal site exemption analyzed in *Standard Scrap* and replaced it with a regulatory scheme very similar to the one set forth in the proposed rules. Under the new rules, sites containing pre-April 18, 1978 spills or releases of PCBs are presumed *not* to present an unreasonable risk of injury to health or the environment from exposure to PCBs at the site. However, EPA regional administrators may make a finding that an unreasonable risk exists with respect to any particular site, in which case the site owner/operator will be directed to dispose of the PCBs in accordance with the disposal rules. *Id.* at 35,401, 35,444 (codified at 40 C.F.R. § 761.50(b)(3)(i) (2000)).

Rogers argues that these 1994 proposed and 1998 final PCB regulations control this case. According to Rogers, the prior regulatory scheme with respect to historic disposal sites was confusing, and "[a] rule simply clarifying an unsettled or confusing area of the law does not change the law, but restates what the law is and always has been, according to the agency." App. Br. at 18. Thus, Rogers claims, "EPA's policy with respect to pre-1978 spills as expressed in the Final Rule and Proposed Rule governing the disposal of PCBs, has applied to this case since its inception and is applicable to this case at this time." *Id.* We reject this argument for several reasons.

First, as discussed in Part II.A.2.c.ii above, Rogers failed to carry its burden of persuading the Presiding Officer (or us) by a preponderance of the evidence that the releases at issue here occurred prior to 1978. *Standard Scrap* originally established that the burdens of production and persuasion with respect to the historic exemption properly lie with the respondent, *see Standard Scrap*, 3 E.A.D. at 272-74, and this principle is generally carried over into the revised PCB rules. *See* 40 C.F.R. § 761.50(b)(3)(iii) (2000) ("[t]he owner or operator of a site containing PCB remediation waste has the burden of proving the date that the waste was placed in a land disposal facility, spilled, or otherwise released into the environment, and the concentration of the original spill"). Thus, regardless of whether the old PCB rules and *Standard Scrap* govern this case, as we find below, or whether

the revised final rules apply, as Rogers urges, the result is the same: Rogers' failure to establish by a preponderance of the evidence that the PCB releases were historic (i.e., pre-1978) dooms its attempts to shoehorn this case into the historic exemption slipper it wishes to wear.

Second, the 1994 proposed rules cannot exonerate Rogers from liability in this case. As the Supreme Court has observed, "[i]t goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound." *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845 (1985) (rejecting argument that agency changes existing regulations merely by proposing a rule for public comment). Thus, Rogers is mistaken when it argues that the 1994 proposed PCB rules superseded the holding in *Standard Scrap*. *See* App. Br. at 17. EPA's Chief Judicial Officer decided *Standard Scrap* in 1990, four years prior to the filing of the complaint in this case, and the decision has never been reversed or overruled: it is still good law. As Region I correctly observes, "[a]t all times relevant to this suit," *Standard Scrap* "remains the controlling Agency interpretation of the prefatory note" to the PCB disposal rules. Reply Br. at 26.

Third, Rogers points out that in the proposed and final rules, EPA stated it was "clarifying" the status of pre-1978 disposal in light of the ruling in *Standard Scrap*. App. Br. at 17-18 (citing *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993)). Thus, Rogers believes the pre-1978 disposal requirements set out in the proposed and final rules should apply to this case because the requirements are mere agency clarifications of what the law has always been. *Id.* at 18.

This argument overlooks the rest of the Seventh Circuit's discussion in *Pope*, upon which Rogers relies to make this point. In *Pope*, the Seventh Circuit Court of Appeals examined the distinctions between a clarifying rule and a rule that effects a substantive change in the law. *See Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993), *overruled on other grounds by Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999). The agency in that case had promulgated new final regulations after the plaintiff-appellant's social security disability hearing had taken place. The sole purpose of the new regulations was to clarify the law on the evaluation of pain, and the promulgating agency had asserted that "'these final rules make no substantive change in our policy.'" *Id.* (quoting preamble to proposed rule). The Seventh Circuit stated, "In determining whether a rule is a clarification or a change in the law, the intent and interpretation of the promulgating agency as to the effect of the rule is certainly given great weight. They are not, however, dispositive. If they were, an agency could make a substantive change merely by referring to a new interpretation as a 'clarification.'" *Id.* The court found that the rule in that case constituted a clarification rather than a change in the law, and thus it was appropriate to apply the new rule in evaluating the standard that the

disability hearing judge should have applied to plaintiff-appellant's disability case. *Id.* at 482-83.

Here, EPA noted in the proposed and final rules that it was "clarifying" the regulatory status of pre-1978 PCB spills in light of *Standard Scrap*. 63 Fed. Reg. at 35,401; 59 Fed. Reg. at 62,792. EPA's choice of the word "clarify" is not dispositive, however. *Pope*, 998 F.2d at 483. The new rules *change* the law set forth in the old PCB disposal regulations and interpreted in *Standard Scrap*, they do not merely *clarify* the law. Indeed, the final rule deletes the prefatory note interpreted in *Standard Scrap* and replaces the historical site exemption it contained with a new, more-inclusive regulatory scheme in which *all* old PCB sites are potential clean-up sites if sufficient risk is deemed to be present. Thus, EPA's new policy with respect to pre-1978 spills, as expressed in the proposed and final rules governing the disposal of PCBs, cannot and does not apply to this enforcement action, which was filed and decided before the new regulations went into effect on August 28, 1998.

2. *Due Process Clause*

Next, Rogers raises several procedural due process arguments with respect to this enforcement action. First, Rogers asserts that "[p]rosecution of a company for allegedly violating regulations promulgated after [the] date of the disposal is a violation" of the Due Process Clause of the United States Constitution.[16] App. Br. at 19. Rogers' position, in essence, is that such "retroactive" application of the PCB rules is unconstitutional because it fails to comport with the general presumption against statutory retroactivity. *See id.* at 19-20. Rogers also argues that it was not fairly on notice that Region I would interpret TSCA and the PCB rules to authorize assessment of a penalty arising from pre-1978 spills of PCBs. Rogers contends that, "As evidenced by the fact that EPA felt the need to issue a clarification of the PCB regulations with the 1994 Proposed Rule and 1998 Final Rule, the PCB regulations themselves fail to provide clear standards with respect to the regulation of historic spills and do not lead a regulated party acting in good faith to the EPA's position in this case." *Id.* at 22. Rogers also points to what it labels Region I's "shifting theories of liability" as further lack of fair notice. *Id.*

Rogers' arguments are unpersuasive. First, as discussed above, Rogers failed to carry its burden of persuasion that the PCB spills at issue here occurred prior to 1978. Thus, Rogers' due process arguments that rely on a finding of an

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[16] To the extent Rogers' arguments could be construed as challenges to the constitutionality of TSCA, we have no jurisdiction to review them. *See In re Britton Constr. Co.*, 8 E.A.D. 261, 279 n.6 (EAB 1999), (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974) ("[i]t is generally considered that the constitutionality of congressional enactments is beyond the jurisdiction of administrative agencies")).

historic spill — i.e., retroactivity and fair notice — fail for lack of a fundamental factual premise.

Second, as Region I correctly points out, merely "issuing a proposed rule does not signify that an agency is acting inconsistently." Reply Br. at 26. As the Supreme Court noted in *Schor*, "[I]t would be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act * * * to tax an agency with 'inconsistency' whenever it circulates a proposal that it has not firmly decided to put into effect." *Schor*, 478 U.S. at 845, *quoted in* Reply Br. at 26. Indeed, "government hardly could go on" if every ongoing enforcement action had to grind to a stop and possibly be refiled each time an agency proposed a change to rules being enforced in the action. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

Third, Rogers claims that Region I changed its theory of liability from an initial focus on the HTS 975 machine as the source of the PCBs[17] to an alleged later "admission" by Maryanne Milette that the initial theory was "mistaken." App. Br. at 22. We discussed Rogers' mischaracterization of Ms. Milette's testimony in Part II.A.2.c.iii above. As we noted, in the passage Rogers' cites, Ms. Milette was discussing her estimation of the amount of oil that leaked from the HTS 975 and by no means was contradicting Region I's theory of this case. In any event, Rogers cannot legitimately argue that it was somehow misled or confused about its legal obligations under TSCA and the PCB rules on the basis of Ms. Milette's testimony, which entered this case as part of the penalty hearing, long after liability had been decided. Thus, this argument fails.[18]

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[17] The initial complaint filed in this case alleged: "Based on the November 5, 1993 and December 1, 1993 inspections of the Facility as well as information provided by Respondent, Respondent has improperly disposed of PCBs from on or before June 16, 1993 to at least December 1, 1993 by operating HTS 975 at the Facility in a manner that causes uncontrolled discharges and spills of PCBs at or above a concentration of 50 ppm or greater." Complaint and Notice of Opportunity for Hearing ¶ 14 (Sept. 23, 1994). The revised complaint used this exact language as well but substituted "March 29, 1994" for "December 1, 1993." Amended Complaint and Notice of Opportunity for Hearing ¶ 15 (Sept. 22, 1997).

[18] Rogers also argues that the Presiding Officer erred in finding that *Standard Scrap* put Rogers on notice of EPA's interpretation of the PCB disposal regulations. App. Br. at 22 n.10; *see* Acc. Dec. at 29. Rogers claims, "A regulated entity cannot be held to be on notice of one administrative case (not widely publicized or readily available to the public) interpreting a regulation that appears to say something else." App. Br. at 22 n.10.

We are not sympathetic to Rogers' argument for two reasons. First, pre-Board and Board decisions have been publicly available on the Lexis and Westlaw electronic databases since 1992 at the latest and in bound volumes (available for purchase and at 700 federal depository libraries) since 1995. Second, Rogers did not make clear, and we fail to see, how its alleged lack of awareness of the holdings in *Standard Scrap* would have affected its actions relative to the violation at issue here.

3. *TSCA as Remedial, but Not Punitive, Legislation*

Next, Rogers argues that TSCA penalties serve remedial rather than punitive purposes and that, because the company has been engaged in cleaning up the PCB contamination under the HTS 975, Region I's request for civil penalties is an attempt "to reprimand Rogers through punishment." App. Br. at 23-24. Rogers cites a 1981 pre-Board case, decided by EPA's Judicial Officer, to support its argument. *See In re Briggs & Stratton Corp.*, 1 E.A.D. 653, 662 (JO 1981) ("[c]ivil penalties under TSCA are intended to deter through regulation, not reprimand through punishment"), *quoted in* App. Br. at 24.

Rogers' reference to a single sentence in *Briggs & Stratton* is selective and ignores the remainder of the paragraph in which it appears. That paragraph states, in part:

> Civil penalties under TSCA are intended to deter through regulation, not reprimand through punishment. Punishment under TSCA is accomplished through the criminal provisions of § 16(b), which impose criminal sanctions on persons who "knowingly or willfully" violate the regulations. The presence of these criminal sanctions in § 16(b), and their juxtaposition next to the civil provisions in § 16(a), is strong evidence of a congressional intent to establish a statutory scheme [that] has a remedial function insofar as the civil sanctions are concerned. The fact that monetary "penalties" are involved under § 16(a) does not alter this statutory scheme. "[T]he term 'penal' is used in different contexts to mean different things." *Smith v. No. 2 Galedburg Crown Fin. Corp.*, 615 F.2d 407, 414 (7th Cir. 1980).

Briggs & Stratton, 1 E.A.D. at 662-63.

While we agree with the general proposition, as expressed in *Briggs & Stratton*, that TSCA penalties are intended to deter through regulation rather than reprimand through punishment, we do not agree with the premise of Rogers' argument here. It is not, as a general matter, considered punitive to impose a civil administrative penalty on a party that is already expending substantial funds to remediate a subject site or otherwise correct regulatory violations. The civil penalty serves the very important purpose of deterring future behavior of like kind, both by the violator and others.[19] This is a legitimate purpose for assessing a penalty, irrespective of the fact that a respondent is also incurring cleanup costs.

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[19] EPA's general policy in this regard states:

> The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into

Continued

See, *e.g.*, *In re Pepperell Assocs.*, 9 E.A.D. 83, 113-15 (EAB 2000) (respondent's partial reimbursement of Maine's cleanup costs, required under state oil spill law, is not a basis for reducing administrative penalty imposed on respondent; "giving the company a downward penalty adjustment for actions it is already required to take under collateral legal provisions would undercut the deterrent value of Pepperell's penalty"), *aff'd*, 246 F.3d 15 (1st Cir. 2001); *In re Newell Recycling Co.*, 8 E.A.D. 598, 631-32 (EAB 1999) (duty to comply with PCB disposal rules exists regardless of whether EPA chooses to pursue action for failure to so comply; as a result, respondent could not detrimentally rely on EPA representation that it would factor into civil penalty respondent's $84,000 outlay to remove PCB-contaminated soil), *aff'd*, No. 99-60694 (5th Cir. Nov. 8, 2000); *In re B & R Oil Co.*, 8 E.A.D. 39, 60 (EAD 1998) (no reduction in penalty to reflect $2 million respondent spent to replace and retrofit underground storage tanks ("UST") in accordance with new UST performance standards; goal of deterring violations of UST rules would be defeated otherwise).

In our view, the civil penalty sought by Region I is a civil administrative sanction, regulatory in nature and remedial in character, not to be considered penal in any sense but assessed for the sole purpose of achieving compliance with TSCA. *See*, *e.g.*, *Helvering v. Mitchell*, 303 U.S. 391, 399-400 (1938) ("[i]n spite of [its] comparative severity," the remedial sanction of paying fines has "been upheld against the contention that [such a sanction is] essentially criminal and subject to the procedural rules governing criminal prosecution") (citing cases); *United States v. Charles George Trucking Co.*, 642 F. Supp. 329, 333-34 (D. Mass. 1986) (potentially "exorbitant" fines to which defendant may be subject under the Resource Conservation and Recovery Act are not, in and of themselves, sufficient to transform the civil remedy intended by Congress into a punitive criminal penalty). Indeed, the penalty assessed in this case falls well below the $25,000 per-day maximum civil penalty authorized by Congress for this type of violation: $25,000 multiplied by 268 days equals $6,700,000. TSCA § 15(a), 15 U.S.C. § 2615(a);

(continued)

> noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). * * *
>
> If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. * * * [Thus,] it is Agency policy that penalties generally should, at a minimum, remove any significant economic benefits resulting from failure to comply with the law. * * *
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> * * * * * * *
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> * * * Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation.

U.S. EPA, General Enforcement Policy #GM-21, *Policy on Civil Penalties* 3 (Feb. 16, 1984).

see 40 C.F.R. § 19.4 tbl. 1 (2000) (maximum daily penalty for violations of TSCA § 15(a) occurring after January 30, 1997, is $27,500). Thus, Rogers' argument fails.

4. *Statute of Limitations*

Finally, Rogers asserts that the "undisputed facts show that the alleged releases of PCBs could not have taken place any later than June 1972." App. Br. at 25. Thus, Rogers claims this action is barred by the general federal five-year statute of limitations in 28 U.S.C. § 2462 because any disposal of PCBs took place well more than five years prior to the filing of the complaint. This argument fails because, as discussed above, Rogers did not establish that its releases of PCBs occurred prior to 1978. At the time the Presiding Officer decided the question of liability, the preponderance of the evidence in the record supported a finding that the releases occurred in 1993. Thus, when Region I filed the complaint on September 23, 1994, it did so well within the five-year period allowed by the statute.

C. *Penalty*

Next, Rogers contends that even if the Board sustains the Presiding Officer's finding of liability for a PCB disposal violation, no penalty should be assessed on the facts of this case.[20] Rogers raises four general arguments that it claims support its position: (1) uncontroverted evidence shows the discharges occurred before 1978 and, thus, no penalty is warranted for these historic spills, and use of EPA's PCB Penalty Policy is inappropriate where the volume and duration of historic PCB spills cannot be measured; (2) the Presiding Officer may disregard the PCB Penalty Policy where, as here, the risks underlying the policy are not present; (3) the Presiding Officer failed to account for numerous mitigating factors in her calculation of the penalty; and (4) evidence in the record contradicts the Presiding Officer's finding that a pool of PCBs existed under the HTS 975 for a nine-month period. We address these arguments in sequence below.

1. *Alleged Historical (Pre-1978) Disposal*

Rogers begins by reiterating its central and oft-repeated contention that the PCB discharges at issue here occurred prior to 1978, and thus are exempt from the

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[20] TSCA requires that the following criteria be considered in determining the amount of a civil penalty:

> [T]he 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, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

strictures of the PCB disposal rules; as a result, the company claims, no penalty is warranted. App. Br. at 25. Rogers also contends that use of the PCB Penalty Policy "is inappropriate in a case of historic contamination where the volume and duration of PCB spills cannot be measured." *Id.* at 26; *see generally* U.S. EPA, *Polychlorinated Biphenyls (PCB) Penalty Policy* (Apr. 9, 1990) ("*PCB Penalty Policy*"). Having determined above that Rogers failed to carry its burden of persuading us that the PCB discharges occurred prior to 1978, we reject these arguments as grounds for not imposing a penalty.[21]

2. *Alleged Absence of Risks Underlying PCB Penalty Policy as Basis for Disregarding Policy*

Rogers also argues that the Presiding Officer "blindly" and inappropriately applied EPA's PCB Penalty Policy to calculate the penalty in this case. App. Br. at 26. Rogers contends that a presiding officer is "free to disregard" an applicable penalty policy in a case where the risks underlying the policy's assumptions are not present. *Id.* Rogers claims that it successfully demonstrated, at the penalty hearing, that the risks underlying the PCB Penalty Policy — i.e., that PCB exposure presents risks of harm to human health and the environment — were not present in this case. Rogers states:

> There was no evidence that Rogers workers were at risk nor was there any evidence of risk to the environment. To the contrary, the risk of PCB exposure, if any, was shown to be confined to an isolated, locked room and Rogers provided its workers with proper protective clothing and training to avoid contact with PCBs.

Id. at 26 n.12. Thus, Rogers urges us to find that the Presiding Officer should have disregarded the PCB Penalty Policy and conducted an independent analysis of the TSCA section 16 factors. *Id.* at 27. Rogers does not specify, however, the

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[21] Rogers cites several inconclusive portions of the PCB Penalty Policy to support its argument that the Policy should not be used where PCB spill volume and duration cannot be measured. *See* App. Br. at 27 (citing *PCB Penalty Policy* at 2-3). In so doing, Rogers ignores another, more relevant passage of the Policy:

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

PCB Penalty Policy at 1 (emphasis added). This statement supports a finding that EPA intended the PCB Penalty Policy to be applied in all PCB cases, regardless of the date or age of the violation, and including cases where volume and duration are difficult to measure precisely and/or must be estimated.

alternative basis, separate and apart from the Penalty Policy, on which the Presiding Officer should have calculated the penalty.

Under the Consolidated Rules of Practice that govern this TSCA enforcement proceeding, a presiding officer "shall consider any civil penalty guidelines issued under the Act" in determining an appropriate penalty. 40 C.F.R. § 22.27(b) (2000). However, as we have made clear in many prior decisions, once a presiding officer considers the relevant penalty policy, he or she may adopt the penalty computed in accordance with that policy or deviate therefrom, so long as the penalty assessed reflects the criteria in the applicable statute. *See*, *e.g.*, *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000); *In re Employers Ins. of Wausau*, 6 E.A.D. 735, 759-62 (EAB 1997); *In re Rybond, Inc.*, 6 E.A.D. 614, 639 (EAB 1996); *In re DIC Americas, Inc.*, 6 E.A.D. 184, 189 (EAB 1995). Rogers apparently believes the Presiding Officer in this case should have deviated from the PCB Penalty Policy because the PCB releases allegedly posed no harm to human health or the environment. We find ample evidence in the record to the contrary.

Initially, we note that the Presiding Officer directly and persuasively addressed the argument that the risks associated with PCBs that underlay the PCB Penalty Policy were inapplicable in this case. As she stated in her decision on the penalty:

> Initially, I point out that Dr. Mary Elizabeth Smuts' testimony at the hearing supports the findings that PCBs present serious risks to human health and the environment and that there were three primary routes of human exposure to PCBs at the Facility; inhalation, dermal contact, and ingestion. In addition, the Respondent's witness, Mr. Lee, acknowledged that he is aware of references in studies to the possible harm to human health from exposure to PCBs. At the hearing, the EPA satisfactorily substantiated the "underpinnings" of the PCB Penalty Policy as to the risk to human health and the environment presented by exposure to PCBs. Moreover, I find that the Respondent, by cross-examination of Dr. Smuts and the presentation of its own evidence, has not "genuinely placed at issue" the PCB Penalty Policy's underlying proposition that exposure to PCBs presents a distinct risk to human health and the environment.

Pen. Dec. at 12 (citations omitted).

More particularly, and by Rogers' own admission, workers in its East Woodstock facility were not required to wear disposable coveralls, booties, and gloves until January 1994. Tr. at 353-54, 463-64. Thus, from at least April through December 1993, workers wearing nondisposable clothing (i.e., company uniforms, which Rogers sent to a commercial laundry) and boots (which workers

were free to wear home) entered and exited the HTS 975 room. Region I summarizes the consequent human health and environmental risks as follows:

> A significant route of [PCB] exposure was through workers stepping in the oil on the floor of the HTS 975 room. The footprints evident on the floor of the 975 room indicate the potential for dermal exposure. The workers have walked through the oil and tracked it on their boots. This can lead to contact with the hands, for example when the worker takes his boots off, and subsequently to an ingestion pathway when the worker handles food or touches his mouth. * * *
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> * * * * * * *
>
> There was also a risk to persons outside the Rogers facility. The oily footprints evident on the floor of the HTS 975 room show that the oil was carried on the bottom of workers' shoes. That oil on the shoes, and oil on workers' clothing, can be taken home where it can contaminate the workers' house or washing machine.
>
> The PCB oil could also travel on workers' soiled clothing to the off-site, commercial laundry service that cleaned the uniforms used by respondent's workers. In the same way that oil on the clothes could contaminate a home washing machine, the presumably greater amount of oil collected on a number of workers' dirty uniforms could also affect the commercial service's laundering machines.[22]

Reply Br. at 28 (citations omitted). The evidence in the record, combined with logical inferences regarding likely direct dermal contact and widespread PCB distribution via private and commercial laundry machines, reveal ample reason for concern for the safety of humans and the environment as a result of the PCB releases at Rogers' East Woodstock facility. Thus, it was entirely appropriate for the Presiding Officer to apply the PCB Penalty Policy to this case.

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[22] The Presiding Officer similarly found:

> I note that until at least January 1994 the protective clothing was worn on a voluntary[, not mandatory,] basis, there was no requirement for cleaning up or washing by the workers leaving the pump room, the workers could leave the pump room and possibly the Facility wearing their regular work boots, and the protective clothing was sent to a commercial laundry without precautions to prevent commingling with other laundry. (Tr. at 354, 429-32). Moreover, no protective respiratory equipment was provided to its workers entering the HTS 975 pump room.

Pen. Dec. at 29.

Moreover, Rogers does not indicate what portions of the Presiding Officer's PCB Penalty Policy analysis it would alter or how it would alter them. In these circumstances, we see no legitimate reason to disturb the Presiding Officer's findings. *See*, *e.g.*, *In re Pac. Ref. Co.*, 5 E.A.D. 520, 524 (EAB 1994) ("[w]hen the penalty assessed by the Presiding Officer falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty"); *accord Chempace*, 9 E.A.D. at 131-32; *In re Johnson Pac., Inc.*, 5 E.A.D. 696, 702 (EAB 1995); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994).

3. *Alleged Failure to Account for Numerous Factors in Penalty Analysis*

Rogers also claims that the Presiding Officer's penalty analysis failed to account for:

> Rogers's prompt and thorough investigation of the possible source of PCBs; the discovery of historic contamination in the concrete and soil beneath the Facility; Rogers's continuing efforts to protect the health and safety of its workers; more than $2 million in remediation costs incurred by Rogers; Rogers's cooperation with the CT DEP; Rogers['s] good attitude; Rogers's good compliance history; and environmentally beneficial expenditures made by Rogers at the Facility, which were not required by law.

App. Br. at 27-28.

Our review of the Presiding Officer's decision on penalty reveals just the opposite: Judge Gunning explicitly considered every one of the factors listed above in reaching her penalty decision. *See* Pen. Dec. at 26-35. Rogers may not be pleased with the conclusions the Presiding Officer reached with respect to these factors, but, if that is the case, Rogers should have indicated how or why it believes the Presiding Officer erred or abused her discretion in evaluating these factors, rather than merely reciting them. A mere assertion that a judge failed to consider certain factors, when in fact the judge did consider those factors, simply cannot serve to advance the assertor's cause. Even in a *de novo* review context, it is not our duty in an adversarial proceeding to comb the record and make Rogers' arguments for it. *See*, *e.g.*, *U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997) ("court is not required to search the record for some piece of evidence" that might make party's case for it); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463-64 (5th Cir. 1996) (same); *Wilson v. Jotori Dredging, Inc.*, 999 F.2d 370, 372 (8th Cir. 1993) (appellate court is not required to search record for error); *In re La.-Pac. Corp.*, 2 E.A.D. 800, 802 (CJO 1989) ("reviewing official is

not required to engage in a search of the entire record to determine what, if anything, supports Respondent's objections; it would be improper for the reviewing official to do so, for Respondent would have its argument constructed for it").

4. *Alleged Contradictory Evidence*

Finally, Rogers claims the Presiding Officer's finding that Rogers "'allowed the contaminated oil to continue to accumulate on the floor of the berm for a period of nine months'"[23] is contradicted by evidence regarding: (1) the reduction of oil weeping from the HTS 975; (2) more frequent collection of oil from the berm beginning in August 1993; and (3) the installation of larger drip pans. App. Br. at 28. We do not find the evidence to be at all contradictory.

First, one of Rogers' managers testified that the seven larger drip pans, which were installed one at a time as pumps were pulled for repair, were not completely installed until some time during the first quarter of 1994. Tr. at 367, 461. Region I introduced a March 7, 1994 letter from Laidlaw setting forth the services Laidlaw planned to conduct for Rogers during the week of March 15, 1994. The letter stated, "The first step in the cleaning process will be to remove all standing residual oil from the containment areas." Tr. at 458. When confronted with this letter at the penalty hearing, Rogers conceded that "it is probable" that at least one of the larger drip pans had not yet been installed as of the time Laidlaw prepared its letter and, "ergo, there was still some standing oil in one area" in March 1994. Tr. at 461. Thus, it appears from the Rogers testimony and Laidlaw letter that any waste oil-limiting effect of the new drip pans was not fully realized until several days or weeks after the endpoint of the violation at issue here.

Second, Janet Kwiatkowski's testimony that she observed "dark, heavy, black oil" in the containment berm in November 1993 and a "little more" dark, heavy, black oil in the berm in December 1993 raise significant questions about Rogers' claims, even if true, to have reduced the amount of oil weeping from the pumps and increased the frequency of waste oil collection. The Laidlaw letter referencing "standing residual oil" also calls these claims into question. Together, the Kwiatkowski testimony and Laidlaw letter provide evidence of oil sitting in the HTS 975 berm over some period of time. Rogers' claims that it had reduced weepage and increased cleanup frequency are not, without more, sufficient to overcome that evidence.

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[23] The nine months referred to by the Presiding Officer began on June 21, 1993, the date the Presiding Officer found Rogers had received Averill's letter regarding the April 1993 samples, and ended on March 15, 1994, the date the Presiding Officer found Laidlaw had chemically cleaned the berm floor. Pen. Dec. at 20.

On the basis of Rogers' arguments, we find no reason to second-guess the Presiding Officer's thorough penalty analysis in this case.[24]

D. *Late-Filed Motion*

On July 7, 1999, Rogers filed with the Board a Motion for Leave to File a Supplemental Memorandum Regarding EPA Regulations Relevant to the Issues on Appeal, along with the supplemental memorandum itself. Rogers filed the motion pursuant to the Consolidated Rules of Practice, which provide that legal briefs of this kind may only be filed with the permission of this Board. 40 C.F.R. § 22.30(a)(2). Rogers seeks leave to file the supplemental brief "in order to bring to the attention of the Board a regulatory provision and a case directly relevant to the outcome of this case." Motion at 1. The regulatory provision Rogers refers to is, apparently, a 1979 final PCB rule, whereas the case it mentions is *In re Lazarus, Inc.*, 7 E.A.D. 318 (EAB 1997), decided by this Board on September 30, 1997.

Rogers does not explain why it was unable to bring these 1979 and 1997 matters to the attention of the Board in its appellate or response briefs, which were filed on August 17, 1998, and September 17, 1998, respectively, well after the regulatory provision and case were released into the public domain. We note that Rogers obtained new counsel between filing its appeal and response briefs in 1998 and its motion in 1999. While its new counsel may have identified some matters that it wished had been cited in the earlier briefs, the fact remains that there is no reason these additional matters could not have been raised during the initial briefing period. The motion is denied.[25]

III. *CONCLUSION*

For the foregoing reasons, we affirm the Presiding Officer's partial accelerated decision as to liability and Initial Decision on penalty, which imposed a

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[24] Any other issues raised by Rogers in its appeal and response briefs, but not explicitly discussed in this Final Order, have been thoroughly considered and are hereby rejected.

[25] As an alternative basis for denying Rogers' motion, we note that both the 1979 PCB rule and *Lazarus*, decided September 20, 1997, predated the Presiding Officer's partial accelerated decision, which was issued November 13, 1997. Thus, the two new arguments Rogers raises in its supplemental memorandum must be rejected on the ground that they were not argued before the Presiding Officer and therefore have been waived. *See*, *e.g.*, *In re Britton Constr. Co.*, 8 E.A.D. 261, 277-78 (EAB 1999) (under 40 C.F.R. § 22.30(a), "parties may only appeal adverse rulings or orders; they 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); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (same), *aff'd*, No. 3:98-CV-0456-AS (N.D. Ind. Dec. 14, 1999); *In re Lin*, 5 E.A.D. 595, 598 (EAB 1994) (same); 40 C.F.R. § 22.30(a), (c).

$281,400 penalty. Rogers shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment should be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, at the following address:

U.S. EPA, Region I
Mary Anne Gavin, Regional Hearing Clerk
Post Office Box 360197
Pittsburgh, Pennsylvania 15251-6197

So ordered.