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ENVIR. APPEALS BOARD

May 12, 2006

VIA HAND DELIVERY

United States Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, DC 20005

RE: In re: Environmental Protection Services, Inc.
(U.S. EPA Docket No. TSCA-03-2001-0331)
TSCA Appeal No. 06-(01)

Dear Clerk:

Please find enclosed for filing an original and five copies of Appellant Environmental Protection Services, Inc.'s Appeal Brief.

Thank you for your courtesy in this matter.

Very truly yours,

Marian C. Hwang
MCH/vlh
Enclosures

cc: Honorable Carl C. Charneski (via FedEx)
Cheryl L. Jamieson, Esquire, Assistant General Counsel (via FedEx)
John J. Ruggero, Esquire (via FedEx)
Lee A. Spielman, Esquire (via FedEx)
Lydia A. Guy, Regional Hearing Clerk (via FedEx)

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ENVIR. APPEALS BOARD

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
ENVIRONMENTAL PROTECTION SERVICES, INC.	)	**TSCA Appeal No. 06-(01)**
	)	
	)	
Docket No. TSCA-03-2001-0331	)	
	)	

APPELLANT ENVIRONMENTAL PROTECTION SERVICES, INC.'S APPEAL BRIEF

Respectfully submitted,

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By Counsel

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SUMMARY OVERVIEW OF APPEAL BRIEF

So as to facilitate the examination of the extensive record developed in this matter before the Administrative Law Judge ("ALJ"), Appellant Environmental Protection Services, Inc. ("EPS" and/or "Appellant") sets forth below a brief statement of the fundamental issues, nature of case and relevant facts that underlie this Appeal before the U.S. Environmental Appeals Board's ("EAB" or the "Board"). A more detailed description of the issues, nature of the case and relevant facts and law are set forth in more detail in the attached Appeal Brief along with appropriate references to the record, argument on the issues, and a short conclusion setting forth the relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion.

Since 1989, EPS has operated one of the country's few scrap metal recovery furnaces that is able to destroy completely polychlorinated biphenyls ("PCB") in electrical equipment at concentrations that are regulated under the Toxic Substances Control Act, 15 U.S.C. §§ 2601 et seq., as implemented by 40 C.F.R. Part 761. Pursuant to 40 C.F.R. Part 761, EPS is subject to a TSCA commercial storage approval ("Approval"), which among other things, establishes a maximum storage limit for the commercial storage of certain equipment under Subpart D of Part 761. Part 761 also exempts certain activities and PCB items. The central underlying issues to be resolved by the Board in this Appeal are two.

1. Whether EPA's three count Amended Complaint should have been dismissed or rejected in light of the absence of evidence produced by EPA to substantiate its claims against EPS.

a. Specifically, Counts I and II of the Complaint (which erroneously alleged that on July 15, 1999, and November 2, 1999, EPS commercially stored "PCB transformers" and/or PCB capacitors in excess EPS's maximum storage capacity ("MSC") limits) should have been dismissed because EPA and the Initial Decision failed to consider that the equipment allegedly commercially stored at EPS was exempt from the MSC limits under the regulations as a result of: a) EPS's processing activities for storage or transportation for disposal at 40 C.F.R. § 761.20(c)(2)(i); b) the transfer within ten days of such equipment to another facility as permitted by 40 C.F.R. § 761.65(d)(5); and/or c) EPS's adherence to the self-implementing decontamination procedures at 40 C.F.R. § 761.79. Accordingly EPS asks this Board to:

- Declare and decree that EPS at all relevant times had complied with the terms of its TSCA commercial storage approval and applicable laws.
- Declare and decree that EPS was the generator of PCB waste, and therefore the storage of such equipment was exempt from the maximum storage limits.
- Declare and decree that EPS had notified EPA of EPS's increased storage limits in its PCB commercial storage approval.
- Declare and decree that the PCB regulations exempted EPS with regard to equipment transferred to another facility at 40 C.F.R.

§ 761.65(d)(5) and/or certain processing activities as further defined at 40 C.F.R. § 761.20(c)(2).

- Declare and decree that the self-implementing decontamination procedures of 40 C.F.R. § 761.79(a) exempted EPS's activities from the scope of its maximum storage limits in its commercial storage approval.

b. Similarly, Count III (which erroneously alleged that EPS failed to operate its scrap metal oven within certain required temperature ranges on certain dates) should have been dismissed for the following reasons:

- EPA and the Initial Decision failed to consider that the contents in the oven were exempt under applicable regulations because the units processed were non-PCB units and/or non-contaminated units and/or decontaminated units. EPS respectfully requests that the Board carefully review the legal import of the applicable PCB regulations. For instance, items that are decontaminated in compliance with 40 C.F.R. § 761.79, or that contain less that 50 ppm PCBs are expressly exempt from any PCB storage or disposal or approval requirements. (40 C.F.R. §§ 761.20(c)(2), 761.65). At all relevant times, EPS was burning non-PCB units and/or decontaminated units, and EPA produced unrelated and unreliable analytical data to incorrectly show PCB concentrations of the units processed in EPS's furnace. Accordingly there was no factual or

legal basis to support the allegations of Count III, and EPA's Complaint against EPS should have been rejected.

- EPS maintained the minimum required temperature of 2 ½ hours, which was ignored when EPA in this action imposed the requirement that such time be calculated on a continuous basis.

2. Whether EPA's administrative complaint was the result of EPA's selective prosecution and enforcement of EPS in response to EPS's ten-year effort to force EPA Region II to take action against another company, G&S, which was allowed to operate by EPA in complete disregard of applicable PCB storage and disposal regulations.

   a. Appellant respectfully requests the Board to evaluate fully the clear evidence which demonstrates that EPS was singled out for prosecution as a result of the investigations and complaint initiated by EPA, while another company was and has been allowed to ignore applicable legal requirements. The record will show that G&S has had no TSCA PCB storage approval, has not been subject to the maximum storage limitations and other significant requirements of 40 C.F.R. Part 761, Subpart D, and as a result has been left untouched.

   b. Appellant further requests that the Board carefully evaluate the substantial record demonstrating that EPA sought to correct this injustice for over ten years by pursuing numerous meetings, inquiries and complaints not only to staff at EPA Region II and III, but also to the highest levels at EPA Region II's Inspector General and its Criminal Investigation Division. All

of these meetings, inquiries and complaints were well known by personnel within Region II, Region III and Headquarters. Moreover, the evidence also documents that persons in Region II (which had jurisdiction over G&S) made numerous inquiries to personnel in Region III inquiring as to the status of Region III"s investigation and subsequent enforcement actions of EPS. Region II also undertook its own inquiry as to the compliance status of EPS --- in direct contradiction of EPA's own dictate that the Regions typically operate independently of each other. The evidence of selective enforcement is substantial.

In summary, the Initial Decision failed to examine fully the ample record and evidence documenting the absence of any factual substance to support any of the charges the EPA leveled against EPS in this case and further failed to find that EPS was the victim of selective prosecution.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
ENVIRONMENTAL PROTECTION SERVICES, INC.	)	**TSCA Appeal No. 06-(01)**
	)	
	)	
Docket No. TSCA-03-2001-0331	)	
	)	

APPELLANT ENVIRONMENTAL PROTECTION SERVICES, INC.'S APPEAL BRIEF

Appellant Environmental Protection Services, Inc. ("EPS") by its undersigned counsel submits this Appeal Brief ("Brief") in support of its appeal of an Initial Decision that was issued by U.S. Environmental Protection Agency ("EPA") Region III on March 7, 2006 pursuant to Rules 22.5 and 22.26 of the Consolidated Rules of Practice. 40 C.F.R. §§ 22.5, 22.26. EPS filed its notice of appeal with the Board on April 10, 2006. By Order of the Environmental Appeals Board for the EPA ("EAB" or "Board"), dated April 4, 2006, EPS was granted an extension of time or until May 12, 2006 to file its Appeal Brief.

I. INTRODUCTION

This is a case that is complicated by its facts, the Toxic Substances Control Act ("TSCA") laws and regulations, and the defense of selective enforcement. What is not complex, however, is the fact that the Initial Decision ignored the applicable laws, evidence and record and thus, resulted in a decision that was incorrect, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with applicable laws.

In this *de novo* review, EPS is mindful of the preamble to the Consolidated Rules of Procedure ("CROP")[1], which states:

> The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the CROP gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with [sic] the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one Presiding Officer. EPA considers this a necessary and important function.

(64 Fed. Reg. 40138, 40165 (July 23, 1999). The Initial Decision in this matter failed to consider and address TSCA and its implementing regulations, as interpreted by EPA in its own guidance documents and interpretive letters. Based on the Initial Decision's failure to consider the clear, legal interpretation of TSCA's PCB laws, EPS challenges the EAB to review fully the record, to correct the erroneous decisions of the Initial Decision, and to assure that the final decision in this matter represents "**the position of the Agency as a whole, rather than just the position of one region, one enforcement office, or one Presiding Officer**."

This Brief is organized into four major sections: (i) Legal standards of review and overview of TSCA's Polychlorinated Biphenyls (PCBs) waste disposal requirements;(ii) EPS's defense of EPA's Administrative Complaint ("Complaint"), (iii) EPS's defense of EPA's selective prosecution and enforcement of its Complaint against EPS; and (iv) Errors of fact and law reflected in the Initial Decision.[2]

[1] References to rules cited herein shall be to the Consolidated Rules of Procedure at 40 C.F.R. §22.

[2] Abbreviations used in this Brief include the following: 1) Regulatory section references as used herein refer to 40 C.F.R. unless otherwise noted; 2) References to Complainant EPA's exhibits are designated "CEX"; 3) Appellant's exhibits are designated "REX"; 4) Transcript references are designated as Tr.; 5) Confidential Business Information Transcript references are designated as "CBI Tr."; and 6) Deposition transcripts are designated as "Depo Tr."

The evidence, as presented before the Tribunal, proved that the EPA brought its Amended Complaint (herein "Complaint") without sufficient evidence to substantiate any charges therein and that EPA had no factual or legal basis to support the allegations in the Complaint. Specifically, Counts I and II of the Complaint (which erroneously alleged that on July 15, 1999, and November 2, 1999, EPS commercially stored "PCB transformers" in excess of EPS's maximum storage capacity ("MSC") limits) should have been dismissed because EPA and the Tribunal in its Initial Decision failed to consider that the equipment allegedly commercially stored was exempt from the MSC limits under the regulations, as a result of: a) transshipped equipment; and/or b) EPS's adherence to the self-implementing decontamination procedures at 40 C.F.R. § 761.79.

Similarly, Count III (which erroneously alleged that EPS failed to operate its scrap metal oven within certain required temperature ranges on certain dates) should have been dismissed because EPA and the Tribunal in its Initial Decision failed to determine whether the contents in the oven also were exempt under applicable regulations because the units were non-PCB units and/or non-contaminated units and/or decontaminated units. Items that are decontaminated in compliance with 40 C.F.R. § 761.79, or that contain less that 50 ppm PCBs are expressly exempt from any PCB storage or disposal or approval requirements. (40 C.F.R. §§ 761.20(c)(2), 761.65.). Because there was no factual or legal basis to support the allegations of EPA's Complaint, EPA's Complaint against EPS was groundless.

Moreover, EPA's Complaint against EPS was instituted two years after EPA's initial investigations in reprisal for (a) EPS's persistent requests since 1998 to seek the equal enforcement of EPA's regulations against a similarly situated company, G&S

Technologies, Inc. ("G&S"), which was left untouched and unregulated, and (b) EPS's persistent complaints to EPA's Inspector General's Office and EPA's Criminal Investigation Division concerning EPA Region II's contradictory, nonexistent lack of enforcement with respect to G&S.

II. STANDARD OF REVIEW

On appeal from an initial decision, the Board reviews the Presiding Officer's factual and legal conclusions on a *de novo* basis. 40 C.F.R. §22.30(f) (2005). Accordingly, the Board may adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. Administrative Procedure Act, 5 U.S.C. §557(b). On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. *See also In re Friedman*, CAA Appeal No. 02-07, slip. op. at 17 (EAB Feb. 18, 2004); *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). Although the Board may give deference to findings of fact based upon witness testimony where credibility is a factor in the decision-making. Thus, for instance, -- such difference should apply only if the decision-making is wrong is a matter of law -- the Board is not bound by such findings and the Board may reach a contrary conclusion. *See In re: Bricks, Inc.*, CAA Appeal No. 94-1, 2003 EPA App. LEXIS 7 (EAB Oct. 28, 2003); *In the Matter of Stevens Industries, Inc., et al.*, 1 E.A.D. 9 (EAB 1972). "The reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with law.*" 5 U.S.C. § 706(2)(A) (2006)(emphasis added). See Newell Recycling Company, Inc. v. U.S. EPA, 231 F.3d 204 (5th Cir. 2000). U.S. v. Ohio

Edison Company, 276 F.Supp.2d 829, 880 (S.D. Ohio 2003)(rejecting expert's opinion, "which essentially contradicts the language or premise of the law" and is "entitled to little, if any, weight."); see also, Thorn v. Itmann Coal Company, 3 F.3d 713, 719 (4th Cir. 1993)(rejecting expert opinion based on premise "antithetical" to the Black Lung Benefits Act).

The existence of contradictory evidence must also be considered by the Board on appeal. *In re: Echevarria, d/b/a Echeco Environmental Services*, CAA Appeal No. 94-1, 1994 EPA App. LEXIS 61 (EAB December 22, 1994). In *In re Bricks, Inc.*, CWA Appeal No. 02-09, 2003 EPA App. LEXIS 7 (EAB Oct. 28, 2003), the EAB reversed a finding of liability where no one piece of evidence established nexus and the ALJ built upon several pieces of inconclusive and contradictory evidence to find nexus between wetlands and navigable waters; criticizing various witness testimony as ambiguous, not based on personal knowledge, unreliable and lacking clarity)[3]; *See also, In re Bil-Dry Corporation*, RCRA (3008) Appeal No. 98-4, 2001 EPA App. LEXIS 1 (EAB Jan. 18, 2001)(two counts of liability reversed and penalty reduced where evidence was insufficient to establish liability as "generator" of waste in tanks).

[3] Appellant in this case later filed for and was granted attorneys' fees and expenses on the grounds that the enforcement action was not substantially justified. This subsequent decision and award was reversed by the Board which held that although the decision in *In re Bricks, Inc.*, CWA Appeal No. 02-09, 2003 EPA App. LEXIS 7 (Oct. 28, 2003) ultimately hinged on findings and conclusions regarding credibility and contradictory evidence, the Region's position had a reasonable basis in law and was, therefore, substantially justified. *In re Bricks, Inc.*, EAJA Appeal No. 04-02, 2004 EPA App. LEXIS 52 (Dec. 21, 2004).

III. OVERVIEW OF TSCA REGULATORY STANDARDS

To provide a brief overview of TSCA's regulatory standards a selected sample of some of the relevant regulations is set forth below, which define: 1) when a party is a "commercial storer of PCB waste" under Part 761; and b) when a party is exempt from Part 761's storage and disposal requirements set forth in Part 761, Subpart D.

The term "commercial storer of PCB waste" is defined by regulation at 40 C.F.R. § 761.3 to mean "the owner or operator of each facility that is subject to the PCB storage unit standards . . . and who engages in storage activities involving either PCB wastes generated by others or that was removed while servicing the equipment owned by others and brokered for disposal." (Emphasis added). The term "PCB waste" is further defined to mean "those PCBs and PCB items that are subject to the disposal requirements of Subpart D of this Part." Id.

The storage of PCB waste and commercial storers of PCB waste are regulated at 40 C.F.R. § 761.65, which establishes a comprehensive regulatory scheme governing TSCA storage approvals, storage limits and financial assurances. The general preamble to § 761.65 provides that "[t]his Section applies to the storage for disposal of PCBs at concentrations of 50 ppm or greater and PCB items with PCB concentrations of 50 ppm or greater."[4]

A straight forward reading of the regulations also makes clear, however, that certain activities are exempt from the storage and disposal requirements at 40 C.F.R. Part 761, Subpart D. Specifically, Subpart D does not apply to: a) processing activities of

[4] The Regulation's exceptions for equipment containing less than 50 ppm PCBs has been widely acknowledged in the case law and administrative law opinions. See, In the Matter of City Management, 1997 EPA ALJ LEXIS 43 (Aug. 22, 1997).

PCB items pursuant to 40 C.F.R. § 761.20(c)(2); b) materials decontaminated in accordance with 40 C.F.R. § 761.79; and c) PCB waste that is transshipped within ten (10) days pursuant to § 761.65(d)(5). Relevant excerpts of these regulations are as follows:

a) 40 C.F.R. § 761.20(c)(2) provides that "**processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval.**" (Emphasis added.)

b) 40 C.F.R. § 761.79(a)(1) provides the following exception: "Decontamination in accordance with this section **does not require a disposal approval under subpart D** of this part." (Emphasis added).

c) 40 C.F.R. § 761.79(a)(4) also provides for the following exception: "Materials from which PCBs have been removed by decontamination in accordance with this section, not including decontamination waste and residuals under paragraph (g) of this section, **are unregulated for disposal under subpart D** of this part." (Emphasis added).

d) 40 C.F.R. § 761.65(d)(5) provides: "Storage areas at transfer facilities are **exempt from the requirement to obtain approval as a commercial storer of PCB waste** under this paragraph, unless the same PCB waste is stored at these facilities for a period of time **greater than 10 consecutive days between destinations**." (Emphasis added).

EPS's activities were subject to these exempted/excepted activities, but were not considered exempt by the Tribunal in the Initial Decision, an error of law.

IV. EPA'S ADMINISTRATIVE COMPLAINT LACKED SUFFICIENT EVIDENCE TO SUBSTANTIATE ITS CLAIMS

A. Background Facts

1. History of Environmental Protection Services

Since 1989, EPS has operated one of the country's few scrap metal recovery furnaces that is also capable of the complete destruction of polychlorinated biphenyls ("PCB") in electrical equipment, at concentrations set forth in regulations promulgated under the Toxic Substances Control Act (TSCA) (15 U.S.C.A. §§2601-2692, as implemented by 40 CFR 761 ("Regulations") and in compliance with applicable federal and state laws. REX 508 (R-00000-R-000002); August 22, 2003 Tr. 204. For two years prior to opening for business in 1989, EPS developed a proprietary mechanism for identifying every unit that would come through the door of its facility. It did so because the regulatory program under which it was to operate, the PCB program established at 40 C.F.R. §761, et seq., provided for onerous penalties for regulatory violations. To ensure EPS's compliance with the Regulations and its "cradle-to-grave" manifest tracking requirements, EPS developed a unique six-digit barcode identifier that became associated with each specific transformer or other piece of electrical equipment that EPS processed so that it could maintain a complete history of the unit from the time the unit entered EPS until it was processed, either through the scrap metal recovery furnace or by other processes and shipped for disposal at an approved TSCA site. June 18, 2003 Tr. 200; June 20, 2003 CBI Tr. 15-17; see also CEX 42. EPS has had the capability of tracking each transformer through its barcode identifier system since the day EPS began operations.

In 1989, EPS also custom-designed a two-chamber furnace that was utilized by the EPA as a model for developing its furnace regulations in 1994, later codified at 40 C.F.R. § 761.72. REX 508 (R-000002). EPS's furnace is comprised of a primary and secondary combustion chamber. Id. In the primary combustion chamber, articles are heated to a temperature below the melting point of aluminum and are kept at that temperature for several hours. Id. Any PCBs present in the drained non-PCB articles and the PCB-contaminated articles are vaporized at these temperatures. Id. The primary combustion chamber operates under a slightly negative pressure (or draft) so that combustion gases do not leak out but are passed into the secondary chamber. Id. The secondary combustion chamber operates at the same combustion conditions, including significantly elevated combustion temperatures, as a PCB incinerator. (REX 508, Bates R-000002). In this secondary chamber, any remaining PCBs and incomplete combustion products formed in the primary chamber are destroyed. Id. Computers record temperatures within the furnace. Id. Metals remaining after articles are processed through the furnace are recycled. REX 508 (R-000003). Emissions from the furnace are permitted, as required by 40 C.F.R. § 761.72 and the West Virginia Division of Environmental Protection. Permit No. R13-1503B, dated February 16, 1999. REX 508 (R-000003).

EPA acknowledged in 1994 when it proposed amended regulations to govern the manufacturing, processing and distribution of PCBs, that "reasonably run industrial furnaces provide a recycling benefit . . . ." 59 Fed.Reg. 62788, 62803 (Dec. 6, 1994). In 1998 when the regulations were finalized, 63 Fed.Reg. 35416 (June 19, 1998), EPA further acknowledged that the regulations were "intended to protect against unreasonable

risks from PCBs by providing cost-effective and environmentally protective disposal options that will reduce exposure to PCBs by encouraging their removal from the environment."

In addition to constructing the scrap metal recovery furnace at EPS's facility in 1989, EPS constructed a storage area to facilitate not only the processing of electrical equipment at the facility, but also the processing of equipment that would **not** ultimately be disposed of at the EPS facility. REX 508; (R-000003). In 1999, equipment containing PCBs at concentrations in excess of 500 ppm could not be disposed of at the EPS facility. Thus, such equipment was transported offsite for disposal at approved TCSA sites. REX 508 (R-000019).

EPS's storage area is approximately 13,000 square feet, and is located immediately off of and adjacent to a loading dock. REX 508, (R-000003); see also CEX 1, CEX 4. The storage area is used for the temporary storage of units until they can be either processed to facilitate storage or transportation for disposal or processed for disposal at EPS's scrap metal furnace – an exempted activity under § 761.20(c)(2). The area conforms to the requirements of § 761.65(b)(1) consisting of: a roof and walls to prevent rain water from reaching PCB item; non-porous surfaces; continuous six inch high curbing with no drain valves, floor drains or other openings; as well as other protective design features. REX 508 (R-000003).

Since November 10, 1993, EPS's Wheeling, West Virginia plant has been approved by EPA to store PCB as required by § 761. REX 508 (R-000003). EPA issued EPS's Approval for Commercial Storage on November 10, 1993, amended it on July 26, 1994, and renewed it on September 29, 1998 (EPS' Approval). REX 508 (R-000003).

As a result of the unanticipated closure of two major PCB disposal facilities in 1999, EPS sought guidance from and advised EPA that EPS unexpectedly would have to store units from these closed disposal operations. The closure of these two facilities and the expected increase in necessary storage capacity was noted in EPA's inspection report, dated July 15, 1999. CEX 7 (C-000579); REX 508, (R-000003).

EPS prepared a notification in accordance with 40 C.F.R. § 761.65(g)(9) on July 11, 1999, and, by letter dated July 19, 1999, notified the EPA pursuant to 40 C.F.R. § 761.65(g)(9) of a modification to EPS's closure plan and advised EPA of an increase in the volume of PCB waste stored at its facility. CEX 52; REX 508 (R-000003). EPA never conveyed to EPS any problem, concern, objection, or rejection of this notice until after the first week of the administrative hearing in this case, *four years later*, and at no time did the volume of transformers and capacitors at EPS exceed the amount provided for in EPS's closure plan, which at all times was fully funded under an irrevocable trust, as EPS by regulation was required to provide financial assurances. REX 508 (R-000003, R-000015, R-000017).

From 1990, EPA inspected EPS on almost an annual basis. REX 508 (R-0000013). Throughout the years, EPS had maintained an exemplary compliance record, with no imposition of fines or penalties, no reported releases or spills, and no complaints. REX 508 (R-000013). A single minor regulatory concern arose in 1992 when EPS did not record the first receipt date of PCB fluid into a 500-gallon tank. REX 508 (R-000013).

B. Count I

1. EPA's July 1999 and November 1999 Inspections

On July 15, 1999, Mssrs. Scott McPhilliamy ("McPhilliamy") and Scott Rice ("Rice"), inspectors with the USEPA Region III office in Wheeling, West Virginia, inspected EPS as requested by the Enforcement Group of EPA Region III. REX 508 (R-000014). This particular inspection was the very first PCB inspection Mr. Rice ever conducted. REX 558 Pg 20 (13-24), pg 22 (6-24), Pg 74 (9-12), Pg 117 (17-19).

The alleged purpose of the inspection was to verify maximum storage capacities under EPS's TSCA PCB Commercial Storage Approval and to determine whether EPS transported waste off-site within the time specified in its Approval. CEX 7.

During and following the inspection, the inspectors attempted to compare EPS's actual storage with the maximum storage capacities (MSCs) set forth in EPS's September 1988 Approval. May 20, 2003 Rice Depos. Tr. at 146-148; June 17, 2003 Tr. 88-90; June 17, 2003 Tr. 238, 253-54; June 18, 2003 Tr. 95-97. Significantly, during the investigation on July 15, 1999, both Messrs. McPhilliamy and Rice failed to ask any questions regarding whether any of the equipment might be exempt due to processing activities, in-service status, ownership of equipment, transshipment within ten (10) days or decontamination in accord with § 761.79 which status would have exempted such equipment from EPS's storage limitations initial approval.[5] Rather, EPA's inspectors simply inventoried the equipment by type of equipment without regard to the planned disposition of the equipment. June 17, 2003 Tr. 243-44, 246-47; June 18, 2003 Tr. 95-97. No further contact with anyone at EPS regarding Count I was initiated by anyone at EPA

[5] § 761.65(d)(5) exempts the storage area from approval if PCB waste is stored less than ten days between destinations.

regarding this inspection until shortly before EPA filed its Administrative Complaint in the instant case. CEX 7, 11, 14.

McPhilliamy prepared an inspection report describing his and Rice's activities during the inspection. June 17, 2003 Tr. 88-90; June 17, 2003 Tr. 238-267; June 18, 2003 Tr. 91-97, and June 18, 2003 Tr. 201-203; CEX 7. In the report, McPhilliamy noted that the inspectors were made aware of a significant increase in EPS' business due to the closure of TSCA facilities, namely S.D. Myers and Hevi-Duty. CEX 7 (C0000579). In addition, the report acknowledged that EPS had expanded its in-house capabilities to include the decontamination of transformers in accordance with §761.79. Id. The report even included a letter from EPA headquarters approving EPS's use of mineral oil dielectric fluid (MODEF) for use in the process of decontaminating transformers. Id. (Attach. 4). The inspectors compared numerous hazardous waste manifests for 1999 during this inspection regarding PCB waste that was shipped to and from the EPS facility and found no discrepancies in the documentation and time frame requirements. Id. EPA's inspection also noted an outgoing shipment of PCB capacitors that was shipped July 9, 1999, but as noted on the summary comment page, the inspectors did not compare off-site shipments with dates the materials were received on-site. In other words, during the inspection, the inspectors made no effort to determine whether the PCB capacitors, which EPS was not permitted to dispose of, were transported off-site within the timeframes allowed in the regulations at 40 C.F.R. §761.65. Aug. 22, 2003 Tr. 54-66, June 19, 2003 Tr. 227. During the July 15, 1999, inspection, the EPA inspectors testified that they

- did not take any oil samples from the items in storage to determine the PCB concentrations of electrical equipment being stored, nor did EPA perform any weight measurements. June 18, 2003 Tr. 95-97.

- did not question whether the units were being commercially stored or whether the units were actual waste or in-service electrical equipment. June 18, 2003 Tr. 48-49, 218; REX 558 at 135-137.

- did not ask EPS during the inspection whether any of the units in the storage area were owned by EPS or if EPS considered itself to be the generator of any units that were in storage on the day of the inspection. June 18, 2003 Tr. 205.

- did not inquire either during or after the inspection whether the units in storage on July 15, 1999, were to be processed in accordance with §761.20(c). June 18, 2003 Tr. 218.

Indeed, both Mr. McPhilliamy and Mr. Rice testified that the extent of their analyses regarding units in storage on July 15, 1999, was to simply identify the types of equipment, utilize hand written PCB concentrations provided by EPS on the PCB storage logs to determine the PCB concentrations of the units in storage, and total the weights of the units. June 17, 2003 Tr. 247-256; June 18, 2003 Tr. 95-97; June 17, 2003 Tr. 88-90 June 17, 2003 Tr. 238-267, June 18, 2003 Tr. 91-97 and June 18, 2003 Tr. 201-203. As will be discussed later, other EPA witnesses conceded during the administrative hearing that simply adding the weights of units in the storage area was not the appropriate way to conduct the inventory. Rather, information should have been acquired regarding whether other regulatory exemptions, e.g., exemptions established at 40 C.F.R. §761.20(c)(2), were in play.

On July 19, 1999, by letter, EPS notified EPA of an increase in EPS's MSC. CEX 52; REX 28; August 21, 2003 Tr. 232-34.

On November 2, 1999, McPhilliamy and Rice again inspected EPS, again at the special request of the Region III Office of Waste and Toxics Program. CEX 11. The

alleged purpose of the inspection was to compare EPS' actual storage to EPS's MSC set forth in the Approval, to review selected manifests covering shipments of incoming and outgoing transformers and PCB oil, to review compliance with the West Virginia Department of Environmental Protection's ("WVDEP) emissions permit, and to review operational data of the scrap metal recovery oven to determine compliance with the requirements of 40 C.F.R. § 761.72. CEX 11 (C000605).

McPhilliamy prepared an inspection report detailing the November 2, 1999, inspection and noted that the inspectors once again simply compared the inventory of equipment, with assumed PCB concentrations, to the MSCs in the September 1998 Approval. CEX 11. The report made no mention of the EPS notice to EPA of July 19, 1999, in which the MSCs were increased. CEX 11.

The November 2, 1999 inspection report stated "EPA selected random manifests of incoming PCB transformers sent to EPS. At this point the transformers were drained and the oil sent off-site for dechlorination. Manifests covering the off-shipment of the oil from a specific transformer were also available. The carcasses of the transformers selected for review were then decontaminated on-site and sent to the scrap metal oven. The manifests selected for review indicated a cradle to grave scenario for the PCB oil (>500ppm) received by EPS." CEX 11 (C000607)(emphasis added). Finally, the report stated "EPS continues to decontaminate transformers using the self-implementing decontamination procedures found at 40 C.F.R. 761.79(c)(3) and (4). Reportedly 144 transformers have been decontaminated since the process was initiated." CEX 11 (C000605)(emphasis added). These transformers as confirmed both by EPA's inspectors and § 761.20(c)(2) do not require a disposal approval and are "unregulated."

§ 761.79(a)(1) and (a)(4). Neither McPhilliamy nor Rice took any oil samples to determine PCB concentrations from the items in storage on November 2, 1999, and neither inspector weighed any of the units in the EPS PCB commercial storage area. The inspectors did not question whether the units were being commercially stored, whether the units had been determined to be waste or were in-service electrical equipment. June 17, 2003 Tr. 263-267; June 18, 2003 Tr. 39, 42, 81-85, 95-97. The inspectors did not ask EPS for the identity of the generator of any units that EPA assumed to be waste or whether any of the units in storage were going to be processed in accordance with §761.20(c) and 761.79(c). June 18, 2003 Tr. 81-83, 218; REX 558 at 135. As was the case with EPA's July 15, 1999, inspection, the inspectors once again used the limited hand written notes from PCB storage log sheets provided by EPS to determine both the PCB concentrations of the units in the storage area and the weights. June 18, 2003 Tr. 21:10-26:5. At the time of inspection, neither McPhilliamy nor Rice conducted a closing meeting, nor did they mention any of their findings from July 15, 1999, nor did they acknowledge receipt of the July 19, 1999, notification from EPS advising EPA of the increased MSCs at the EPS facility. REX 508 (R-000003). EPA personnel requesting this inspection knew about EPS's increased storage needs, as (1) EPS had notified EPA by letter, dated July 19, 1999, of the closure of the two large waste disposal facilities, S.D. Myers and Hevi-Duty, and (2) even EPA had authorized the shipment of PCB waste from a superfund site. REX 500 (R000897); Aug. 18, 2003 Tr. 51-52; Sept. 10, 2003 Tr. 77-78; June 18, 2003 Tr. 52-54. In addition, McPhilliamy prepared a report, dated October 2, 2000, of issues discussed during his August 30th meeting with EPS. CEX 14.

The report confirmed that EPS was not advised of any of the findings from EPA's July 15, 1999 or November 2, 1999 inspection. CEX 14 (C000636).

Based on EPA's failure to take oil samples, to determine PCB concentrations, to weigh the units, and to determine the ultimate disposition of items in EPS's PCB commercial storage area on July 15 and November 2, 1999, Count I of the Complaint cannot be supported by the record.

2. Count I is Unsupported as a Matter of Law

a. EPA has the Burden of Proving the Allegations in its Complaint

Complainant has failed to establish its *prima facie* case as to Count I. Under the Consolidated Rules of Practice,

> [t]he complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a *prima facie* case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief.

40 C.F.R. §22.24(a). It has been held that a "*prima facie* case" is "one that prevails to the absence of evidence invalidating it." In the Matter of Louisiana Pacific Corporation, Docket No. CAA-120-V-84-2, 1987 EPA ALJ LEXIS 34 (March 24, 1987).

In this matter EPA failed to acquire sufficient information during its July and/or November 1999 inspections to enable EPA to know whether the weights of units in the EPS commercial storage area were in excess of the MSCs in the Approval. Indeed, all EPA did was add up the weights of materials that were physically present on the day of the inspections and simplistically compare those numbers to MSCs, which EPA erroneously assumed were applicable on those days. Inspector Rice testified as follows:

A. The penalty for Count I was based merely upon face value data. The number of storage units that were in storage the day of our inspections versus what was in the commercial storage permit. That's what it was completely based upon.
Q. Versus --
A. The commercial storage permit --
Q. I'm sorry. Now I get to ask you to repeat something. What --
A. The commercial storage permit says Environmental Protection Services is allowed to store "X" amount of this --
Q. Okay.
A. -- at any given time.
Q. Okay.
A. We went and did the inspection. We saw "this" amount --
Q. Which was more than X?
A. Which was more than X. And the penalty was calculated on nothing more than that.
Q. Okay.

Depo. Tr. of Scott Rice May 20, 2003 at 146-147; REX 558.

First, the inspectors failed to determine either during the inspections or at any time prior to the day EPA filed its Complaint whether the units in the storage area during the inspections were "PCB Waste" as defined in §761.3. The PCB commercial storage approval regulations do not apply to material unless it is "PCB waste." Absent this determination, it is impossible for EPA to have known whether those units were subject to the commercial storage approval regulations at all. REX 278; Depo. of John Smith, May 16, 2003 at 55-66; June 19, 2003 Tr. 228-241; June 18, 2003 Tr. 49.

Second, and assuming arguendo that the units were "PCB Waste," the inspectors failed to acquire any information regarding whether EPS was the owner, and therefore the generator as defined at §761.3, of the PCB Waste. June 18, 2003 Tr. 204-205. PCB Waste stored by its owner, EPS, who is therefore the generator of the PCB Waste, is not subject to the MSCs in the EPS PCB commercial storage approval because that PCB Waste is not "commercially stored." Indeed, the primary indicia of commercial storage is

storage of equipment owned by others. See §761.3 definition of Commercial Storer of PCB waste which provides:

> Commercial Storer of PCB Waste means the owner or operator of each facility that is subject to the PCB storage unit standards of §761.65(b)(1) or (c)(7)...and who engages in storage activities involving either PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal. (emphasis supplied).

Third, EPA inspectors failed to perform any independent weight measurements. June 18, 2003 Tr. at pages 95-97. Rice testified at length during the hearing that he would not accept EPS's representations regarding the PCB concentrations of any unit involved in the EPA allegations in Count III because they were "hand written" and unverifiable. June 18, 2003 Tr. 120-122, 197-198, 212-213. Rice was the EPA inspector who drafted the technical portions of the EPA Complaint and was the EPA's technical representative who had the most contact with and responsibility for analyzing all of the data supplied by EPS at EPA's request both during and following EPA's inspections. June 18, 2003 Tr. 118-119, 184-198. It is completely inconsistent for EPA to argue, as it has, that EPS hand written PCB data is "unverifiable" and therefore not acceptable to prove that units subject to Count III are not regulated while simultaneously arguing, as it does, that EPS hand written unit weight data, which is no more verifiable than the PCB concentration data (but is the only factual data EPA has) is acceptable to support the EPA allegations in Count I.

Finally, the inspectors were not even aware that EPS had notified the Regional Administrator in accordance with §761.65(g)(9) of an increase in MSCs during the inspections or subsequently. June 18, 2003 Tr. 35; May 20, 2003 Depo. of Scott Rice 139-143; May 21, 2003 Depo. 71-80. Therefore, during the nearly year and a half

between the second inspection and the filing of EPA's Complaint, the time when Rice was completing his investigation, he did not even have the proper MSC available to compare to whatever weights he incorrectly assumed were in EPS's commercial storage area during the inspections. Accordingly, EPA's conclusions regarding EPS' compliance with the MSCs in its Commercial Storage Approval as alleged in Count I are invalid *ab initio*.

Since EPA acquired no facts prior to or after the filing of its Complaint to identify a single unit in storage on either July 15 or November 2, 1999, it cannot meet its burden of proving any material facts, such as the PCB concentrations, the weights, and the ultimate disposition of any units in the storage area on the date of either inspection and cannot sustain its burden of proof of the allegations in Count I.

b. 40 C.F.R. §761.20(c)(2)'s Exception For Certain Processing Activities Applied to EPS's PCB Commercial Storage Approval.

1. EPS received its PCB commercial storage approval in September of 1998, approximately two months after the § 761.20 (c)(2) regulations were promulgated. Those regulations established an exception for certain units that were then no longer subject to commercial storage approval requirements. 63 Fed. Reg. 35384, 35392, 35439-35440 (June 29, 1998). Between the date of promulgation of the regulations and the date of the inspections of EPS in 1999, EPS was provided no guidance by EPA regarding whether the newly promulgated regulations had any impact on its Approval. In fact, the Approval's own terms and conditions at REX 2 at (C0000559) required that at all times EPS shall comply with 40 CFR Part 761, as amended. The plain language of §761.20(c)(2)(i) provides for an exception and states:

> Any person may process and distribute in commerce for disposal PCBs at concentrations of ≥ 50 ppm, or PCB Items with PCB concentrations of ≥ 50 ppm, if they comply with the applicable provisions of this part... (i) processing activities which are primarily associated with and facilitate storage or transportation for disposal does not require a TSCA PCB storage or disposal approval.

(Emphasis added).

Nowhere in the PCB regulations at 40 C.F.R. 761 *et seq.* is the term "TSCA PCB storage approval" or "PCB storage approval" defined. While the regulations at §761.65(a)(4) establish a mechanism for the owner of a storage facility to increase allowable time for storage of PCB waste, the term "commercial storer of PCB waste" is defined at §761.3, but provides an important exception by stating "a generator who only stores its own waste is subject to the storage requirements of § 761.65, but is not required to obtain approval as a commercial storer." (Emphasis supplied).

Accordingly, EPS submits that the only approvals to which the exception articulated at §761.20(c)(2) could refer are PCB commercial storage approvals as required under §761.65(d). Moreover, EPA witnesses Charlene Creamer, the Region III PCB Coordinator at the time of the 1999 EPS inspections, Dr. John Smith, McPhilliamy, and Rice all testified during the administrative hearing that the exceptions articulated at §761.20 apply to the commercial storage area at the EPS facility. Sept. 10, 2003 Tr. 81-88 (Creamer); June 19, 2003 Tr. 228-249 (Smith); May 16, 2003 Depo. of Scott McPhilliamy at 55-66, June 18, 2003 Tr. 40-45, 48-49, 81-86, 216-218 (McPhilliamy); June 18, 2003 Tr. 202-203 (Rice). The depositions of both McPhilliamy and Rice were admitted into evidence during the administrative hearing, and all of this testimony was completely ignored by the Tribunal in its Initial Decision.

Based upon the above factual and legal analysis, it is undisputed that from the time EPA promulgated the §761.20(c)(2) exception for certain processing activities in 1998 until the filing of EPA's Complaint in June of 2001, EPS received no guidance whatsoever from EPA regarding the manner in which EPA interpreted the §761.20(c)(2) exception against EPS's commercial storage approval requirements. August 21, 2003 Tr. 274-79.

c. The Initial Decision and EPA's Conclusions Were Based on a Mischaracterization of the Relevant Issues.

The Tribunal found at page 18 of the Initial Decision that the exception established in §761.20(c)(2) was not applicable, noting that EPA anticipated this argument and it "is addressed fully in complainant's main brief." Complainant's Post-Hearing Brief, filed September 17, 2004 (referred to herein as "CB"). EPS submits that EPA completely mischaracterized the issue in its main brief as noted below.

1. EPA asserted at CB 23 that "[w]hat happens to the units ultimately does not change the fact of storage and the exemption does not apply retroactively." That statement flies in the face of both logic and the regulatory language, and demonstrates EPA's complete and utter lack of understanding of how the real world operates. Plain logic dictates that no PCB transportation, transfer facility, or disposal business could operate if the regulatory status of each piece of equipment is fixed prior to it becoming PCB waste and remains fixed throughout the process of the disposal of the equipment. In fact, the commercial storage approval regulations themselves exempt certain waste equipment from the commercial storage approval process on their face. Respondent EPS's Post-Hearing Brief, filed on September 17, 2004 (hereinafter referred to as "RB"). *See* RB at 14-15, 19-23.

2. EPA also stated at CB 23 that "Respondent continues to admit that the PCB Items counted by EPA were indeed in storage." Indeed, Respondent has always admitted to storage of the items. However, EPA completely misses the critical regulatory distinctions between "storage" and "commercial storage of PCB waste." EPS has never admitted to commercial storage of these PCB items. *See* RB at 11-14, 21-23, 25-26.

3. EPA at CB 23 erroneously asserts that "[n]othing in Respondent's TSCA Approval or in the definitions of 'storage for disposal' and 'commercial storer if PCB waste' provide for any such distinction," between storage and commercial storage. Respondent submits the EPA could not be more wrong. The distinction is articulated clearly in those definitions. *See* RB at 11-14, 21-23.

4. EPA at CB 24 incorrectly asserts that "[t]he only evidence that Respondent provides to support the application of the processing exemption for decontamination activities is unsupported regulatory interpretations, the testimony of Respondent's President, and the president's affidavit." Respondent submits that its regulatory interpretation is supported by a) EPA's own expert witness Dr. John Smith; b) EPA Region III inspectors Scott McPhilliamy and Scott Rice; c) the clear language of the regulations; and d) guidance documents on EPA's web page. *See* RB at 15. EPA's position is contrary to all of the evidence and only underscores the degree to which EPA is willing to ignore the plain, clear, and unambiguous regulations and record, and to vindictively prosecute EPS. *See also* RB at 14-15. Respondent submits that if EPA cannot rely on the clear, plain and unambiguous terms of EPA regulations, guidance and officials, then surely it cannot utilize the same regulations to support its complaint against

EPS. EPA did no independent investigation to elicit facts about any of its allegations, has arbitrarily rejected or accepted certain evidence in the form of data depending on its support to Complainant, has arbitrarily and incorrectly interpreted regulation, and now has the temerity to ignore the clear evidence which support the applicability of the processing exemption. *See* RB at 6-10.

5. EPA at CB 25-26, without any legal justification or evidentiary support, speculates that "Respondent was storing transformers for much longer than the time needed to 'process' them." EPA's assertion regarding the length of time equipment was on site at EPS, the date that equipment was received by EPS and the amount of time it takes to process equipment at EPA are irrelevant. The only regulatory restriction on the length of time that such equipment may be stored prior to disposal is the general requirement set forth at § 761.65(a)(1), which allows one year for disposal of PCBs and PCB Items at concentrations > 50 ppm once the PCBs and PCB Items are determined to be PCB waste through removal from service for disposal. Accordingly, EPA's speculative assumptions and unsupported assertions carry no evidentiary weight. Whether the equipment was "waste" as defined in the regulations, and whether any of the "PCB transformers" were decontaminated was adequately documented by EPS. Complete documentation, including certificates of disposal, which verified processing by decontamination, were provided to the EPA in accordance with the March 5, 2003 discovery Order of this Tribunal. *See* follow-up sanction and clarification Orders dated May 28, June 3, and June 4, 2003, as well as June 17, 2003 Tr. at 36:0 to 41:19. *See also* EPA Inspection Reports CEX 7 and CEX 11 and testimony of Rice and McPhilliamy both in hearing and deposition (REX 558 and REX 560) confirming EPS's

decontamination processing. Indeed, in the case of EPS's decontamination of transformers and EPS's level of effort to process the PCB transformers, there was testimony contradicting EPA's assumptions because EPS is not approved to dispose of PCB waste generated from PCB transformers and PCB waste must be processed for transportation for disposal.

6. EPA at CB 26-27 argues that Respondent was "storing" waste PCB transformers as a "commercial storer of PCB wastes," and that the transformers EPS stored or held prior to any processing and decontamination activities were not encompassed by the processing exemption at §761.20(c)(2)(ii). Once again EPA by quantum leaps and speculation reaches an unsupported conclusion and simply assumes that the transformers onsite were waste. Respondent submits that the record is devoid of any support for the assumption that these transformers were, in fact, "waste" as defined in the regulations. In addition, EPA merely assumes the identity of the generator for such units that may have been waste, despite lengthy testimony from EPA and EPS witnesses to the effect that one cannot make that determination without additional knowledge regarding the origin and fate of those units on site. Respondent submits that there was no such testimony by EPA or EPS. The only testimony in the record regarding units alleged to have been improperly, commercially stored focused on the capacitors that were the subject of Count II. Respondent submits that there is no support in the record for EPA's position that Respondent was not processing the units for transportation for disposal of the PCB waste. Indeed, the only testimony in the record is from Respondent testifying that EPS was, indeed, processing to facilitate transportation for disposal since EPS cannot legally dispose of PCB waste from PCB transformers. RB 14-15, 21-22.

EPA had the opportunity but chose not to ask a single question on cross-examination of any EPA witness to challenge this testimony. Accordingly, it cannot now create a challenge from whole cloth, using mere assertions or speculation unsupported by the record.

7. Finally, EPA at CB 38 contends that regulatory exemptions must be narrowly construed, citing In Re: Consumers Scrap Recycling, Inc., Docket EAB Appeal (Jan. 29, 2004) Slip Op. at 21, citing Comm'r v. Clark, 489 U.S. 726, 739 (1989) (statutory exemptions are to be construed narrowly in order to preserve the primary operation of the general rule.) Respondent submits that this contention is disingenuous. In this same litigation, EPA asked this court to narrowly construe the regulations relating to EPS, while parading one witness after another to provide that G&S, the largest disposal firm of PCB electrical equipment in the USA, is not and has never been a "commercial storer of PCB waste" as defined by the PCB regulations. *See* RB at 49-122. EPA provided no testimony or any form of documentation to even suggest that G&S conducts storage any differently than does EPS. Meanwhile, EPS entered into the record hundreds of pages of exhibits and eight days testimony from Keith Reed, Dave Dillon, Ann Finnegan and Daniel Kraft documenting that PCB storage exists at both facilities, and that G&S does four times the capacity of business as EPS. Remarkably, EPA did not even try in its 125-page brief to explain any difference between G&S and EPS to the EPA Tribunal, all the while asking the Court to rule that there is a distinction in the regulations so that commercial storage dos not exist at G&S, but does exist at EPS for the same items.

3. EPS on July 19, 1999 Notified EPA of EPS's Increased MSC Storage Limits in its PCB Commercial Storage Approval.

The PCB regulations at §761.65 require a "commercial storer" of PCB Waste to comply with and provide financial assurance requirements, i.e., a method of funding the closure of its PCB commercial storage facility upon cessation of business at the facility. The regulations state:

> A commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that he owns or operates. In establishing financial assurance for closure, the commercial storer of PCB waste may choose from the following financial assurance mechanisms or any combination of mechanisms...
> (9) A modification to a facility storing PCB waste that increases the maximum storage capacity indicated in the permit requires that a new financial assurance mechanism be established or an existing one amended. When such a modification occurs, the Director of the Federal or State issuing authority must be notified in writing no later than 30 days from the completion of the modification. The new or revised financial assurance mechanism must be established and activated no later than 30 days after the Director of the Federal or State issuing authority is notified of the completion of the modification, but prior to use of the modified portion of the facility. 40 C.F.R. 761.65 (g)(9). (emphasis supplied).

On July 19, 1999, EPS provided notification under §761.65 (g) (9) to the Regional Administrator of EPA Region III increasing the MSCs in its 1998 PCB commercial storage approval. Aug. 21, 2003 Tr. 232-233; CEX 500. There was no physical modification to the PCB commercial storage area at the EPS facility in 1999 or at any time since the 1989 commencement of business at EPS. Aug. 21, 2003 Tr. 233-234. Rather, the original PCB waste storage area at the facility was designed to accommodate significantly higher weights of PCB wastes than the amount of closure funds available in

the original financial assurance mechanism provided by EPS. Aug. 21, 2003 Tr. 244-255. Subsequently, the investments in the trust fund that EPS had initiated and over which EPA, not EPS, was the sole trustee controlling investments, appreciated so significantly that a great deal of additional closure funds became available by the summer of 1999. Aug. 22, 2003 Tr. 7-22. Concomitantly, the estimated cost of closure of the EPS facility steadily dropped between the establishment of the financial assurance trust fund and the summer of 1999. Aug. 22, 2003 Tr. 21-22.

Significantly, EPA never provided any response, written or otherwise, prior to the commencement of this action to EPS's July 1999 notice advising EPA of EPS's increased MSC limits. June 17, 2003 Tr. 161-167, 174-175; Aug. 21, 2003 Tr. 256-259; Sept. 10, 2003 Tr. 74-75; Depo. of Rice May 20, 2003 Tr. 138-140. EPS submits that any reasonable person, who had submitted a formal, clear notification that complied with the requirements of §761.65(g)(9) (using variants of the word "notify") and received no acknowledgment or corrected response from EPA, would assume that its notification was both in accordance with the regulations and accepted by EPA. Aug. 21, 2003 Tr. 227-234. Belatedly, during the administrative hearing more than two years after EPA filed its Complaint and more than four years after submitting the notice, EPA witness after EPA witness testified that the regulations quoted above do not specifically provide or require any EPA approval to effect a modification of the MSC under §761.65(g)(9). June 17, 2003 Tr. 161-163; June 19, 2003 Tr. 219-225; Sept. 10, 2003 Tr. 42-43; June 18, 2003 Tr. 35-38, 215-216. EPA's belated response should have waived any right it had to complain about the effect of EPS's notice letter.

As noted by the Tribunal during the administrative hearing, no expert is needed to understand the plain language of the regulation.

> because regulations speak for themselves, either the plain wording of the regulation or the regulation read in conjunction with other regulations.

June 18, 2003 Tr. 236: 16-19. EPS submits that it was and is entitled to interpret the PCB regulations quoted above based on the regulation's plain, common and unambiguous meaning. That common meaning includes the fact that the cited regulation does not include the word "approve" but does include variants of the word "notify" in two places.

After neither receiving nor expecting any response from EPA regarding EPS's July 19, 1999 notification increasing MSCs in its Approval, EPS further assumed its compliance status was unquestioned when EPA designated EPS as a disposal site for PCB wastes generated as part of a Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C.A. §§9601 *et seq,* remediation project in June 2000. Aug. 18, 2003 Tr. 51-52; Sept. 10, 2003 Tr. 77-78; June 18, 2003 Tr. 52-54. In August 2000, Scott Reed of EPS was advised that EPS was not approved for receipt of the PCB waste from the CERCLA project because the amount of waste exceeded the MSCs in its commercial storage approval and because EPS was not on the approved CERLA list. Mr. Reed immediately contacted Charlene Creamer of EPA Region III, the then-PCB Coordinator for Region III, and explained that EPS had submitted its notification to increase its MSCs in 1999 to 100,000 pounds. Aug. 18, 2003 Tr. 44-46. Without any further explanation from EPA, EPS was then approved to receive 97,000 pounds of PCB transformers from the CERCLA site. Aug. 18, 2003 Tr. 51-52, 54-55. It is noteworthy that the 97,000 pounds of PCB transformers approved by EPA was well in excess of the 5,000 pound MSC limit set forth in EPS's 1998 Approval, but

less than the 100,000 pound MSC limit which EPS believed had been properly achieved as a result of EPS's July 19, 1999 notification to EPA increasing its MSCs in its PCB commercial storage approval. Aug. 18, 2003 Tr. 38, 43,45, 54; Aug. 21, 2003 Tr. 237-240.

EPA by its actions cannot now, after the fact, assert that EPS has violated the MSCs contained in a 1998 PCB Approval and that the July 19, 1999 notification increasing the MSCs is invalid when EPA itself never objected to EPS's notification. EPS submits that EPA waived any such objection when EPA approved EPS to receive PCB transformers with weights in excess of the 1998 PCB Approval's MSC, but less than EPS's July 19, 1999 notification of increased MSCs.

The Tribunal in its Initial Decision made no mention of any of the testimony cited above or any record to support its findings. EPS submits that the findings of the Tribunal in its Initial Decision are therefore unsupported in fact or law and must be reversed.

4. EPA Failed to Provide EPS Fair Warning of Its Interpretation of 40 C.F.R. 761.20(c)(2) – In Contradiction to the Regulations.

In the absence of fair notice of an agency's interpretation of a regulation, "an agency may not deprive a party of property by imposing civil or criminal liability." General Electric Co. v. EPA, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995). The test for determining whether a regulated party has received fair notice of EPA's interpretation of a rule is whether, through "reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform . . ." Id. At 1329, citing Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). If an agency has not provided the regulated party with any pre-enforcement

warning of its interpretation, an agency "cannot, in effect punish a member of the regulated class for reasonably interpreting [its] rules." 53 F.3d 1330, citing Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987).

EPA failed to provide EPS fair warning of its interpretation of 40 C.F.R. 761.20(c)(2) before it decided "to use a citation" "for making its interpretation clear" to EPS. See General Electric at 1329. Indeed, EPA provided conflicting guidance of its interpretation by approving a shipment of waste that was well in excess of the 1998 PCB Approval, but less than and well within the increased MSC that EPS believed was perfected by the combination of EPS's July 19, 1999's notification and no contrary response from EPA.

EPS submits that it reasonably interpreted 40 C.F.R. 761.20(c)(2) to exempt EPS's processing activities (that are primarily associated with and facilitate transportation of PCB electrical equipment, including transformers and capacitors for disposal) from the PCB commercial storage approval requirement, as that regulation states on its face. In contrast, the interpretation that EPA is now attempting to apply is contrary to the plain language of the regulation.

In summary and based on the above facts, it is undisputed that EPA did not respond to EPS between the time EPS submitted its July 19, 1999 notification to increase its MSCs and the date EPA filed its Complaint in 2001. June 17, 2003 Tr. 161-167, 174-175; Aug. 21, 2003 Tr. 256-259. It is also undisputed that Scott Reed of EPS spoke with Charlene Creamer, the then-PCB Coordinator for Region III, immediately upon EPS's receipt of the EPA notification that EPS would not be approved to accept the 97,000 pounds of CERLCA PCB wastes in early 2000 from the Ohio CERLCA remediation site

and told Ms. Creamer about the July 19, 1999, EPS notification under §761.65(g)(9) increasing EPS's MSC limit above those in its September, 1998 Approval. Aug. 18, 2003 Tr. 38-46. Finally, it is undisputed that EPS subsequently received approval by EPA to receive 97,000 pounds of CERCLA PCB waste for disposal, with no further contact from EPA or any explanation by the EPA for its change in position. EPS submits that EPA could have done nothing more inconsistent regarding regulatory interpretation guidance than it did in failing to respond to EPS's 1999 notice increasing MSC's and then subsequently approving EPS for the receipt of CERCLA PCB waste at a weight that was well in excess of the 1998 Approval MSC, but less than the MSC as modified by EPS's July 19, 1999 notice to EPA.

Having failed to provide fair warning regarding the interpretation of its own regulations, EPA cannot prevail in Count I of its Complaint, and this Board must find for EPS on all allegations in Count I.

The Tribunal in its Initial Decision rejects EPS's arguments by simply stating that the fair warning argument "is inapposite to the facts and the legal issues raised in this case." Initial Decision at 21. EPS submits that such rejection in such a sweeping statement is incorrect in light of all of the substantial, factual evidence presented, and that the issue of fair warning is central to both the factual and legal issues raised in the case. EPA had no facts at all to support its allegations when it filed the Complaint, and has been able to offer no legal defense of its actions.

5. EPS's PCB Commercial Storage Approval Required Compliance With All Applicable Regulations in Effect At The Time It Was Issued, Including 40 C.F.R. 761.20(c)(2).

EPA maintained during the Hearing that the exceptions to the requirement for a commercial storage approval promulgated at 40 C.F.R. 761.20(c)(2) (for certain processing activities) did not apply to EPS because it was not expressly mentioned in EPS's PCB Approval, which was issued after the regulation was promulgated. June 18, 2003 Tr. 94-95. EPS submits that the Approval must apply to and incorporate all applicable regulations in effect at the time the Approval was issued, including 40 C.F.R. 761.20(c)(2). See, e.g., United States v. Geophysical Corp. of Alaska, 732 F.2d 693, 696 (9th Cir. 1984) (holding that regulations which were incorporated by reference into the permit clearly govern the permittee's actions). The EPS PCB commercial storage Approval expressly states at General Condition A.1 that "Environmental Protection Services shall, at all times, operate in accordance with, the provisions of the PCB regulations (40 C.F.R. Part 761), the Conditions of this Approval, the Environmental Protection Services December 29, 1992 application, the letter dated April 9, 1998, and all subsequent submissions and modifications." CEX 2 (C000559). The approval states further at General Condition A.7 that "...EPS must adhere to the regulations concerning PCB transformers, at 40 C.F.R. Part 761." CEX 2 (C000559). (Emphasis supplied).

In comparison, EPS has only been charged with a violation of §761.65(d) in Count I and Count II. Significantly, there is no express reference to "Section 761.65(d)" contained in EPS's Approval. CEX 1. In its enforcement actions, EPA cannot simply pick and choose which regulations from 40 CFR 761 EPA chooses to apply for determining EPS's compliance with its PCB Commercial Storage Approval. EPA's position that the §761.20(c)(2) exception to the commercial storage requirements does not apply to EPS's Approval because it was not specifically included in the Approval is

completely inconsistent with EPA's position that EPS has violated §761.65(d) under Counts I and II, since §761.65(d) does not appear in EPS's Approval either. Either both regulations apply or neither regulation applies. If the former (both regulations apply), EPA cannot prevail on its allegations in Count I because the units in question were subject to the §761.20(c)(2) exception and a PCB commercial storage approval is not required for such units during the time they are in EPS's PCB commercial storage area. If the latter (neither regulation applies), EPA cannot prevail on its allegations in Count I because the requirements of § 761.65(d) are not included in the EPS Commercial Storage Approval and do not apply to EPS. Accordingly, and in either case, EPS must prevail in its defense of Count I of the Complaint.[6]

6. 40 C.F.R. 761 Does Not Define the Term "approval to store PCB Items."

EPA maintains that the EPS PCB commercial storage approval is merely a permit to store PCB Items. REX 558; see generally Depo. of Rice May 20, 2003. EPS submits that there is nothing in any section of 40 C.F.R. 761 that defines an approval to store PCB Items. The only storage approval defined or established in the regulations is a commercial storage approval, for which the regulations explicitly establish exceptions applicable to EPS's facility. See 40 C.F.R. 761.3. Moreover, the definition of "commercial storer" does not just deal with a "commercial storer" of PCBs. Rather, the definition articulated at 40 C.F.R. 761.3 is titled "commercial storer of PCB waste" and speaks to an owner or operator of a facility "who engages in storage activities involving either PCB waste

[6] The Initial Decision at 21 rejects this argument because it apparently failed to understand EPS's argument that EPS should be informed of applicable regulations. EPS's point was simply that the PCB regulations regarding commercial storage were significantly revised after the EPS commercial storage approval was issued, and the new regulations had a profound impact on the commercial storage approval requirements, an impact that was completely ignored by the Tribunal in its findings and conclusions.

generated by others or that was removed while servicing the equipment owned by others and brokered for disposal." The definition does not contain the word "Item."

EPA provided no evidence to support an allegation that a single unit on site during either inspection was being commercially stored. Prior to filing its Complaint, EPA asked no questions regarding the disposition of any equipment on site during either inspection. EPA obtained no information regarding ownership of any stored equipment on site during either inspection and therefore cannot and did not prove that any of the equipment on site was commercially stored and thus subject to the MSCs in EPS's Approval. Accordingly, EPS must prevail in its defense of Count I of the Complaint.[7]

[7] The Tribunal rejected EPS's argument in its Initial Decision with no analysis beyond the statement that since it had already determined the facts, it didn't need to analyze this argument. EPS submits that this is insufficient consideration of the argument and requests the EAB to analyze fully the issues and the record as the Tribunal should have done but failed to do.

7. EPS's Financial Closure Mechanism – an Irrevocable Trust – Fully Protected EPA.

Even if the PCB Commercial Storage Approval was not modified by EPS's notification and the 40 C.F.R. 761.20(c)(2) exception did not apply to EPS, EPS's financial assurance fund established in accordance with 40 C.F.R. 761.65 (with EPA as trustee) was at all times sufficient for closure of the facility. The purpose of the financial assurance regulations is to ensure that facilities at which PCBs are commercially stored will be properly closed without use of public funds. *See* 54 Fed. Reg 52716 (Dec. 21, 1989)("EPA justifies the imposition of these requirements based upon the several instances in which facilities that went out of business or were forced to close possessed insufficient resources at the time of closure to provide for an adequate cleanup. If the expenditure of public resources is to be avoided, it is incumbent that owners and operators of approved facilities make provision for closure funds during the active life of their facilities."). Further, the permissible amount of PCB waste on site is tied to the amount of financial assurance. Id. ("Financial assurance would be demonstrated in an amount sufficient to close the facility when closure costs would be at a maximum, and that eventuality would usually correspond to the maximum allowed inventory of stored PCB waste").

EPS established a trust fund in accordance with §761.65(g) as the mechanism for closure of its facility. Aug. 22, 2003 Tr. 10-16. The trust fund was established in 1993 and EPA judged its corpus sufficient to close the facility as evidenced by the EPA approval of the PCB Commercial Storage Approval. CEX 2 (C000567-C000568).

During the ensuing years, the cost of closure steadily decreased, both because the cost of disposal of PCB wastes decreased industrywide and because the trust corpus

increased in value due to increases in the value of the investments contained therein. Aug. 22, 2003 Tr. 7-22. EPS was therefore able to submit its July 19, 1999 notice increasing MSCs in its Approval because the trust corpus at the time of the notice was more than sufficient to pay for the closure of the facility at the increased MSC level, as required under §761.65(g), at all times. Aug. 22, 2003 Tr. 7-22. Since the trust corpus was sufficient at all times to close the facility, EPS was never in violation of the requirement that its financial assurance mechanism be sufficient for closure of its facility without using funds from any public or private source other than EPS, the owner and operator of the facility.[8]

8. EPS's Generator Status of Equipment Exempted EPS from the MSC Limits of the Approval.

Assuming, arguendo, that the equipment in storage was waste (and EPS does not concede that it was), EPS was the generator and owner of the PCB Items that were the subject of Count I of the Complaint and no commercial storage approval was needed for those PCB Items. PCB commercial storage approval requirements do not apply to any PCB waste that is not stored commercially, i.e., waste that is generated on site by the owner of the equipment and site. See 40 C.F.R. 761.3 defining "commercial storer of PCB wastes." In September of 2000, well before EPA filed its Complaint in this case and in response to an inquiry from EPS, EPA Region II provided guidance to EPS stating that the owner of equipment is the generator of PCB waste resulting from that equipment. REX 312. Importantly, the guidance provided to EPS by Region II stated that Region III

[8] The Tribunal rejected EPS's argument as being "beside the point" (Initial Decision at 22) even though the ALJ at page 9 of the Initial Decision relied on EPA's concern over EPS's financial assurance mechanism to rationalize EPA's inspection of EPS in the first place. In fact, EPA's concern about EPS's financial assurance mechanism was a pretext for EPA's selective inspections and enforcement of EPS, which were intended to punish EPS for its efforts to ensure that the PCB regulations were enforced against another

concurred in the interpretation of the regulations provided to EPS. (Id.). EPA witnesses testified during the hearing about the concurrence process and Region III's concurrence with the interpretations provided in that letter. June 17, 2003 Tr. 136-139, 145-150, 153-161; Sept. 10, 2003 Tr. 96-99; Sept. 10, 2003 Tr. 130-133.

In its inquiry, EPS described a scenario under which: (a) a PCB disposal facility contracted with a client to transport transformers from the client's site to the disposal site, with the disposal facility testing the transformers after they arrived at the disposal facility; and (b) the disposal facility making the determination that transformers testing with PCB concentrations of 50 ppm or more were PCB wastes and must be disposed. EPS asked EPA to determine who was the generator of the PCB waste in the above scenario involving the transformers in excess of 50 ppm PCB. In addition, EPS asked EPA whether the storage of such PCB wastes would require a PCB commercial storage approval. REX 312. In response, EPA stated unequivocally that, under the above scenario described by EPS in its inquiry, the owner of the transformers at the time they were tested and determined to be waste was the generator of the PCB wastes and that the storage of those transformers that were PCB waste did not require a PCB commercial storage approval. (Id).

Under its contracts with all of its clients, EPS becomes the owner of all equipment that it transports to its Wheeling facility at the time the equipment is picked up for transportation at the client's site. Aug. 22, 2003 Tr. 10-16. EPS is therefore the owner of all PCB equipment that passes through the doors of its facility. In addition, EPS performs the only PCB concentration testing on more than 99% of the transformers that

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entity. Clearly, the issue of whether the financial assurance mechanism was adequate at all times is central to the issue of EPA's motive in initiating the inspections.

arrive at its facility under its contract with its clients. August 18, 2003 Tr. 54. Thus, EPS is the entity that determines whether transformers and other units that contain PCBs at concentrations in excess of 50 ppm are waste and must be disposed of. Under the plain language of the September 2000 EPA guidance, EPS is both the owner of the units and the entity that makes the determination that the equipment is waste. REX 312; Aug. 22, 2003 Tr. 24-29. Accordingly, EPS is the generator of all such PCB wastes and the storage of that waste does not require a PCB commercial storage approval. EPA Region III cannot, after the fact, now say that it disagrees with the clear guidance provided by Region II and in which Region III concurred. For the reasons set forth above, this Court must therefore find in favor of EPS on Count I.[9]

9. EPA Improperly Applied the PCB Penalty Policy in Calculating a Proposed Penalty for Count I.

The 1990 EPA PCB Penalty Policy establishes guidelines for the calculation of penalties for violations of the PCB Regulations. CEX 24. Penalties are based on the "nature" of the violation, the "extent" of the potential or actual environmental harm from a given violation, and the "circumstances" of the violation. CEX 24 (CF000966). In order to assess a penalty for a violation, EPA must know the amount of PCBs involved, the amount released, and a number of additional factors. CEX 24. EPA had none of the requisite information available to it when it calculated the proposed penalty for Count I. Accordingly, EPS submits that it is not possible for EPA to properly calculate a penalty for Count I even if one assumes that a violation occurred, which EPS denies.

[9] The Tribunal rejected this argument as contrary to the evidence, yet the record fully supported a finding that EPS became the owner of all equipment it contracted to handle for its customers at the time EPS took possession of that equipment. Since the regulations regarding commercial storage only apply to materials of others stored at a facility, ownership of the equipment is key to the issue of whether commercial storage occurred.

C. Count II

1. Count II is Unsupported by Facts

Count II of the EPA Complaint alleges that EPS commercially stored PCB capacitors weighing in excess of the MSC in its Approval in July of 1999. EPS hereby incorporates the facts set forth in Section IV.B.1, supra.

McPhilliamy prepared an inspection report describing his and Rice's activities during the EPA inspection that took place July 15, 1999. CEX 7; June 17, 2003 Tr. 88-90, June 17, 2003 Tr. 238-267, June 18, 2003 Tr. 91-97 and June 18, 2003 Tr. 201-203.

The inspection report noted an outgoing shipment of PCB capacitors that was shipped July 9, 1999, (six days prior to the inspection so the inspectors never physically saw the capacitors). In other words, the inspectors made no effort during the inspection to determine whether the PCB capacitors, which EPS was not permitted to dispose of, were transported off-site within the timeframes allowed in the regulations at 40 C.F.R. §761.65. During the July 15, 1999, inspection, the EPA inspectors could not take any fluid samples from the capacitors that they assumed were commercially stored, nor could they have weighed them, since the capacitors had been shipped days prior to the inspection. June 17, 2003 Tr. 252-258. The inspectors did not question whether the capacitors were being commercially stored or whether they were actual PCB waste. June 17, 2003 Tr. 252-258. Finally, and most importantly, the inspectors asked no questions of EPS either during or after the inspection regarding whether the capacitors were processed in accordance with §761.20(c). Indeed, both McPhilliamy and Rice testified that the extent of their analyses regarding those capacitors was to simply take the weights from the handwritten shipment paperwork and compare that weight to the MSC in EPS's

September 1998 Approval. June 17, 2003 Tr. 252-258, Rice Depo. May 20, 2003 at 146-147. At the time of inspection, neither McPhilliamy nor Rice mentioned any of their findings.

In contrast, EPS witness Keith Reed testified at length regarding the processing and shipment for disposal of the capacitors. Aug. 22, 2003 Tr. 43-48. The capacitors were designated as non-PCB capacitors when shipped from EPS's customer. Aug. 22, 2003 Tr. 46-47. They were shipped under a manifest indicating they were non-regulated. CEX 11. The capacitors were mounted on a large matrix of aluminum frames as part of capacitor bank, consisting of three banks. Aug. 22, 2003 Tr. 45. Each bank was unloaded via overhead cranes at EPS. Aug. 22, 2003 Tr. 45-46. They were tested at EPS's facility and found to be PCB Capacitors. Aug. 22, 2003 Tr. 47. Before the individual capacitors could be transported to an EPA approved PCB disposal site, they had to all be removed from the banks and palletized. The processing took more than 8-10 hours with 2-3 people working. Aug. 22, 2003 Tr. 67-68. Once the capacitors were removed from their banks, they were placed in appropriate shipping pallets, and all of the capacitors were shipped to Safety Kleen. Aug. 22, 2003 Tr. 64; CEX 10.

The effect of EPA's failure to take fluid samples, determine PCB Concentrations, weigh the units, determine whether EPS was the generator of the waste, and determine whether the capacitors were processed to facilitate the transportation to another site for disposal, is that EPA filed its Complaint against EPS without any supporting evidence. Administrative procedural rules require that EPA bears the burden of proving facts alleged in its Complaint. See 40 C.F.R. §22.24(a). Since EPA gathered no pertinent facts

regarding the capacitors, it cannot sustain its burden of proof and EPS must prevail on Count II.

2. Count II is Unsupported By Applicable Laws

a. Count II Background Facts

Count II of the Complaint erroneously alleged that on July 9, 1999, EPS stored PCB capacitors in excess of its MSC limit. Specifically, Paragraph 22 of the Amended Complaint alleged that on July 9, 1999, Appellant was storing at its facility 26,367 lbs of PCB capacitors. For reasons set forth below, the record has demonstrated, that the subject capacitors at issue on this date arose from a single manifest record documenting that the subject PCB capacitors were all shipped offsite within ten days between destinations.

b. EPS is a Transfer Facility as Defined at 40 C.F.R. 761.3.

The PCB regulations define "transfer facility" as

> any transportation-related facility including loading docks, parking areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB waste, rather than for actual transport activities. Storage areas for PCB waste at transfer facilities are subject to the storage facility standards of § 761.65, but such storage areas are exempt from the approval requirements of §761.65(d). ...unless the same PCB waste is stored there for a period of more than 10 consecutive days between destinations.[10]

40 C.F.R. 761.3 (emphasis supplied). EPS's operations include activities that are described in the definition of the term "transfer facility." Accordingly, EPS's facility is a transfer facility under the PCB regulations. EPA witnesses Smith, Creamer, and Webb all

[10] The ten-day consecutive day time period between destinations should commence from the time "between destinations," i.e., commencing with the date after PCB waste is shipped out from the originating destination, which should not be included in the calculation of time. This interpretation is consistent with Rule 6 of the Federal Rules of Civil Procedure, which provides that "in computing any period of time

agreed that EPS's facility can be a transfer facility as well as a disposal facility under the PCB regulations. June 19, 2003 Tr. 227 (Smith); June 17, 2003 Tr. 141 (Webb); Sept. 10, 2003 Tr. 95-96 (Creamer).

The regulations further discuss transfer facilities at 40 C.F.R. 761.65(d)(5) and specifically exempt the storage areas at transfer facilities from the requirement to obtain a PCB commercial storage approval unless the same PCB waste is stored for more than 10 consecutive days at the facility between destinations. Thus, in the case of equipment that is processed to facilitate transportation for disposal and on site for not more than 10 consecutive days between destinations, as were the capacitors that are the subject of Count II, the storage of those capacitors in the commercial storage area at EPS is exempt from the MSCs in the EPS's Approval. Those MSCs do not apply to the capacitors in question because EPS is a "transfer facility" as defined in § 761.3. Aug. 22, 2003 Tr. 42-48. EPA has therefore failed to prove its allegations in Count II and the Court must find in favor of EPS on Count II.

c. The Capacitors that are the Subject of Count II Were Stored for only 10 Consecutive Days and Therefore are not Subject to the Commercial Storage Approval Requirements.

Keith Reed testified at length during the hearing about the processing of the capacitors in July of 1999. Aug. 22, 2003 Tr. 42-48. The documentation available from EPS, combined with the testimony of Mr. Reed, clearly establish that the capacitors were shipped from EPS's client on June 29, 1999, received at EPS on June 30, 1999, and shipped for disposal on July 9, 1999 – a total of ten (10) days between destinations. REX 515; CEX 10. EPA did not dispute Mr. Reed's testimony and offered no proof that the

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prescribed or allowed by these Rules . . . , the day of the act, event, or default from which the designated period of time begins to run shall not be included." (Emphasis added.)

capacitors were on site for more than ten consecutive days between destinations. Inasmuch as these capacitors were on site for not more than ten consecutive days between destinations, the exemption from the PCB commercial storage approval requirements applies to the capacitors in question and they were not regulated by the MSCs in the EPS PCB commercial storage approval.

d. The Capacitors Were Processed to Facilitate Transportation for Disposal in accordance with the PCB commercial storage approval exemption under 40 C.F.R. 761.20 (c)(2).

As stated above, Section IV.C.1., supra, EPS witness Keith Reed testified at length about the processing and shipment for disposal of the capacitors. The capacitors were designated as non-PCB capacitors when shipped from EPS's client, were mounted on a large matrix of aluminum frames in three banks, and were found to be PCB capacitors after they arrived at the EPS facility. August 22, 2003 Tr. 43-49. Since EPS is not permitted to process PCB electrical equipment through its scrap metal recovery oven, the capacitors had to be transported for disposal to an approved TSCA site. August 22, 2003 Tr. 43-49. Before the individual capacitors could be transported to an EPA approved PCB disposal site, the capacitors had to all be removed from the banks and palletized. The processing took more than 8-10 hours with two to three people working. (Aug. 22, 2003 Tr. 67-68.

All of this processing was the type of processing contemplated by EPA when it promulgated the commercial storage requirement exception at 40 C.F.R. 761.20 (c)(2), which provides "processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage approval." §761.20(c)(2)(i). Indeed, EPA cited the following examples of activities that it

considered "processing to facilitate transportation for disposal" in the preamble to the Federal Register in which these regulations were promulgated:

> Examples include, but are not limited to: removing PCBs from service (e.g., draining liquids); pumping liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility or disposal facility; dismantling or disassembling serviceable equipment pieces and components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers. 63 Fed Reg 35383 at 35392 (emphasis supplied).

Clearly, the dismantling of the capacitor banks and repackaging of the capacitors for shipment to a licensed PCB disposal site are not only similar to those activities cited by EPA, they are the exact activities cited by EPA.

For all of the aforementioned reasons, EPA cannot sustain its burden of proof to support the allegations in Count II and EPS must prevail on Count II.

e. EPA Improperly Applied its 1990 PCB Penalty Policy in Calculating its Proposed Penalty for Count II.

The 1990 EPA PCB Penalty Policy establishes guidelines for the calculation of penalties for violations of the PCB Regulations. CEX 24. Penalties are based on the "nature" of the violation, the "extent" of the potential or actual environmental harm from a given violation, and the "circumstances" of the violation. CEX 24. In order to assess a penalty for a violation, EPA must know the amount of PCBs involved, the amount released, and a number of additional factors. CEX 24. EPA had none of the requisite information available to it when it calculated the proposed penalty for Count II. Accordingly, EPS submits that it is not possible for EPA to properly calculate a penalty for Count II even if one assumes that a violation occurred, which EPS denies.

D. Count III

Count III of the Complaint alleged that EPS on certain specified dates and times failed to comply with §761.72(a)(3)'s minimum burn times and temperatures.

1. Count III is Unsupported by Facts

The Complainant has failed to provide EPS with any adequate notice of the factual basis necessary to support Count III, in its Complaint, in its Amended Complaint, in its Second Amended Complaint, in its prehearing exchange, and in its rebuttal case. EPA filed Count III without having any transformer PCB concentration data whatsoever on the day it filed its Complaint, simply providing EPS after filing its Complaint with a list of dates and burn cycle times, which cycles EPA alleged were less than two and one half hours in duration and in violation of §761.72. EPA assumed that the transformers that were processed on those dates and in those particular burn cycles were regulated under TSCA, i.e., contained PCBs at concentrations in excess of 50 ppm. Without that assumption, there could have been no way for EPA to allege that the burn cycle times were in violation of the PCB rules since, *a priori*, those rules do not apply to the processing of equipment which is not regulated under TSCA and EPA had no information regarding the regulatory status of a single piece of equipment at the time it filed its Complaint.

Once EPS was given the dates and burn cycle start and end times, EPS was able to review its records and provide EPA with the PCB concentrations of those transformers. For the first time, EPS was also able to provide EPA with the number of transformers processed on the dates in question. Neither EPA nor EPS could have known that number until EPS reviewed its records and determined from the barcodes (a) the types of

equipment associated with those specific barcodes, and (b) the equipment that was processed during the burn cycles on the dates in question.

Ninety-nine plus percent of the transformers processed on the dates initially cited by EPA were non-regulated based on laboratory analyses conducted by an independent, certified laboratory, ACTI. REX 551 (R004640-R004677). The ACTI laboratory results, which EPS had in its files, were provided to EPA the first time that EPA asked for this specific information on 1237 barcodes (well after EPA had filed its Complaint). Confronted with such information, EPA elected not to accept the ACTI results from EPS, but rather issue a TSCA subpoena to ACTI immediately prior to the commencement of the administrative hearing. Thus began EPA's misguided effort to identify the transformers "du jour" in which EPA misinterpreted and misused the ACTI data to identify different burn cycles of concern, resulting in the identification of different sets of transformers processed as the EPA identification of burn cycles changed during the hearing.

Indeed, as late as the twelfth day of the thirteen-day hearing, EPA witness Rice testified that there may have been as many as three different sets of transformers that EPA had alleged were improperly processed. Sept. 10, 2003 CBI Tr. 28:14-34:16 (further discussed below). Incredibly, even as of that twelfth day of the hearing, EPA had listed at least three different sets of burn cycles. Id. EPS submits that it therefore had no way to defend itself through the review of its own records to provide details for the hearing record regarding each transformer processed in those burn cycles and the manner in which it had been processed. EPS could have been prepared to explain the processing of any transformer EPA wanted to learn about had EPA settled, prior to the twelfth day of

the hearing, on a single set of burn cycles that it thought identified the transformers it believed to have been improperly processed.

Complainant's basis for bringing Count III morphed throughout this entire administrative process, depending on Complainant's interpretation of the PCB concentration data underlying the Complaint, the First Amended Complaint, and the Second Amended Complaint. As such, EPS was not provided with the constitutionally required notice of the precise violation alleged by EPA in Count III, nor of the factual basis for the violation alleged in Count III. Further, the notice of the basis for Count III provided by EPA in its Complaint did not satisfy the federal Administrative Procedure Act or 40 C.F.R. § 22.14.

The U.S. Supreme Court has held that due process requires proper notice of administrative actions, including disclosure of the grounds of agency action and the evidence the agency is relying upon. Goldberg v. Kelly, 397 U.S. 254 (1970). Further, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978), citing Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). The constitutional requirement of a meaningful opportunity to respond "entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence." Brock v. Roadway Express, Inc., 481 U.S. 252, 264-265 (1987)(emphasis added). As explained above, EPS was not provided adequate notice of the substance of the evidence supporting EPA's Count III.

In addition to constitutional requirements, EPA was also subject to the Federal Administrative Procedure Act ("APA") and the Consolidated Rules of Practice, which required EPA to provide adequate notice of the violations alleged in Count III and the factual support for the allegations. The APA requires that "[p]ersons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted" by the agency. 5 U.S.C. § 445(b)(3). Under 40 C.F.R. §22.14, the EPA's complaint must include "[s]pecific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated," and "[a] concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(2)&(3). A respondent in a proceeding under the Consolidated Rules has only been accorded due process if the respondent knew the basis of the complaint against it, it understood the issues, and it was afforded a full opportunity to meet the charges. See Yaffe Iron and Metal Company, Inc. v. EPA, 774 F.2d 1008, 1013 (10th Cir. 1985), citing NLRB v. MacCay Radio & Telegraph Co., 304 U.S. 333, 349-50 (1938).

In Rodale Press, Inc. v. Federal Trade Comm'n, 407 F.2d 1252 (D.C. Cir. 1968), the Federal Trade Commission's conduct in an administrative proceeding mirrored the conduct of Complainant in the present case. In Rodale Press, the D.C. Circuit set aside an order of the Federal Trade Commission when the theory of the violation under which the complaint was issued differed from the theory upon which the complaint was sustained by the Commission, and the evidence presented by the respondents at the hearing went to contest the theory under which the complaint was issued. Id. at 1255-1256. "[I]t is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change." Id. at 1256 (emphasis added).

Significantly, because one factual issue had been substituted for another, the court held, the Commission had deprived the respondents of both notice and hearing on the substituted issue. Id.

Similarly, in the present case EPA changed the facts it used to support Count III from the day it issued its Complaint to and including the end of the hearing, and at several points in between, including in its prehearing exchanges, and in its Amended Complaint, which revised the allegations from improperly processing "PCB Transformers" to improperly processing "PCB-contaminated Transformers," an error characterized as a "typographical error." Complainant's Motion for Leave to File a Second Amended Complaint, Section I., Introduction (March 13, 2003). These changes materially changed the nature of the allegations against Appellant EPS.

Specifically, when Rice was asked at the Hearing whether "[a]t some point before the end of this proceeding," the Respondent should "be entitled to know specifically which units the government is alleging were improperly processed," Rice agreed. Sept. 10, 2003 CBI Tr. 32:1-33:9. Although EPA claimed that the numbers that ACTI used for the EPS data were the same as the EPS bar codes, Rice admitted that the numbers of the units actually did not match up. Sept. 10, 2003 CBI Tr. 32:12-33:5. Even throughout the hearing, the number of transformers that EPA alleged was not burned properly varied a great deal. EPA began by alleging 1237 units were involved, then went up to over 1500 and then went back down to 1267. Sept. 10, 2003 CBI Tr. 27:23-32:22. Clearly, if EPA was not even sure which burns, and therefore which units, were alleged to be in violation of TSCA near the end of the hearing, it is impossible for Respondent to know which specific burn cycles and the sets of units processed therein are at issue. Therefore, due to

EPA's complete failure to provide Respondent with proper notice regarding the factual basis for Count III, this count should be dismissed.

2. Count III is Unsupported in Law

a. Complainant has Failed to Establish a *Prima Facie* Case Regarding Count III.

Complainant has failed to establish its *prima facie* case as to Count III. See 40 C.F.R. §22.24(a); In the Matter of Louisiana Pacific Corporation, Docket No. CAA-120-V-84-2, 1987 EPA ALJ LEXIS 34 (March 24, 1987) (holding a "*prima facie* case" is "one that prevails to the absence of evidence invalidating it.").

Even without looking at EPS's evidence, which invalidates the evidence proffered by EPA to support Count III, EPA cannot establish its *prima facie* case. EPS has been charged with improper processing of "PCB-contaminated" transformers[11] in the Second Amended Complaint. Second Am. Compl. ¶¶ 24-28. In order for EPA to properly bring its Complaint in this matter, it would have needed to have information regarding the PCB concentrations of the units that it alleged were improperly processed in the EPS scrap metal recovery furnace. At the time EPA filed the Complaint in June 2001, EPA possessed no data regarding the PCB concentrations of any units that EPA alleged in Count III were improperly processed. June 18, 2003 Tr. 118, 119, 194:22-196:3. Complainant's counsel even argued that, without the ACTI laboratory data, which was

[2] The original Complaint erroneously alleged that EPS improperly processed "PCB transformers," a serious mistake in definitions and a term of art in the PCB regulations that EPA later claimed in its Memorandum in Support of its Amended Complaint was a "typographical error," despite the fact that EPS had advised EPA of its error two years prior to the filing of the Amended Complaint. (Complainant's Motion for Leave to File a Second Amended Complaint, Section I., Introduction, filed March 13, 2003, Motion to Dismiss and Affidavit of Keith R Reed, November 2001). Moreover, the scrivener of the Complaint certainly should have been aware of the significant regulatory difference between a "PCB transformer" and a "PCB-contaminated" transformer, making it highly unlikely that this was simply a typographical error and more likely that EPA simply had no valid concentration data whatsoever on the day it filed the original Complaint.

not even subpoenaed until ten days before the hearing and nearly two years after EPA filed its Complaint, EPA would have no data to support Count III. June 17, 2003 Tr. at 24-25. In fact, Complainant's counsel described the ACTI data as "the heart of [EPA's] case." June 20, 2003 Tr. at 122.

In addition, Rice testified that he did not know the PCB level of any unit in Count III at the time the Complaint was drafted. June 18, 2003 Tr. 118-119, 190-193. On direct examination, Rice was asked "at the time that you drafted or assisted in drafting this Complaint, did you know the PCB concentrations of the bar-coded items that were burned during the times and temperatures that did not meet the regulatory requirements of 40 C.F.R. § 761.72(a)(3)? Did you know what the concentrations were?" June 18, 2003 Tr. 118:18-24. To this, Mr. Rice replied, "No." Id.

Keith Reed, President of EPS also testified that EPA had no PCB data at the time the Complaint was filed. Aug. 22. 2003 Tr. at 78-79, 106-107. Scott Reed, Vice President of EPS testified that he did not provide any PCB data to the EPA during a meeting with EPA inspector McPhilliamy, who participated in both on-site inspections of EPS in 1999. August 18, 2003 Tr. at 47-51. Finally, McPhilliamy also testified that he had no information regarding the PCB concentrations of any transformers that were the subject of the Complaint. Aug. 18, 2003 Tr. 20:16-20.

Following the filing of the Complaint, EPS provided PCB data on all units in question to verify that all but a handful of the units were non-PCB, and thus non-regulated under TSCA. Therefore, the burn cycle times during which these non-PCB units were processed are irrelevant and outside the enforcement jurisdiction of EPA. However, during several hours of testimony, Scott Rice said he did not believe any of the

EPS transformer concentration data to be reliable or accurate because much of it was "handwritten" and he did not know whether EPS had a quality assurance procedure to validate the data. June 18, 2003 Tr. 212:19-213:11. Accordingly, as of the date that EPA filed Count III of its Complaint, its own inspector responsible for the technical work on the Complaint confirmed that EPA had no verifiable or reliable information regarding the PCB concentration of a single transformer of the more than 1200 that it alleged were improperly processed by EPS. Indeed, not one of the three Complaints filed by EPA even identified the burn cycles EPA was concerned about, let alone the number of transformers EPS was alleging to have been improperly processed. Compl. ¶¶ 24-28, Am. Compl. ¶¶ 24-28, Second Am. Compl. ¶¶ 24-28. EPS was not provided the identification of the initially cited burn cycles until well after the Complaint was filed, and then only after it filed a FOIA to obtain the basis for EPA having filed the Complaint.

EPA, having had no basis in fact to file Count III of its Complaint when it did so, made a final, desperate attempt to support Count III of its Amended Complaint with transformer PCB concentration data supplied by EPS's laboratory, ACTI. Ten days prior to the commencement of the Hearing and two years after the Complaint was filed in this matter, EPA issued a TSCA subpoena to ACTI, threatening severe penalties if ACTI did not supply the transformer PCB concentration data requested within ten days. REX 377.

Throughout the hearing, EPA incorrectly assumed that the barcodes used by EPS to track units within its facility corresponded with a column in the ACTI data labeled "Serial Numbers," and EPA based its reliance on the ACTI data—the only data it had in support of Count III—on this incorrect assumption. During the initial week of the hearing, Mr. Rice testified at length regarding the manner in which he interpreted the

ACTI data, including the fact that Rice assumed that the unique EPS six-digit barcode transformer identifier numbers were included as part of the data supplied by ACTI in response to the EPA TSCA subpoena. June 20, 2003 CBI Tr. at 7:1-8:7. EPS President and CEO Keith Reed subsequently testified that Rice had grossly misinterpreted the data. Reed stated that there were no EPS barcode identifiers included in the ACTI data because ACTI did not utilize EPS's barcode identifier numbers in either its sample analyses or reporting process. Rather, it used a different set of five-digit numbers clearly labeled "Sample Identification" and sometimes referred to as oil batch ID numbers. Aug. 22, 2003 CBI Tr. 20:9-24:21. Indeed, the column in the ACTI data labeled "Serial Number," which Rice assumed incorrectly (but was directed by EPA counsel not to call ACTI and verify (Sept. 10, 2003 CBI Tr. 44:17-22)) to be EPS barcode identifiers, was not involved in any analysis and reporting process by ACTI and, instead, was simply an extraneous data column. Sept. 9, 2003 CBI Tr. 30:6-32:23; Sept. 10, 2003 CBI Tr. 21:21-22:6; Aug. 22, 2003 CBI Tr. 6:1-7:15, 28:6-2921, 35:4-375, 38:19-39:22. During the second phase of the Hearing, EPS produced a letter from ACTI confirming that ACTI did not use EPS's barcode identifiers in any way as part of its laboratory analysis and reporting procedure. REX 521; Aug. 22, 2003 CBI Tr. 20:9-24:21.

Moreover, during Rice's cross-examination, numerous inconsistencies in Rice's interpretation of the ACTI data were noted. June 20, 2003 CBI Tr. 44:1-45:24; Sept. 9, 2003 CBI Tr. 38-44; Sept. 10, 2003 CBI Tr. 12:15-19:21; See also Rice's direct examination June 18, 2003 Tr. 110. Finally, on September 10, during Rice's cross-examination, he stated the following regarding his knowledge of the ACTI quality control procedures: "while we're talking about ACTI, would -- you guess that maybe ACTI and

EPS know a little more about how they run their system than you do at this point?" Rice responded, "Yes". September 10, 2003 CBI Tr. 55:12-17.

Rice's interpretation of the ACTI data is thus incorrect.[12] When the ACTI evidence is viewed in the context of this record, it is very clear that EPA grossly misinterpreted that data. EPA offered no other credible support for Count III. Indeed, EPA counsel wrote in Complainant's Response to Respondent's Motion to Strike Certain Evidence that, with respect to the ACTI data, "...the unique laboratory and equipment identifiers in the records provided by ACTI and Respondent are like a 'trail of bread crumbs' that allow one to reliably associate the PCB concentration of a specific sample identified by its ACTI 'Serial Number' to the identical bar code identifier used by Respondent for each particular item burned on a specific date and time." In reality, all EPA had as a result of its subpoena of the ACTI data was bread crumbs, and nothing more. Accordingly, Appellant EPS submits that EPA has failed to establish a *prima facie* case and Count III should be dismissed.

In In the Matter of L&C Services, Inc., Docket No. VII-93-CAA-112, 1997 EPA ALJ LEXIS 113 (January 29, 1997), EPA brought a complaint against L&C Services alleging six violations of the Clean Air Act's National Emission Standards for Hazardous Air Pollutants ("NESHAP") for asbestos. However, for four of the alleged violations, EPA had no samples to support its allegations. This Court explained, "with respect to Counts I, II, III, and VI, EPA has failed to show through Polarized Light Microscopy that the material involved in each of those counts was regulated asbestos containing material.

[12] Although EPA could have subpoenaed a witness from the ACTI laboratory to explain the data that it had provided to EPA in response to the TSCA subpoena it received from EPA, it chose not to do so. Rather, EPA relied entirely on its own fact witness, Scott Rice, who not only had no actual knowledge of the quality control process ACTI utilized to verify its analysis process, but didn't even have a rudimentary

EPA's suspicions of suspected RACM are not enough." Id. In the Matter of L&C Services, Inc., 1997 EPA ALJ LEXIS 113, at *16 (emphasis added).

Similarly, in the present case, EPA's mere suspicions, allegations, and suppositions regarding the PCB concentration of the transformers that it alleged were improperly processed in Count III of its Amended Complaint are not enough to establish its *prima facie* case as to Count III. EPA relies on data from ACTI to support Count III but, as explained above, it has unashamedly misinterpreted this data. Further, EPA didn't even have this misinterpreted data when it brought the Complaint. June 18, 2003 Tr. 118-119. Even if EPA had had the ACTI data at the time it brought the Complaint, the data offers no support whatsoever for Count III, as explained above. See In re A.B. Carter, Inc., RCRA-85-67-R, 1987 EPA ALJ LESIX 10, *17 (October 6, 1987) ("[T]he bringing of this action was at best premature in that EPA before it filed this complaint should have made further inquiries . . . Had they taken the trouble to do this the assumptions upon which they based their concerns in the complaint, which subsequently were found to be erroneous, would not have been made."). EPA cannot simply distort whatever data it does have and then claim it has made out a *prima facie* case.

In another similar case, EPA alleged 17 violations of TSCA by Pacific Refining Company at its petroleum feedstock refining facility. In the Matter of: Pacific Refining Co., Docket No. TSCA-09-92-0010, 1993 EPA ALJ LEXIS 161 (December 14, 1993). One of the counts in the EPA's complaint alleged that there was a PCB leak on the respondent's premises in violation of 40 C.F.R. §761.60(d)(1). The EPA inspector noted that "PCB transformer F-957597A had a visible leak and spill stain of about 1 foot by 1

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knowledge regarding the meaning of the numbers EPA received and was directed by EPA counsel not to contact ACTI to gain any such knowledge.

foot." Id. at *16. Pacific argued that without sampling, the visual inspection conducted by the EPA was insufficient to satisfy its burden of proof when Pacific had offered an alternative explanation that the stain was caused by a non-PCB switchgear located nearby. Pacific had performed a wipe test, the results of which showed PCB concentrations under regulated levels. The court agreed, and found that EPA had failed to establish the existence of a PCB spill because EPA could not refute the reliability of Pacific's analysis. In the Matter of: Pacific Refining Co., 1993 EPA ALJ LEXIS 161, at *16-18 (December 14, 1993). Similarly, in the present case, EPA has warped the only data it has in order to support its Count III after the fact.

A critical difference exists between the Pacific Refining case and the present case. When the Pacific Refining case was heard in 1993, the "assumption rule" was still in effect. Under the "assumption rule" untested oil filled items were assumed to be between 50 and 500 ppm. Therefore, in the Pacific Refining case, EPA used the assumption rule as a basis for alleging a violation of TSCA, which Pacific then countered with evidence that the spill was under regulated levels of PCBs. Significantly, in 1998 the "assumption rule" was removed from the disposal aspect of the regulations. Under the current regulatory scheme, EPA can no longer rely on the assumption rule to meet its burden of proof. Instead, when EPA alleges that items are processed for disposal in violation of TSCA's PCB rule, EPA must provide evidence regarding the PCB concentrations of the items at issue. [13]

[13] See email from Dan Kraft, EPA Region II to various individuals at EPA discussing the impact of the new June 19, 1998 Megarule on the EPA burden of proof in an enforcement case (REX 530, Bates R-002351) stating "While it is true that 'At the time of disposal, the concentration of the unit should be known to avoid illegal disposal,' there is no requirement to test. So it would fall to EPA to prove that any given disposal was illegal. Before the 1998 Disposal Amendments, the definition of PCB Contaminated Electrical Equipment at 40 C.F.R. Section 761.3 provided the assumption of contamination for any untested oil-filled transformer. This gave us an enforcement handle throughout use and disposal. When the Amendments

In the present case, EPA's glaring misinterpretation of the ACTI data is the only evidence it has offered in support of Count III, and it is insufficient to meet EPA's burden of proof[14]. Appellant/Respondent has both clarified the true meaning of the data and shown how EPA has no support for its theory of the violation alleged in Count III. Accordingly, EPA cannot prevail on Count III of its Complaint.

b. The Scrap Metal Recovery Furnace Regulations Do Not Require that the 537° C Minimum Temperature Be Maintained in One Cycle For 2 1/2 Continuous Hours.

40 C.F.R. 761.72(a)(3) states "in a scrap metal recovery oven: (3) the primary chamber shall operate at a temperature between 537° C and 650°C for a minimum of 2½ hours and reach a minimum temperature of 650° C (1202° F) at least once during each heating cycle or batch treatment of unheated, liquid-free equipment." A clear reading of the regulation is that one complete cycle must maintain a total time of 2½ hours between the required temperatures. Nowhere in the regulation is the word "continuous" found when referring to the 2½ hour temperature requirement. Indeed, nowhere in the entire sentence is the word "continuous" in close proximity to the temperature requirement or in close proximity to any other word. It simply isn't there. However, Rice's calculations in support of the violation allegations in Count III are based on the time between when the primary chamber first reached 537° C and the first five-minute recorded period in which the temperature fell below 537° C. (June 18, 2003 Tr. at 105-107; June 20, 2003 CBI Tr.

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removed the assumption from the Definitions Section and placed it in a specific 'PCB concentration assumptions for use' Section (40 C.F.R. Section 761.2) it eliminated the previous regulatory jurisdiction over storage for disposal or disposal of untested oil-filled electrical equipment. Now, unless EPA had an analysis, a recycler could dispose of tank trucks of untested oil from transformers say for home heating fuel and we're unable to enforce. I hope we can restore the full contamination assumption."

[14] See August 18, 2003 Tr. at 15, where this Court dismissed arguments about the relevancy (or lack thereof) of the ACTI data, explaining that those arguments relate to "EPA's burden of proof," and that, "to the extent, if any, that [the data from ACTI] does not shed light upon the allegations in Count III, I will not consider them."

32-33. The fact is that for all burn cycles alleged to have been insufficient in length the burn temperature rose after the initial five minute period during which it first fell below 537° C and stayed above the required temperature for a length of time that, when added to the first time span of acceptable temperature, totals 2 1/2 or more hours. Keith Reed, qualified as an expert in the field of design and operation of scrap metal recovery ovens and combustion of PCBs, testified specifically that the regulation does not need to require continuous temperature in excess of 2 1/2 hours and that it, in fact, does not. Aug. 22, 2003 Tr. at 149-157. EPA did not dispute K. Reed's testimony.

c. EPS Had No Fair Warning Regarding the EPA Interpretation of the Time Requirements at 40 C.F.R. §761.72(A).

Because EPA did not provide EPS with any pre-enforcement warning of its interpretation of 40 C.F.R. § 761.72(a), it cannot punish EPS for reasonably interpreting this rule. General Electric Co. v. EPA, 53 F.3d 1324, 1330, citing Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987).

d. EPA Improperly Applied its 1990 PCB Penalty Policy in Calculating its Proposed Penalty for Count III.

The 1990 EPA PCB Penalty Policy specifies the manner in which penalties are to be calculated for violations of the PCB Regulations. CEX 24. EPA inspector Rice testified that he calculated the proposed penalty for Count III. He also described his calculations. June 20, 2003 Tr. 17-42. Notwithstanding the fact that EPS did not violate the PCB regulations as alleged in Count III, EPS submits that Mr. Rice calculated the proposed penalty improperly even if one hypothetically assumes that the units were PCB-contaminated.

The entire proposed penalty for Count III is based on improper disposal of PCB transformers. June 20, 2003 Tr. at 77-78. As has been noted above, Keith Reed testified that none of the transformers that were the subject of the original Complaint were PCB transformers Aug. 22, 2003 Tr. at 72-73. EPS submits that none of the other two sets of transformers on which EPA based subsequent proposed penalty calculations as the hearing progressed were PCB transformers either. In the original complaint, EPS was charged with burning drained PCB transformers. Despite EPS providing data to show that none of the transformers in question were PCB transformers under the Regulations, EPA did not amend its Complaint until approximately two years later, then claiming the original Complaint allegation was a typographical error and changing its allegations to improper processing of PCB-contaminated transformers. See Section IV.B.2.a.3., infra.

Since EPA started its calculations with the erroneous assumption that the penalty for Count III should be based on disposal of PCB transformers and since none of the transformers were PCB transformers as defined in the regulations (June 18, 2003 Tr. at 118), the proposed penalty is void *ab initio*. Moreover, Mr. Rice testified that destruction of PCBs did occur in the EPS scrap metal recovery oven during the cited burns. Depo. May 20, 2003 Tr. 107-110. He then stated that this destruction of PCBs constituted disposal and calculated a proposed penalty for the improper disposal based on the PCB Penalty Policy, taking a thirty percent reduction because of the transformers being PCB-contaminated as opposed to being PCB transformers. Keith Reed, testifying as an expert witness on the combustion of PCBs, confirmed that the PCB's were destroyed in the EPS scrap metal recovery oven during the cited burns. Aug. 22, 2003 Tr. 154-157. However, EPS is allowed to process PCB-contaminated transformers in its scrap metal recovery

oven under §761.72(a)(3). EPS submits that the entire purpose of promulgating that section of the PCB regulations was to allow the processing of such equipment in a scrap metal recovery oven. June 17, 2003 Tr. at 247-251. Rice has therefore misapplied the EPA PCB Penalty Policy in all of his calculations and any proposed penalty regarding Count III is incorrectly calculated. Accordingly, the EPA proposed penalty for Count III should be stricken and EPS submits that no penalty should be assessed.

E. The Initial Decision is Replete with Errors of Fact and Errors in Law

The initial Decision issued March 27, 2006, in this case contains multiple errors of both fact and law. Most of these errors should, independent of each other, result in all of the allegations in each of the Counts of the Amended Complaint being rejected. Clearly, in their totality, the errors dictate that the Initial Decision be reversed in favor of Respondent. A compilation of the errors committed by the Tribunal is appended at Attachment B to his brief. Examples of such errors include the following:

1. The Tribunal erroneously relied on mistaken facts, as first alleged by EPA in its Complaint. Specifically, EPA erroneously alleged that EPS processed PCB Transformers (which are classified with a far higher PCB concentration containing $\geq$ 500 ppm PCBs) in its scrap metal recovery furnace, which was later mischaracterized by EPA as a "typographical error." EPS advised EPA shortly after the initial Complaint was filed that the Complaint mistakenly alleged that EPS processed PCB transformers, when it was neither permitted to do so nor had it ever done so. Despite

repeated attempts to convince EPA that its allegation was materially erroneous, EPA did not correct the allegation for nearly two years, when it amended the Complaint offering that the mischaracterization was a "typographical error." Anyone who understands and works intimately with the PCB regulations knows clearly the regulatory significance and difference between PCB Transformers and PCB-Contaminated Transformers because that difference is a fundamental part of the entire regulatory program. It is so significant that it could not possibly have been merely a "typographical error," as stated by EPA it its Amended Complaint.

2. The Court erroneously a) relied upon the testimony of John Smith regarding the ultimate disposition of PCBs from uncontrolled combustion or open burning, unlike the controlled burning in the EPS furnace; b) ignored the testimony of Keith R. Reed (who was admitted as an expert witness in the field of and operations of scrap metal recovery ovens under 40 CFR 761.72(a)); c) ignored the documentation submitted by Mr. Reed verifying the destruction of PCBs based on actual testing of PCBs.; d) relied on the testimony of Scott McPhillimy, who was never admitted as an expert in the field of PCB combustion in this case and was not competent to testify about whether PCBs could be emitted after being processed in the EPS furnace. Dr. Smith based his testimony regarding PCB destruction on "**un-controlled** burning and open burning" subject to §761.3. The EPS scrap metal recovery furnace operated at EPS, however,

operates in accordance with §761.72 and is **controlled** burning. Thus, Dr. Smith's testimony is irrelevant to the issue of whether PCBs could have been emitted from the EPS furnace. Lastly, EPA provided no proof of the PCB concentrations of a single unit allegedly processed improperly and subject to Count III of the Amended Complaint. Accordingly, the Tribunal erred in making this finding.

3. The Court improperly dismissed deposition testimony of three EPA witnesses (Dr. John Smith, Scott Rice, and Scott McPhilliamy) at page 14 of the Initial Decision in regard to the applicable Maximum Storage Capacities in effect under the EPS commercial storage approval, stating "[u]nless formally admitted into the record, however, deposition testimony may not be cited either to prove or disprove any fact at issue." However, the depositions were admitted into the record during the hearing. The Court therefore erred in rejecting the deposition testimony of those key witnesses.

4. At page 37 of the Initial Decision, the Court acknowledges that Complainant's Exhibit 44 is a "critical element" concerning the proof of a violation as charged in Count III of the Amended Complaint. In describing Complainant's Exhibit 44, EPA acknowledged that the barcodes (which supposedly EPA relied upon to identify equipment improperly processed by EPS) did not all match up -- although "many of them match." However, ALL of the numbers should have matched based on the fact that EPA had conceded (and even based its case on) that every

unit processed by EPS was linked to a "unique six digit bar code identifier number," and if the barcodes did not match one for one, the only conclusion that can be logically drawn is that the lab data did not mean what EPA though it meant, a fact that was proven by ACTI documentation, testimony of EPS's witnesses, and the cross examination of inspector Rice. The Court erroneously ignored all such evidence. The facts remain that EPA did not have what it thought it had in the ACTI data and that EPA had no understanding of the correlation between the ACTI data and the EPS barcode numbers regarding PCB levels. EPA failed to establish a *prima facie* case of a violation in Count III.

5. At page 27 of the Initial Decision, the Court rejects Appellant's argument that the capacitors subject to Count II were being processed in a manner that exempts the capacitors from the commercial storage approval MSC requirements. The Court erred in creating from whole cloth an intent factor that is dispositive of whether a waste is being processed for transportation, for disposal or stored in anticipation of processing. Nowhere in the PCB regulatory program is intent defined as a determinative factor for classifying whether the storage of a PCB waste must be regulated. The manifest establishes that the capacitors were shipped off site for disposal within 10 days of receipt by EPS. Whether EPS intended to process the capacitors is irrelevant.

6. At page 22 of the Initial Decision, the Tribunal rejected Respondent's argument that EPS owned the equipment subject to the allegations in

Count I, stating "EPS's argument that it is the owner of the PCB transformers involved in this case is contrary...with its actions in seeking and maintaining an EPA-approved permit to store waste PCB transformers." The Court rejects all of the evidence presented during the hearing, apparently assuming erroneously when an entity applies for a commercial storage approval, the entity must intend to and does commercially store every piece of equipment that comes in the door from the time the approval is issued. Such finding is contradicted by the applicable regulations and the record in this case.

7. While the Initial Decision relies on EPA's concerns about EPS's financial assurance mechanism as the sole reason for inspecting EPS (which is EPA's defense to EPS's selected enforcement claim), the Tribunal inconsistently and erroneously disregards as "beside the point Respondent's similar reliance on EPS's sufficiency of its financial assurance mechanism (which is integral to EPS's defense in Count I)." The Tribunal erroneously accepts EPA's contention about its concern over EPS's financial assurance mechanism, rather than its improper desire to punish EPS for attempting to get EPA to enforce the PCB regulations against a competitor, which was the real motive for EPA's inspections.

8. At page 18 of the Initial Decision, the Tribunal erroneously finds that EPS was not engaging in self-implementing decontamination procedures in accordance with 40 CFR 761.79 (c). That EPS was, in fact, doing so, is fully supported in the record. 40 CFR761.20(c)(2)(i) clearly exempts

transformers that are decontaminated in accordance with those self-implementing decontamination procedures from the requirements of commercial storage approvals and exempts facilities that are using that process from commercial storage approval requirements as well.

9. At page 8 of the Initial Decision, the Tribunal discusses testimony of Keith Reed, who was admitted as an expert witness in the field of combustion of PCBs and the operation of scrap metal recovery furnaces under 40 CFR 761.72(a)(3), but later in the Initial Decision rejects Mr. Reed's testimony about the disposition of PCBs processed in the EPS furnace, and accepts the testimony of Dr. John Smith, an EPA witness testifying on open burning and uncontrolled burning emissions of PCBs, which was not an issue in this case.

10. At page 14 of the Initial Decision, the Tribunal discusses the MSCs in the EPS commercial storage approval but completely glossed over the issue of whether the units admittedly in storage on the days EPA inspected the EPS facility were being commercially stored, a key factor necessary to determine whether an MSC, which only applies to commercially stored units, was violated. EPA offered no proof that any of the units in storage were being commercially stored, and the Tribunal erroneously found that they were being commercially stored despite no proof being offered by EPA.

11. At page 15 of the Initial Decision, the ALJ addresses whether the Regional Administrator must approve changes in the financial assurance mechanism

and states "[i]t would be inconsistent, to say the least, to require a commercial storer of PCB waste to maintain an EPA-approved financial assurance mechanism to guarantee environmental cleanup in a sound manner, only to allow that same storer unilateral authority to increase its Maximum Storage Capacity, and thereby jeopardize the adequacy of the financial assurance. The record supports the fact that the EPS financial assurance trust, of which EPA is the sole trustee, was sufficient to cover the cost of environmental cleanup at all times in question, so this statement has no basis in the record, and is an error of fact.

These are just a few of the more significant errors committed by the ALJ in rendering its Initial Decision. There are 59 such errors described in Attachment B and, in combination, they necessitate overturning the Initial Decision's findings and conclusions in favor of the Appellant.

PAGES 68-72 NOT USED

V. EPA'S SELECTIVE ENFORCEMENT OF EPS INVALIDATES EPA'S ADMINISTRATIVE COMPLAINT

A. Introduction

The lack of any evidence to substantiate EPA's Complaint against EPS (§ IV, supra) only further supports EPS's defense that the Complaint arose from EPA's selective enforcement or prosecution of EPS.

For reasons set forth below in Section V.C, EPA implemented two wholly different and inconsistent enforcement policies against two companies, EPS and G&S, engaged in similar businesses. The record documents that G&S was and continues to be a commercial storer of PCB waste, and should have been subject to the full panoply of applicable regulations at 40 C.F.R. 761. Nevertheless, G&S was and continues not to be required by EPA to have a commercial storage permit, to satisfy financial assurance requirements, and to satisfy a host of other requirements that EPA requires of EPS.

Despite EPS's concerted efforts to exercise its constitutionally protected rights over ten years to bring such violations to the attention of EPA and to ensure the equal enforcement and application of laws by EPA, EPA Region II ("Region II") ignored such violations, leaving EPS with no alternative but to challenge to the highest levels the integrity of EPA's officials and their lack of enforcement efforts. Given EPA's stake in EPS's accusations and with full knowledge of contrary facts, EPA actively devised and advocated novel, unorthodox and incorrect interpretations of the regulations and facts to justify G&S's unlawful operations and EPA's own incorrect positions.

For reasons that are fully set forth below, G&S has been left untouched and virtually unregulated, without any reasonable, rational or legal basis to justify EPA's disparate non-enforcement of G&S and discriminatory enforcement of EPS. EPS's efforts to ensure the equal

application of the PCB regulations to both entities (EPS and G&S) and to ensure a fair and level competitive market were met by EPA with vindictiveness, hostility, resentment and punitive measures. Rather than EPA using the information provided by EPS to initiate a thorough investigation of and enforcement proceeding against G&S, the EPA began actively protecting G&S and systematically singling EPS out for prosecution, culminating in the unfounded and unsupported June 2001 Administrative Complaint.

B. Legal Standards Supporting Defense of EPA's Selective Enforcement Against EPS.

Selective enforcement may be asserted as a defense "against officials who apply valid laws against individuals in a discriminatory manner." Anderson v. Anderson, 2000 U.S. Dist. LEXIS 19459 at *10-11 (N.D. Ohio 2000) (citations omitted). The defense of selective enforcement, if proven, will invalidate the actions of an administrative agency. See Baltimore Gas & Elec. Co. v. Heinz, 760 F.2d 1408, 1419 (4th Cir. 1985), cert denied 474 U.S. 847 (1985). There are two types of selective enforcement: True 'selective prosecution' . . . [and] . . . '[v]indictive prosecution.'" See Futernick v. Sumpter Twp., 78 F.3d 1051, 1056 n. 7 (6th Cir. 1996); see also, Heaton v. City of Princeton, 47 F.Supp.2d 841, 843-844 (W.D. Ky. 1997).

True "selective enforcement" requires the claimant "demonstrate that federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." United States v. Smithfield Foods, 969 F. Supp. 975, 985 (E.D. Va. 1997) (citations omitted). As the Smithfield Foods Court discussed, true selective enforcement requires the defendants establish that "(1) defendants have been singled out while other similarly situated violators were left untouched,[6] and (2) the government selected defendants for prosecution

[6] The Record in this case provides substantial proof that G&S was left "untouched" -- a factor which other courts have found critical to the defense of selective enforcement. See In the Matter of: United States Dep't of the Navy, Naval Air Station Oceana, RCRA-III-9006-062, 2000 EPA ALJ LEXIS 76 (Nov. 15, 2000) (requiring evidence that other violators "went 'untouched.'"); United States v. Armstrong, 517 U.S. 456 (1996) (requiring showing that

invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights." Id. citing United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 962 (W.D. Mich. 1990), opinion adopted by, 955 F.2d 45 (6th Cir. 1990), cert denied, 506 U.S. 820 (1992); see also, In re: B&R Oil Co., Inc., 8 E.A.D. 39 (E.P.A. 1998).

The defense of selective enforcement is grounded in the guarantee of equal protection, provided by the Fourteenth Amendment to the United States constitution. See Wayte v. United States, 470 U.S. 598, 608-609 (1985). Although a claim for selective enforcement initially required membership in a protected group so as to allow for "impermissible considerations of race [or] religion," the United States Supreme Court subsequently held in Village of Willowbrook v. Olech, 528 U.S. 562 (2000), that "[o]ur cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment." Id. at 564 (citations omitted). See also, Oyler v. Boyles, 368 U.S. 448, 456 (1962). Accordingly, success on a defense of selective enforcement only requires that EPS establish that it was "intentionally treated differently from others similarly situated and that there is no rational basis for the different treatment." Id. EPS does not need to establish impermissible considerations such as race or religion. See also, United States v. Pretty Products, Inc., 780 F.Supp. 1488, 1501-02 (1991).

The types of legitimate governmental interests that have been approved by courts as providing a rational basis for disparate application of the laws are not applicable here, such as limited enforcement budgets, the establishment of precedent, availability of evidence, and the

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similarly situated suspects were treated differently by law enforcement); Summers v. City of Raymond, 105 F. Supp. 2d 549, 552 (S.D. Miss. 2000) (requiring showing that "similarly situated persons were treated differently" by the City).

random selection of enforcement targets. See, e.g., In re: B&R Oil Company, Inc., 1998 EPA App. LEXIS 106; 8 E.A.D. 39 (Nov. 18, 1998); Futernick v. Sumpter Township, 78 F.3d 1051, (6th Cir. 1996). In this case, EPA's complete failure to regulate G&S while prosecuting EPS has no rational basis and cannot be discretionary. EPA's actions must be subject to Constitutional constraints, particularly when there is no discretionary authority on the part of EPA to completely exempt and leave untouched a party from mandatory commercial storage approval requirements, which is analogous to allowing businesses or drivers to operate without licenses, without speed limits, and without requisite insurance.

Vindictive enforcement is selective prosecution used by administrative agencies to discourage or punish entities for exercising their constitutional rights. Heaton, 47 F.Supp.2d 841 at 844. The general inquiry in a vindictive prosecution claim analysis is "whether as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for the hostility or punitive animus towards defendant[s] due to [their] specific legal right[s] . . . The analysis is directed to determine how the decision to prosecute was actually made in the case under consideration." U.S. v. P.H.E., Inc., 965 F.2d 848, 858 (10th Cir. 1992) (citations omitted). As stated by the Sixth Circuit in Futernick:

> To succeed in a vindictive enforcement claim a plaintiff must prove that (1) he or she exercised a protected right; (2) the prosecutor or state official had a stake in the exercise of that right; (3) the prosecutor's or state official's conduct was unreasonable; and (4) the prosecution or state enforcement was initiated with the intent to punish the plaintiff for the exercise of the protected right.

78 F.3d at 1056 n. 7.

The Initial Decision's one-sided reliance on facts and reasoning presented by EPA, while ignoring the facts, evidence and record presented by EPS is glaring in its oversight. And more importantly misconstrues the standards of evidence applicable to evaluating the evidence in

support of a claim for selective enforcement. To prove selective enforcement, a party, such as EPS, "should not [b]e . . . required . . . to prove 'selective enforcement,'" as suggested by the Initial Decision at 41, 43. Rather, the trier of fact can draw reasonable inferences from the evidence adduced at trial," from which she "could reasonably conclude that the legitimate non-retaliatory reason offered by [the employer] was a pretext that . . . was supported by the clear weight of the evidence." Delli Santi v. CNA Insurance Companies, 88 F.3rd 192, 202 (2nd Cir. 1996). *See also,* Hurd v. JCB International Credit Card Company, 923 F.Supp. 492, 504 (N.D. Ga. 1997)(holding that "trier of fact can decide not only that the reasons proffered by defendant are pretextual but can also 'generally infer discrimination when it finds that the employer's explanation is unworthy of credence.'")

Courts also rely on circumstantial evidence from which the fact finder can infer retaliatory actions. See, Wolotka v. School Town of Munster, 399 F.Supp.2d 885 (N.D. Ind. 2005)(circumstantial evidence from which fact finder could infer intentional discrimination sufficient to establish *prima facie* case of retaliatory discrimination); Cain v. Elgin, Joliet & Eastern Railway Company, 2006 U.S. Dist. LEXIS 4373 (N.D. Ind. 2006)(circumstantial evidence, including suspicious timing and admission that if everyone were fired for same violation no employees would be left, sufficient to infer intent in retaliatory discharge claim and defeat summary judgment); The Tara Circle, Inc. v. Bifano, 1997 U.S. Dist. LEXIS 10153 (S.D.N.Y. 1997)(circumstantial evidence sufficient to support finding of intent, but selective enforcement of zoning laws claim not ripe because no showing others were treated differently); see also, *Unpublished Decisions*: King v. City of Eastpointe, 86 Fed. Appx. 790 (6th Cir. 2003)(stating "A plaintiff must provide proof of intent, although courts may infer discriminatory purpose from the totality of the circumstances . . ." demonstrate selective enforcement under

§ 1983 racial discrimination claim; C&H Company v. Richardson, 78 Fed. Appx. 894 (4th Cir. 2003)(timing is a relevant factor, but timing alone is not always sufficient to demonstrate intent in § 1983 cases).

In this case, even the Initial Decision's reliance at 42 on the B&R Oil Company case, 8 E.A.D. 39, 51 (EAB 1998) attempts to rationalize the lack of enforcement in this case between EPS and G&S as discretionary enforcement or a difference of opinion by noting that "a regulator is required to make difficult and **often completely arbitrary decisions** about who will bear the brunt of finite efforts to enforce the law." (Emphasis added). Citing Futernick v. Sumpter Township, 78 F.3rd 1051, 1058 (6th Cir. 1996).

EPA's complete failure, however, to regulate G&S is indeed "arbitrary" and simply cannot be rationalized as discretionary or a difference in opinion. EPA and, now, the Initial Decision, have left G&S completely untouched, unregulated, unlicensed, unpermitted and without PCB TSCA Approval – while EPA has pursued EPS in its investigations and complaint.

For reasons set forth more fully below, EPA improperly brought its Complaint against EPS under both theories of selective enforcement. First, under the "true" theory of selective enforcement, EPA treated two similarly situated companies in completely different manners. EPS was singled out and G&S was left untouched. The record has shown that there is no factually or legally supportable or rational basis to support EPA's disparate treatment of two similarly operated entities. Second, the record also proves that EPA's claim was vindictively prosecuted to punish EPS. EPA's dissimilar treatment of these two companies was based on EPS's exercise of its protected rights to seek EPA's enforcement of G&S under TSCA, which resulted in EPS seriously challenging EPA's integrity. As a result, EPA developed a very personal stake in EPS's exercise of its rights when EPS strongly questioned EPA Region II's

integrity and ability to enforce applicable TSCA regulations. Further, EPA distorted the factual evidence to the benefit of G&S and the detriment of EPS without any rational basis to justify such disparate treatment. EPA's unfair and unequal application of the PCB regulations was motivated by the improper and undue purpose of dissuading EPS from exercising its constitutionally protected right to petition the government for the equal and appropriate enforcement of the PCB regulations and EPS' legitimate and justified requests for an investigation of officials in EPA Region II. EPS' exercise of its rights was met with hostility by the EPA resulting in retaliatory and unsupported investigations in 1999 and a Complaint in 2001.

C. G&S As a Matter of Law Was and Continues To Be a Commercial Storer of PCB Waste Subject to 40 CFR Part 761.

Central to EPS's claim is that G&S, just as EPS, was and is a "commercial storer of PCB waste" as defined by the regulations at § 761.3; and, thus, should have been subject to the full panoply of regulations, but has not been. This section will

1. Define the term "commercial storer of PCB waste";
2. Document that G&S was and is a commercial storer of PCB waste;
3. Document that EPA has not ever regulated G&S as a commercial storer of PCB waste;
4. Document EPS's efforts over ten years to bring these matters to the attention of EPA;
5. EPA's efforts to protect G&S and to rationalize EPA's non-enforcement of G&S, and
6. Demonstrate EPA's discriminatory and retaliatory treatment of EPS.

1. Legal Definition of Commercial Storer of PCB Waste

Section 761.3 expressly provides that a "commercial storer of PCB waste" is

> the owner or operator of each facility that is subject to the PCB storage unit standards of §761.65(b)(1) or (c)(7) or meets alternate storage criteria of §761.5(b)(2), and <u>who engages in storage activities involving either</u>

> PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal.

(Emphasis added). A "commercial storer of PCB waste," which "only stores its own waste" or does not at any time exceed "a total of 500 gallons of liquid and or non-liquid materials containing PCB's at regulated levels" is not required to obtain EPA's approval as a commercial storer of PCB waste. Section 761.3.

The evidence set forth in the record proves that G&S has been a commercial storer of PCB waste because a) it "engages in storage activities involving . . . PCB waste. . . that was removed while servicing the equipment owned by others and brokered for disposal," and b) the PCB waste shipped to and received by G&S was "PCB waste generated by others." Thus, G&S unquestionably was and is a commercial storer of PCB waste.

Because EPA defended G&S by erroneously contending that G&S (and not its customers) was the actual "generator of waste," we further note that the regulatory definition of a "generator" is based on which party has the control and determines when the useful life of the PCB equipment should be terminated. This is the defining criterion for determining who the generator is for PCB-contaminated and PCB equipment, not who sampled and determined the "actual" PCB concentration. Section 761.3 thus defines the "generator of PCB waste" to mean

> any person whose act or process produces PCBs that are regulated for disposal under Subpart D of this part, or whose act first causes PCBs or PCB Items to become subject to the disposal requirements of Subpart D of this part, or who has physical control over the PCBs when a decision is made that the use of the PCBs had been terminated and therefore is subject to the disposal requirements of Subpart D of this part....

(Emphasis added.) Therefore, if a utility makes the decision to dispose of PCB equipment and/or pre-designates equipment for disposal, as in the case of G&S, or if a disposal company has a pre-designated policy that it will **only** accept PCB equipment for disposal, then the disposal

company, such as G&S, would be subject to the requirements of Subpart D of Part 761. For each and every utility that ships untested oil-filled (un-drained) electrical equipment to G&S with a **pre-designated** intention by either party that electrical equipment testing above 50 ppm PCBs will be disposed (after "evaluation" of PCB concentration), then the utility customer is the original generator of the waste containing greater than 50 ppm PCB for purposes of the PCB regulatory program established in under Part 761. Once this intention for disposal is declared, the PCB waste is subject to § 761 Subparts C (Marking), D (Storage and Disposal), J (Records) and K (Waste Disposal Records/Reports) at the time the equipment is removed from service at the utility. Thus, the utility is the original generator of the PCB waste; the equipment is not considered in-use; and the PCB waste is considered in storage at the utility until eventual shipment to G&S. The shipment is required by § 761.208 to be on a hazardous waste manifest, and the receipt of the equipment (PCB Waste) by G&S makes G&S a Commercial Storer, subject to the requirements of Part 761. To assist the EAB in its evaluation of the regulations, Attachment A consists of a decision tree chart for determining a party's "generator" status and when manifesting in accordance with Part 761 is required."[7]

EPA's own expert witness in this case, Dr. John Smith, an EPA chemist and co-author of the PCB regulations is in accord, testifying that a utility is the "generator" if it pre-designates all oil filled electrical equipment shipped to a facility for "disposal" even though the PCB levels are not known at the time of shipment.[8] (Emphasis added). Likewise, Tom Simons, with EPA

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[7] See also John H. Smith May 16, 2003 Depo. Tr. 72-82, 116-118 (admitted REX 277, June 19, 2003 Tr. 203); June 19, 2003 Tr. 225:18-226:6; Tom Simons, June 19, 2003 Tr. 74-125; Dave Dillon, June 29, 2004 Tr. 162-163; Charlene Creamer, Sept. 10, 2003 Tr. 57-61; Ann Finnegan, Sept. 11, 2003 Tr. 18:20-184:13; Dan Kraft, Sept. 11, 2003 Tr. 317-318, 340:22-344:5. Supportive Letters or Documents include: Region II letter to EPS, dated November 1, 2000 (REX 448); John W. Melone letter to EPS, dated December 21, 1998 (REX 414); Inspection report of G&S Technologies, dated November 18, 1999 (REX 480).

[8] See Smith testimony, REX 278, admitted at June 19, 2003 Tr. 204; May 16, 2003 Tr. 116-120 (testifying that "If a utility pre-designates all oil filled electrical equipment shipped to a disposal facility that contained over 50 ppm PCBs to

Headquarters, and co-author of the PCB regulations, also testified that a utility is the generator when a utility predesignates PCB-contaminated units for disposal, despite the fact that the utility does not know which of the units it is shipping are PCB-contaminated.[9] (Emphasis added). This is so, stated Simmons, because the regulations refer to "contains" within the definition meaning that the unit is PCB-contaminated throughout the course of its life if PCB levels between 50 and 499 ppm PCBs are present in the unit regardless of whether the unit has been tested. The same applies to PCB units that are greater than >500-ppm PCBs. This is consistent with the plain language and the overall scheme of the PCB regulations.

In this case, it is disingenuous that EPA failed to apply its own general enforcement rule -- that "any electric utility and any company with PCBs is deemed to have knowledge of all aspects of TSCA and the PCB regulations." See EPA's PCB Penalty Policy that presumes the regulated community to be knowledgeable and provides:

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be disposed," the utility is the generator because "that's when the transformers became waste, when they declared they're going to a disposal facility." Smith further testified that the utility is still the generator, regardless of whether the PCB was unknown or untested. "The generator is still the person who declared it waste. . . When they ship untested transformers, the ones that aren't regulated are not regulated whether they're tested or not. The ones that are regulated are regulated whether they're tested or not. So the ones that were shipped and ended up being less than 50 are not regulated waste. Whether they were declared to be waste or not, they're not regulated under TSCA. But if they were shipped and they were over 50, then that is waste, and they are regulated. And they have to be manifested, and the people who said these are waste to begin with is the generator) (emphasis added).

[9] Simons testimony, June 19, 2003 Tr. 76-111 (confirming that "PCB-contaminated electrical equipment under the new definition is based on the concentration that's actually in the unit regardless of whether you know it or don't know it.... If a utility company predesignates all oil-filled electrical equipment shipped to a disposal facility that contains over 50 parts per million to be disposed... the utility is the owner of that equipment". The utility would be the owner -- the generator; further noting that the majority, if not all, of bills of lading used by G&S did not satisfy EPA's specific manifesting requirements and acknowledging that according to G&S's Surplus Evaluation Arrangement, such units were intended for disposal, thus, a "shipment involved with the bill of lading" would be "an after-the-fact violation of the requirement for manifesting... If the generator knew that waste was going to be created because of G&S's policy. . .").

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

EPA Penalty Policy, CEX 24 at 15.

Once an entity is determined to be a commercial storer of PCB waste as defined by the regulations, it is subject to a host of regulations under 40 C.F.R. Part 761 (Subparts C, D, J and K), which comprehensively regulate the transportation, storage, and disposal of certain PCB waste. Specifically, stringent storage requirements are imposed for the "storage for disposal of PCB at concentrations of 50 ppm or greater and PCB items with concentrations of 50 ppm or greater. Section 761.65 specifically imposes, *inter alia,* storage limitations, structural requirements for storage, location outside of 100-year flood water elevations, container storage specifications, formal EPA notification and approval for commercial storers of PCB waste, which are required to have closure plans, financial assurances, among other requirements.

Section 761.202 *et seq.* further requires a "disposer of PCB waste" to provide EPA notice of the facility's PCB waste handling activities and to ensure that the shipment of PCB waste for commercial offsite storage or offsite disposal be transported on a manifest using an EPA form as specified at § 761.208. Based upon the Penalty Policy language, G&S (which highlights in its own brochures its over thirty years of marketing experience in the PCB disposal business (REX 401)) and its electric utility customers are deemed to have knowledge of all aspects of TSCA and the PCB regulations.

2. The Record Documents That G&S Was and Continues To Be A Commercial Storer Of PCB Waste – But Was Ignored

At the hearing, EPS in conjunction with testimony from EPA PCB Regulatory Officials, Dr. John Smith and Tom Simons, presented substantial and overwhelming evidence that G&S was a commercial storer of PCB waste. None of this evidence or this part of the record was addressed in the Initial Decision.

a. Evidence of G&S's Receipt of PCB Waste Intended for Disposal Abounds.

EPS presented substantial evidence that PCB waste was received by G&S under contractual arrangements with its customers and that such PCB waste was intended for disposal. This evidence included the following:

1) Numerous contracts between the utilities and G&S including: REX 406 (documenting Allegheny Power's contract agreement with G&S for disposal of PCB waste, providing that "G&S will **dispose of** non-PCB capacitors", "price includes **disposal of oil" (50-499 ppm)**, issuance of a certificate of destruction and "transportation equipment ... be[ing] provided by the **disposal** firm." (R5310-5319); REX 462, Aug. 20, 2003 Tr. 295 (confirming former GPU's contract specifications confirming intent to have **PCB waste** shipped for **disposal**; transformer and **waste disposal** specifying scope of services and specifying that "contractor must be able to provide transportation and **disposal coordination** services **for all types** of non-PCB liquid and solid waste and other wastes as specified in Attachment J and K, which include all types of PCB waste and non-PCB waste"; REX 485. Aug. 20, 2003 Tr. 135 (documenting Cinergy Services' blanket destruction contract for transformers, capacitors, reclosers and oil switches requiring contractor to "provide environmentally sound destruction

services," compliance with "loading and destruction of equipment" requirements, and compliance with 40 CFR Part 761" (R5328-5329).

b. CID's Investigation Report Also Documented G&S's Disposal of PCB Waste.

G&S's disposal of PCB waste was further documented in CID's Reports. On June 30, 2004, under Cross-Examination by EPA counsel, Special Agent Dillon ("Dillon") of EPA's Criminal Investigation Division ("CID"), for all practical purposes was qualified as an expert in gathering facts related to environmental regulatory investigations. Agent Dillon testified to the following:

1) As a result of a meeting in about January 2000 with CID (Jack Aduddell, Dillon and Charles Hoffman) and EPS (Elwin Robinson and Reed) in New York City, CID commenced an investigation of G&S's handling, transportation, disposal, and exportation of PCB items. June 29-30, 2004 Tr. 27:25-29:13. The bulk of Dillon's job was to gather facts, review and request documentation and to take copious notes when interviewing witnesses. Id. at 57:21-58:25, 300:19-301:4. With respect to documentation, Dillon asked for everything relevant to his investigation. Id. at 64:1-18.

2) Dillon prepared and typed the Investigation Activity Reports and Summary Reports (collectively "CID Reports") at REX 610 (HQCID 4-51). Dillon testimony, June 29-30, 2004 Tr. 23:21-24:1, 27:6-14. Dillon confirmed that his handwritten notes and resulting typed written reports described accurately his interviews with the utilities and their practices to ship non-PCB, PCB-Contaminated and PCB items to and their disposal practices with G&S. Id. at

87:1-10; 277-282; 76:2-8 (regarding GPU reports). He therefore stands behind the accuracy of all of his typewritten CID Reports. Id. at 38:8-17, 143:22-144:7.

3) During his investigation, Reed provided Dillon with an education on PCB regulations. Id. at 74:16-75:14. Dillon also discussed the interpretation of applicable TSCA regulations with EPA HQs officials, believed to be Dr. John Smith and Dave Hannemann. Id. at 56:6-18.4.)

4) Dillon was aware that the decision of when a unit becomes a PCB waste was an important consideration (Id. at 326:4-11), and that the term "evaluation" was meant strictly to determine the PCB concentration of a unit. Id. at 202:19-203:18.

5) Based on an inspection report of G&S, dated November 18, 1999, by Finnegan (REX 480), Dillon noted that when the utility decides to dispose of and transport PCB waste, hazardous waste manifests are required. June 29-30, 2004 Tr. 327:4-333:6. Dillon also noted that Finnegan had advised Duquesne that the shipment of any transformer over 50 parts per million, whether tested or untested, must be manifested. Id. at 161:1-163:10; HQCID 16.

6) The CID Reports document that: (a) four utilities shipped units greater than or equal to 50 ppm PCBs to G&S for disposal, thus making G&S a commercial storer (June 29-30, 2004 Tr. 336:25-344:20; see discussion at §II.D.3.); (b) G&S served the members of the Utility Transformer Disposal Consortium ("UTDC"), which was organized to secure aggregate disposal of regulated and non-regulated transformers at lower disposal costs. Id. at 200:20-201:4; and (c) no evidence was developed by CID to contradict the accuracy of the Certificates of Disposal issued by G&S to the utilities interviewed by Dillon. Id. at 199:13-200:6.

7) The facts and circumstances of the G&S Criminal Investigation conducted by Dillon were discussed with Region II TSCA officials (Greenlaw, Kraft and Finnegan). Id. at 26:10-19, 156:20-157:14, 202:4-10. Dillon admitted that he relied heavily on Region II TSCA officials to determine if the allegations were founded or unfounded (Id. at 80:12-19), and Dillon specifically conferred with EPA Region II officials, including Kraft, Greenlaw and Finnegan, regarding his interview with GPU, a customer of G&S. Id. at 88:22, 89:17, 91:10, 92:23.

8) EPS also referred Dillon to two individuals (Dr. John Smith and Dave Hannemann) at EPA HQs, who were knowledgeable about the PCB disposal and commercial storage requirements, and who Dillon contacted. Id. at 27:19-24, 40:2-12, 160:3-14. Dillon provided modified copies of the CID Reports to the EPA HQs officials, believed to be Dr. John Smith and Dave Hannemann. Id. at 29:14, 30:8. The two EPA headquarters officials declined to be interviewed by Dillon as "a formal interview was determined not necessary as they [EPA HQs] concurred with the opinion and interpretation of PCB regulations as it relates to G&S...by Region II TSCA officials...and the practices of G&S...." Id. at 295:18-297:20. Copies of the CID Reports prepared by Dillon also were provided to CID's headquarters office in Washington, DC. Id. at 54:1-21. EPA headquarters officials agreed with the interpretations of Region II officials, and thus were aware of the potential civil violations against G&S. Id. at 205:6-208:18; 272:7-274:1, 275:23-276:8.

9) Dillon was well aware of G&S accepting on a routine basis PCB waste on bills of lading (and not on hazard waste manifests) but did not consider that a federal

crime because of **"a ton of confusion"** that existed with utilities and Dillon's "own Region II people." Confusion in a criminal prosecution is close to a "deaf null [sic] **[death knell]**". Id. at 241:25-244:23, 264:5-16, 302:2-21.[10] In an interview, Dillon noted that Greenlaw "opine[d] on several occasions delineating what violations...at which level these violations rose to." Dillon further "concluded that the violations if they existed did not rise to the level of federal criminal conduct." Id. at 103:9-104:1. Based on Dillon's discussions with Greenlaw about Dillon's interview of four utilities, CID concluded that **"no significant"** or **"egregious"** environmental **criminal** conduct occurred. Id. at 99:21-100:15, 101:2-15.[11] (Emphasis added.)

10.) Dillon did not follow-up on all leads given to him by Reed. Id. at 346:18-351:7. For instance, Dillon did not investigate EPS's charges concerning G&S's illegal export and disposal of PCB waste. Id. at 214:10-215:19.

11.) The last time Dillon saw the un-redacted typewritten CID Reports was in June of 2003 when he sent a copy to Cheryl Jamieson. (June 30, 2004 Tr. 210). Dillon did not redact any document contained in Exhibit 610, the typewritten CID Reports. June 29, 2004 Tr. 22:13-20. Dillon met three times with EPA counsel (Lee Spielmann and once with Cheryl Jamieson) and talked to Jamieson on the telephone two to three times. The purpose was to discuss the facts of his investigation. June 29, 2004 Tr. 19:10-20:18.

12.) Neither Dillon nor CID were involved in any decision to commence or bring a civil enforcement action. June 30, 2004 Tr. 284:8-14.

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[10] Such confusion was created by and exacerbated by EPA Region II's own actions.

[11] EPS notes that the standards for criminal and civil liability are vastly different, where a criminal intent could not be proved with respect to G&S when EPA Region II itself was in accord with G&S's own actions.

c. CID Reports Substantiate G&S's Commercial Storage of PCB Waste.

Based on the aforementioned facts, CID's investigation was poisoned by CID's reliance on the same Region II personnel, whose actions were being questioned. Nevertheless CID's own records and testimony from Special Agent Dillon (§ V.C.2.b) further substantiated and proved that the utilities intended that their equipment was sent to G&S for disposal.

CID's reports at REX 610 (emphases added) note the following:

- "UTDC focused on securing aggregate **disposal** of regulated and non-regulated transformers in order to secure lower **disposal** costs. UTDC did enter into agreement with G&S Technologies, Inc. for such **disposal**." (HQ CID 4-5)[12]

- "In 1999, this [service] was changed from EPS to G&S Technologies for the aforementioned **disposal**. [Unidentified individual] was the G&S Technologies representative he dealt with regarding transformer **disposal**." (HQ CID 15) (emphasis added).

- Duquesne stated that it performed its "own repairs but can't keep up with the accumulating transformers so they send them to G&S Technologies for **disposal**." (HQ CID 16) (emphasis added).

- Duquesne "was sure that they gave specific instructions to G&S that all transformers they sent to them were for **disposal**. [He] was sure that [Duquesne] told G&S that all units sent them were not for evaluation but specifically for **disposal**." (HQ CID 20) (emphasis added).

- "GPU has contracted...[to] **dispose of** transformers containing less than 500 ppm of PCBs." (HQ CID 21).

- GPU had "the same destruction technology as EPS... For PCB oil filled transformers 50-499 ppm, the oil is pumped into drums and shipped offsite for **disposal**." (HQ CID 25-26).

- Butler (BREC) noted that it "went with UTDC and was looking for them to test their transformers and **dispose of** same,...relied on UTDC for...all their disposal needs" (HQ CID 38-39). "BREC sent 18 undrained and untested transformers to G&S for **disposal**. **No manifest was completed**...." (HQ CID 39).

[12] References herein to bates lettered documents "HQ CID" are to REX 610.

- BREC "contacted G&S and arranged for the pick up and **disposal** of approximately 76 undrained and untested transformers...without completing a manifest." (HQ CID 40; see also HQ CID 45).

- BREC reported that it had "received a letter from G&S listing that 5 of the less than 50 ppm transformers had in fact been resold without BREC's prior approval. As a matter of fact, they had been sold even though BREC specifically stated they should be reduced to scrap metal if and only if BREC decided against repairing them for their own reuse." (HQ CID 46).

- BREC stated that it "wanted to have all their accumulated transformers disposed before the end of the calendar year." (HQ CID 46).

- BREC identified major concerns with G&S involving "reselling of units without prior generator approval...number one concern was the paperwork handling followed by [BREC's] expectation that all [BREC] units would be destroyed and not resold." (HQ CID 47).

- Drake Rural Electric Cooperative "contacted G&S...and informed them that DREC had approximately 76 transformers and other breakers and capacitors that they needed disposed." (HQ CID 49) (emphasis added).

3) The final version of EPA's November 18, 1999 inspection report concerning G&S (obtained as a result of the ALJ ordering the document to be made available) contained a table prepared by Finnegan, which summarized the final status of all surplus loads received at G&S between April 1, 1999 and November 18, 1999, with a note that data were calculated from G&S shipping papers. REX 480 (R-005156A and R-005157A). This table documented that all oil filled (un-drained) regulated units with PCB levels greater than 50 ppm were disposed by G&S. See REX 459. See also, G&S's Surplus/Evaluation Agreement discussed in § II.D.2., supra.

d. EPS Provided Evidence of G&S's Manifesting Violations that EPA Refused to Enforce.

The purpose of the hazardous waste manifest rules (§761.208; further discussed below at §V.C.2.) are to ensure that hazardous wastes can be tracked from "cradle-to-grave," as dictated by our country's significant environmental policies enacted by Congress and reflected in CERCLA and TSCA. In EPA's 1990 PCB Penalty Policy, major manifesting violations are

considered a High Level One violation with an imposed fine of $27,500 per occurrence. The PCB Penalty Policy defines a "major manifesting" violation to include the "[f]ailure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors."

G&S was required to comply with the "Unmanifested Waste Report" requirements at § 761.211, which provides that:

> (a) After April 4, 1990, if a PCB commercial storage or disposal facility receives any shipment of PCB waste from an off-site source without an accompanying manifest or shipping paper (where required in place of a manifest), and any part of the shipment consists of any PCB waste regulated for disposal, then the owner or operator of the commercial storage or disposal facility shall attempt to contact the generator, using information supplied by the transporter, to obtain a manifest or to return the PCB waste.

The utility companies further are required to comply with complex manifesting requirements at §761.208 which mandate use of a manifest including certification, signature of transporter, date of acceptance, document copies and retention and transporter requirements. As supported by the testimony of Dillon and Reed, the CID Reports and the exhibits submitted into the record, the following is a list of partial PCB manifesting violations for which G&S has been left untouched.

1) General Public Utilities (GPU).

On August 2, 2000, a fax was sent by EPS to EPA investigator McPhilliamy advising him of manifesting violations by GPU and G&S. REX 441 (R-002119, R-002028 and R-002029), admitted and discussed at Aug. 21, 2003 Tr. 40:20-42:20. On July 7, 2000, EPS transmitted a letter to Dillon advising him of the same manifesting violations. REX 439 (R-002015 and R-002016), admitted and discussed at Aug. 21, 2003 Tr. 34:9-38:14. On February 5, 2001, modified copies of the CID Reports relating to GPU were sent to John Smith and Dave

Hannemann. REX 610 (HQ CID 8); Dillon testimony, June 29, 2004 Tr. 75-151; REX 610 (HQ CID 21-HQ CID 27). In addition, in June 2003, Dillon transmitted copies of the un-redacted CID Reports to Cheryl Jamison, and discussed the reports with Lee Spielmann. The following is a list of undisputed facts derived from CID's Reports, Exhibit 610, which summarize Dillon's investigation of GPU:

a) GPU contracted with G&S to transport, test, evaluate, repair and resell units that were less than 2 ppm PCB. Otherwise, G&S was to dispose of all other transformers under 500 ppm PCB. REX 610 (HQ CID 26).

b) All units from GPU to G&S were shipped on standard bills of lading and not on hazardous waste manifests. Id.

c) For units between 50-499 ppm, G&S pumped the oil out and shipped such oil offsite, but G&S processed the un-regulated carcass. The disposal facility was stipulated in GPU's contract as G&S. Id.

d) For PCB oil filled transformers 50-499 ppm, the oil was pumped into drums at the G&S facility and shipped offsite for disposal. The carcasses were then processed at G&S with the scrap metal marketed. Id.

e) If a unit tested over 500 ppm PCBs, G&S could not process even the empty carcass. Both oil and/or the carcass needed to be shipped offsite with a manifest to a stipulated disposal facility. Id.

f) All units were tested by G&S unless GPU could ascertain a unit's PCB concentration from the nameplate or sample testing history. Id.

g) Prior to G&S, GPU utilized the PCB disposal services of EPS; GPU used the same criteria with G&S as GPU did with EPS. Id. REX 462.

h) GPU advised that there had not been any discrepancies with certificates of destruction, bills of lading, analytical results and that G&S had been "superb" with the paperwork.[13] REX 610 (HQ CID 22).

i) GPU advised that units manufactured prior to 1979 are assumed to contain PCBs, and estimated that 40-50% of GPU's units are Non-PCB. REX 610 (HQ CID 26.

During the hearing, EPS testified and documented that during the time GPU was EPS's customer (over an eighteen-month period) GPU (now First Energy) made 293 manifested shipments of PCB waste to EPS. Reed testimony, Aug. 21, 2003 Tr. 28-52; REX 443, admitted and discussed at Aug. 21, 2003 Tr. 53; REX 441, admitted and discussed at Aug. 21, 2003 Tr. 42; REX 439 (R-002015-R-002016), admitted and discussed at Aug. 21, 2003 Tr. 38. To the extent GPU's quantity of shipments to G&S remained the same as EPS's, G&S's receipt of shipments from GPU over nearly four years would have involved approximately 800 manifesting violations. EPA knew or should have known of such violations, but took absolutely no enforcement action. Further, on November 18, 1999, Greenlaw actually advised G&S that the customers of G&S could not have any say in the fate of their equipment; otherwise, G&S would be commercially storing such material and subject to Part 761. Dillon Testimony, June 30, 2004 Tr. 326:4-332:25. EPA Region II's own inspection report, dated February 2, 2001 (REX 480; Dillon testimony, June 30, 2004 Tr. 326-337), noted that G&S agreed to make that fact clear to its customers, yet neither Region II personnel nor Dillon ever followed up with G&S to ensure G&S's compliance.

2) Butler Rural Electric Cooperative (BREC).

[13] To the extent G&S was not complying with the hazardous waste manifest requirements and used only bills of lading, it is not surprising that G&S's paperwork methods were "superb" as the stringent manifesting requirements to ensure cradle-to-grave records would not have been an issue or required.

Jack Aduddell of the CID Division was advised by fax that two co-operatives in Ohio were shipping oil filled regulated PCB equipment to G&S on bills of lading. REX 438 (R-002019), admitted and discussed at Aug. 21, 2003 Tr. 25-26:24. EPS provided Dillon with the contact persons at BREC. Dillon testimony, June 29, 2004 Tr. 75:11-14. Based on Dillon's interview with BREC, as summarized in CID's Reports, the following facts cannot be disputed:

a) BREC dealt with UTDC and received a general pricing sheet and a "flyer" containing information about how the units (transformers) would be handled and how they would be properly disposed. REX (HQ CID 43).

b) As of July 1999, BREC accumulated approximately 94-95 oil filled untested transformers (each containing approximately 7-9 gallons) with no information as to each unit's PCB concentration. Id.

c) BREC's stated policy was to ship units for testing, advisement, and repair. Only units testing less than 50-ppm PCB were to be repaired. Id.

d) BREC relied on UTDC for all of BREC's PCB transportation, manifesting, testing, paperwork, and disposal needs to ensure regulatory compliance. REX 610 (HQ CID 42).

e) J&J Trucking picked up its first load from BREC on July 27, 1999; the truck driver, however, left without providing a manifest when a BREC official was not at the truck site. BREC understood that all PCB loads must be manifested. REX 610 (HQ CID 44).

f) Two of the units from the July 27, 1999, load were later tested greater than 500 ppm PCBs at G&S and were sent to Safety Kleen. BREC was requested to prepare a manifest needed in order to send the two units from G&S to Safety Kleen. Id.

g) Eventually BREC provided G&S a manifest along with a continuation sheet identifying all the units sent to G&S, including weight, approximate gallons and internal numbers. REX 610 (HQ CID 45).

h) On October 27, 1999, BREC disposed of a second load of approximately 69 oil filled units, un-drained, untested with unknown PCB concentrations. J&J Trucking left without providing BREC a manifest. Id.

i) BREC received a Certificate of Disposal for all units, but later received a letter from G&S identifying five of BREC's non-PCB units as being resold. REX 610 (HQ CID 46).

j) On December 15, 1999, BREC sent approximately 18 units (mostly 10 KVA) to G&S and advised G&S that BREC wanted all of its accumulated transformers disposed before the end of the year. Id.

k) The December 15, 1999 load was put on a bill of lading. BREC had not received the PCB levels or a certificate of disposal. Id.

The above facts substantiate three manifest violations by G&S for failing to ship PCB wastes on manifests and for failing to produce an un-manifested waste report as required by §761.211. See also REX 421, admitted at Aug. 20, 2003 Tr. 342; REX 483, admitted at Aug. 20, 2003 Tr. 122; Dillon testimony June 30, 2004 Tr. 255-265. Consistent with its prior conduct, EPA took absolutely no enforcement action regarding any of these violations, which are substantiated by documents in EPA's own files.

3) Darke Rural Electric Cooperative (DREC).

EPS also advised Jack Aduddell of the CID Division that two co-operatives in Ohio were shipping oil filled regulated PCB equipment to G&S. Aug. 21, 2003 Tr. 25-26:24; REX 438 (R-002019), admitted at Aug. 21, 2003 Tr. 33. EPS also provided documents, information and the

name of a contact person at DREC to Dillon, who subsequently interviewed a representative from DREC. Reed testimony, June 29, 2004 Tr. 75:11-14. Dillon's interview and investigation of G&S's dealings with DREC, as set forth in CID Reports (REX 610), establish the following undisputed facts:

a) As a result of S.D. Myers going out of business, DREC switched to G&S for DREC's disposal of old PCB transformers. REX 610 (HQ CID 48).

b) G&S provided a price for transportation and a separate quote for disposal based on the outcome of PCB testing. DREC contracted with G&S directly for disposal services. DREC advised G&S that 76 transformers, capacitors and other breakers needed to be disposed. REX 610 (HQ CID 49).

c) On December 15, 1999, J&J Trucking picked up the units, but did not prepare a manifest or a bill of lading. Id.

d) On February 7, 2000, DREC received a letter from G&S with two manifests attached. One transformer tested greater than 500 ppm PCB and two transformers tested greater than 50 ppm PCB. Id.

e) DREC received Certificates of Destruction for all of their units, but no paperwork or manifests relating to the pickup. Id.

f) DREC was never billed for transportation or disposal costs. Id.

The above facts prove a manifest violation by G&S for failing to either have manifests and/or failing to produce an un-manifested waste report as required by § 761.211. EPA, consistent with its prior conduct, took no enforcement action regarding this violation, which is substantiated by documents from EPA's own files.

4) Duquesne Light.

Dillon testified about the interview he had with two individuals from Duquesne and the CID Reports he produced. Dillon testimony, June 29, 2004 Tr. 150-199. The following is a list of undisputed facts based on Mr. Dillon's investigation and interviews with Duquesne, as reflected in the CID Reports:

a) In 1998-1999 a potential merger between Allegheny Power and Duquesne was contemplated. Allegheny Power was already using the services of UTDC for disposal of Allegheny's transformers at G&S. REX 610 (HQ CID 18).

b) As a result, in 1999, Duquesne changed PCB waste disposal companies from EPS to G&S for the disposal of Duquesne's greater than 50 ppm PCB transformers. REX 610 (HQ CID 15).

c) G&S advised Duquesne that since G&S was doing the testing for PCB concentration, Duquesne could ship all of its transformers on bills of lading. REX 610 (HQ CID 15-16).

d) Shortly thereafter, [Finnegan] contacted Duquesne and advised Duquesne that any transformer over 50 ppm PCB, tested or untested, must be manifested. REX 610 (HQ CID 16).

e) A load of filled untested units was sent to G&S on a bill of lading that contained one unit testing over 500 ppm PCB. Id.

f) In August of 1998, Duquesne visited G&S to audit and discuss using G&S for Duquesne's equipment. REX 610 (HQ CID 18).

g) On May 10, 1999, Duquesne wrote a letter to G&S complaining about G&S selling one of Duquesne's units without Duquesne's approval. REX 610 (HQ CID 19).

h) Duquesne received Certificates of Destruction but none of the settlement sheets. Id.

i) Duquesne sent a total of eight loads to G&S, five were on a manifest. One of the loads contained a transformer greater than 500 ppm PCB and was on a bill of lading. Id.; REX 610 (HQ CID 16).

j) Duquesne "was sure that" they gave specific instructions to G&S that all transformers they sent to them were for disposal."[14] REX 610 (HQ CID 20).

The above facts prove manifesting violations by G&S for its failure either to manifest regulated units in a shipment or to produce an unmanifested waste report as required by § 761.211. See also, REX 408, 411, 413, 414, 416, 418 and 433. Once again, EPA took no action regarding any of these proven violations based upon EPA's own files.

5) Wisconsin Public Service Corporation (WSPSC).

Undisputed facts further document five shipments to G&S from WSPSC without manifests:

a) On August 19, 2003, Keith R. Reed testified about a load of equipment shipped to G&S on April 22, 1999, as documented on a bill of lading for disposal. Aug. 19, 2003 Tr. 347:8-357-22. The load contained nine oil filled (undrained) PCB-contaminated units and one oil filled PCB transformer. The load was shipped on a bill of lading. REX 415, admitted at Aug. 19, 2003 Tr. 347; REX 484 (R003482), admitted at Aug. 20, 2003 Tr. 123.

b) On July 8, 1999, a load of 125 transformers was shipped on a bill of lading for disposal at G&S. The load contained fifteen oil filled (undrained) PCB-contaminated units and

[14] Duquesne's position is also confirmed in Finnegan's and Duquesne's handwritten notes of their conversation in which Duquesne stated most clearly that units sent to G&S were for disposal and that G&S had better not be reselling units. REX 413 (R3175-3176, 3170-3174.

one oil filled PCB transformer. REX 419, admitted and discussed at Aug. 19, 2003 Tr. 385-387; Reed testimony, Aug. 19, 2003 Tr. 381:13-385:8; REX 484 (R003443).

c) On July 22, 1999, a load of 88 transformers was shipped on a bill of lading for disposal at G&S. The load contained five oil filled (undrained) PCB-contaminated units. REX 419; Reed testimony, Aug. 19, 2003 Tr. 385:10-387:20; REX 484 (R003398).

d) On August 3, 1999, a load of 114 transformers was shipped on a bill of lading for disposal at G&S. The load contained ten oil filled (undrained) PCB-contaminated units and one oil filled PCB transformer. REX 470; Reed testimony, Aug. 20, 2003 Tr. 25:22-30:14; REX 484 (R003354).

e) On August 5, 1999, a load of 113 transformers was shipped on a bill of lading for disposal at G&S. The load contained fourteen oil filled (undrained) PCB-contaminated units. REX 470, admitted and discussed at Aug. 20, 2003 Tr. 30-36; Reed testimony, Aug. 20, 2003 Tr. 30:15-36:12; REX 484 (R003433).

The above cited facts, evidence and testimony document five manifesting violations by G&S for failing to require manifests for the above WSPSC shipments and failing to produce an unmanifested waste report as required by § 761.211. Once again, EPA took no enforcement action regarding these violations based upon EPA's own file documents.

6) Kaukauna Electric Cooperative.

On July 22, 1999, a load of 42 transformers was shipped on a bill of lading for disposal at G&S. The load contained nine oil filled (undrained) PCB-contaminated units. The related exhibits and testimony document manifesting violations by G&S for failing to have manifests and failing to produce an un-manifested waste report as required by § 761.211, yet EPA took no enforcement action. REX 420, admitted at Aug. 20, 2003 Tr. 23; Reed testimony, Aug. 20, 2003 Tr. 10:14-18:11.

7) Warren Electric Cooperative.

On August 9, 1999, a load of 137 transformers was shipped on a bill of lading for disposal at G&S and the facts are undisputed. The load contained seventeen oil filled (undrained) PCB contaminated units and three oil filled PCB transformers. The record documents manifesting violations by G&S for failing to have manifests and for failing to produce an unmanifested waste report as required by § 761.211, yet EPA took no enforcement against G&S. REX 471, admitted at Aug. 20, 2003 Tr. 43; Reed testimony, Aug. 20, 2003 Tr. 36:14-43:5.

8) Southside Electric Cooperative.

On October 10, 1999, a load of 125 transformers was shipped on a bill of lading for disposal at G&S. The load contained five oil filled (undrained) PCB-contaminated units and one oil filled PCB transformer. The record documents manifesting violations by G&S for failing to have manifests and/or to produce an un-manifested waste report as required by § 761.211, yet EPA took no enforcement action against G&S. REX 475, admitted at Aug. 20, 2003 Tr. 61; REX 477, admitted at Aug. 20, 2003 Tr. 68; Reed testimony, Aug. 20, 2003 Tr. 57:7-61:18.

9) United Electric Cooperative.

On November 11, 1999, a load of 126 transformers was shipped on a bill of lading for disposal at G&S and the facts are undisputed. The load contained eleven oil filled (undrained) PCB-contaminated units and two, oil filled PCB transformers. REX 482, admitted at Aug. 20, 2003 Tr. 114; Reed testimony, Aug. 20, 2003 Tr. 107:4-114:6. The record documents manifesting violations by G&S for failing to have manifests and failing to produce an un-manifested waste report as required by § 761.211, yet EPA took no enforcement action against G&S.

10) PECO.

The following facts from Reed's testimony and CID Reports are undisputed:

a) On October 11, 1999, a load of 78 transformers was shipped on a bill of lading for disposal at G&S. The load contained eight oil filled (undrained) PCB-contaminated units and one-oil filled PCB transformer. REX 476, admitted at Aug. 20, 2003 Tr. 64; REX 484 (R003305), admitted at Aug. 20, 2003 Tr. 123; Reed testimony, Aug. 20, 2003 Tr. 61:19-64:4.

b) On October 14, 1999, a load of 63 transformers was shipped on a bill of lading for disposal at G&S. The load contained seven oil filled (undrained) PCB-contaminated units and three oil filled PCB transformers. REX 477; REX 484 (R003337); Reed testimony, Aug. 20, 2003 Tr. 64:5-68:10.

c) On October 22, 1999, a load of 60 transformers was shipped on a bill of lading for disposal at G&S. The load contained one oil-filled (undrained) PCB-contaminated unit. REX 484 (R003261).

d) On October 29, 1999, a load of 75 transformers was shipped on a bill of lading for disposal at G&S. The load contained six oil-filled (undrained) PCB-contaminated units. REX 484 (R003317).

In summary, the undisputed evidence with respect to PECO proves four dates of manifesting violations by G&S for failing to have manifests and/or failing to produce an unmanifested waste report as required by § 761.211. EPA took no enforcement action against G&S.

e) G&S Failed to File Its PCB Commercial Storage Notification to EPA.

On December 21, 1989, the EPA passed a final rule regarding notification and manifesting for PCB waste activities. Effective sixty days (60) after promulgation, all disposers of PCB waste owned by others were required to notify the EPA of such activity on Form 7710-53. Nearly ten years later, Finnegan of EPA Region II received a certified letter from G&S that included a copy of G&S's first Notification of PCB Activity, dated September 21, 1999, which advised EPA of G&S's small commercial storage activities. REX 479 (R000141). G&S's failure to have submitted timely and accurately its notification form was noted in an independent inspection conducted of G&S by EPA Region V on December 14, 2000. In EPA's Report, Region V concluded that G&S should have notified EPA in 1990 as a "commercial storer," and not simply as a "small commercial storer." REX 458 (R004615). According to EPA's PCB Penalty Policy (CEX 24), the failure to submit such notification was a High Level One Violation subject to a fine of $27,500 per day:

> 4) Major manifesting. Failure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors.

G&S 's failure to have notified EPA from 1990 until 1999 represents approximately 3500 days of violations for failing to notify the EPA of G&S's Commercial Storage activities. Facts supporting such manifesting violations are set forth in §II.D.3.c., which documents the following receipts of regulated PCB waste by G&S prior to September 21, 1999:

- One shipment from Butler Rural Electric Cooperative
- One shipment from Darke Rural Electric Cooperative
- Three shipments from Duquesne Light
- Five shipments from Wisconsin Public Service
- Four shipments from PECO
- One shipment from Warren Electric Cooperative
- One shipment from Kaukauna Electric Cooperative

f. G&S Operated as a Commercial Storer of PCB Waste Without EPA Approval.

The following undisputed facts further document that G&S was and continues operating as a commercial storer of PCB waste without the required EPA approval permit:

1) On November 1, 1999, a meeting was set up by EPA Region II with G&S. REX 478; Reed testimony, Aug. 20, 2003 Tr. 68:11-70:4; REX 479; Reed testimony, Aug. 19, 2003 Tr. 89:5-116:9. At EPA Region II's request, G&S provided a copy of a Notification of PCB Activity dated September 21, 1999 for "small commercial storer" activities and stated G&S would begin working on applying for a full commercial storage permit.

2) On December 9, 1999, G&S sent a certified letter to Finnegan, with documentation relating to all oil filled in-service transformers received at G&S from April 1, 1999 to November 18, 1999. The letter stated: "[p]lease note that the only customers presently providing us with "in-service" transformers for evaluation are the "cooperatives." The letter went on to state G&S would set up an appointment with Greenlaw to review the application when a working draft is completed. The letter included five documents (REX 484 [R003482, R003443,

R003398, R003354, and R003433]), which documented G&S's receipt of transformers from Wisconsin Public Service and four documents (REX 484 [R003305, R003337, R0033261 and R003317]), which documented G&S's receipt of transformers from PECO. These two companies are major investor owned utilities and not cooperatives. Reed testimony, Aug. 20, 2003 Tr. 123:10-125:19.

3) On April 6, 2000, G&S provided the EPA a formal application to become a PCB Commercial Storer. REX 486, admitted at Aug. 20, 2003 Tr. 144; Reed testimony, Aug. 20, 2003 Tr. 135:24-144:24.

4) On July 11, 2002, G&S sent a letter withdrawing G&S's application for a PCB Commercial Storage Permit. REX 486; Reed testimony, Aug. 20, 2003 Tr. 143:24-152:7. G&S's letter stated: "[a]s always, most of the PCB-Contaminated oil commercially stored at our facility is generated from surplus "in-service" electrical equipment purchased by us for surplus evaluation and taken out of service after evaluation at our facility."

5) Previous to this letter, G&S had provided the following information to the EPA:

- 99.9% of G&S's business is with major utilities. Approximately 10-15 percent of units received by G&S have PCB levels between 50 to 499 ppm PCB. REX 412, admitted at Aug. 19, 2003 Tr. 320; Reed testimony, Aug. 19, 2003 Tr. 295:3-320:8.

- On an annual basis, G&S brings in about 120,000 units and processes about 500 units per day. REX 489 (R-003797), admitted at Aug. 20, 2003 Tr. 159; Reed testimony, Aug. 20, 2003 Tr. 156:8-170:3.

- Drained PCB-contaminated units received by G&S most typically contained a cupful of oil. See REX 412 (R-002839). This small amount verified that the bulk of PCB fluid at G&S was from oil filled (undrained) PCB-contaminated units.

- Finnegan also advised Dillon that when she did the first EPA inspection of G&S in October 1998, G&S's facility was rather large with a lot of transformers. REX 610 (HQ CID 29).

6) Subsequently, Jay S. Spector of G&S sent a Certified letter to Jane M. Kenny, Regional Administrator for EPA Region II. REX 486, Reed testimony, August 20, 2003 Tr. 146:3-152:7. The letter included G&S's Annual Report for Small Commercial Storage as required by § 761.180(b). A review of this document (REX 486 [R-005529]) verified unequivocally that G&S on a daily basis was storing over 500 gallons of PCB fluid and greater than 70 cubic feet of PCB solid waste. For instance, G&S's 2001 Annual Report, Column 4, indicated that: (a) G&S stored at the beginning of the year 1333 kg of PCB fluid, (b) received 4759 kg of PCB fluid, (c) generated 142,926 KG at the facility, and (d) then shipped for disposal 148, 014 KG of PCB fluid. Since the production of PCB was banned in 1979, no new PCB were manufactured during 2001 and therefore all PCB on site at G&S had to have been contained or stored in transformers or other electrical equipment. G&S's annual report must be interpreted in the context of 40 CFR Part 761, which requires that any commercial storage facility storing 500 or more gallons of PCB (which equates to 1750 to 3850 KG by fluid weight) is subject to the commercial storage approval requirements. Based on G&S's own annual report, G&S was storing at least 40,000 gallons; accordingly, G&S was a large PCB Commercial Storer operating without a PCB Commercial Storage Permit. Reed testimony, Aug. 20, 2003 Tr. 146:3-152:7.

7) The 2001 Annual Report, column 3, lists weights of G&S's PCB equipment, which reflects that G&S had (a) 3117 KG in storage at the beginning of the year, (b) no receipts, (c) 64,355 KG generated, and (d) 65,606 KG shipped for disposal. G&S's

Annual Report further proved that G&S did not consider the PCB equipment as being commercially stored, when in fact it was commercially stored. Thus, for every day of operation, G&S was storing in excess of 70 cubic feet of solid waste without a PCB Commercial Storage Permit as required by § 761. Reed testimony, Aug. 20, 2003 Tr. 146:3-152:7.

8) The significant volume stored at G&S is also reflected in G&S's own 1996 brochures stating:

> G&S . . . has grown into the largest oil-filled electrical equipment disposal facility on the East Coast. . . As you know, the "Generator" of oil-filled electrical equipment is responsible for its destiny from "cradle-to-grave." It is for this very reason G&S... prides itself on, not only providing its customers with fast, reliable service, but providing them with the "peace-of-mind" they deserve from their Oil-filled Electrical Equipment Disposal Facility.

REX 401 (R3047-R3048); Reed testimony, Aug. 19, 2003 Tr. 117:5-123:12.

Based on the above facts, it is undisputed that the clear majority of all oil stored at G&S was from major utilities that sent PCB regulated waste to G&S for disposal. This conclusion was confirmed by EPA Region V's own investigation, which found:

> G&S routinely receives transformers which are stored until they can be tested. G&S doesn't consider the fluid in the transformers commercially stored until they get the results back. The regulations say that transformers are commercially stored whenever they come in to the facility as a waste . . . G&S buys transformers for scrapping and treats the oil from these transformers as their own waste, rather than as commercially stored waste. Region V would treat this as a storage violation.

REX 458 (R4614-R4615), admitted at Aug. 20, 2003 Tr; Aug. 20, 2003 Tr. 229:8-244:11; REX 610 (HQ CID 29). Pursuant to EPA's PCB Penalty Policy, G&S's failure is a High Level One Violation with a fine of $27,500 per day:

4) Major manifesting. Failure to notify EPA; for commercial storers, submitting false information upon application or operating without an approval or in violation of approval conditions; and failure to manifest or major manifesting errors.

At a minimum, G&S has operated 2,750 days without a permit, with EPA's full knowledge and acquiescence.

g. G&S Illegally Disposed of PCB Items Without Approval.

The following facts document G&S's illegal disposal of PCB items:

1) EPA's October 26, 1998 inspection report revealed that a 500-gallon polyethylene tank used for the storage of PCB fluid at G&S was destroyed on August 8, 1998 in a shed fire. REX 407; Reed testimony, Aug. 19, 2003 Tr. 166:17-197:10. EPA's PCB Penalty Policy classifies such incidents as a High Level One Violation:

   1) Major disposal. This includes any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations, including unauthorized export. Failure to comply with the conditions of a TSCA approval for PCB disposal or alternative treatment, other than recordkeeping, also constitutes a level 1 violation.

   The fine for such incident is $27,500. No action was taken against G&S, nor did G&S contact the EPA on the day of the fire to report the incident.

2) As noted by EPA's inspection of G&S on April 8, 1999, REX 412 (R002840), G&S's original tank was replaced with another polyethylene tank. During the inspection, the second PCB storage tank was no longer at G&S, and G&S had no record of its disposal. EPA's PCB Penalty Policy classifies this failure to be a Medium Level Violation:

   1) Major recordkeeping. No records, or major recordkeeping violations, at disposal facilities, including incinerators, high efficiency or industrial boilers, landfills

> and other approved alternate disposal facilities. No records, or major recordkeeping violations, by transporters or commercial storers. Major recordkeeping violations would include failure to keep records or substantial discrepancies in records on disposal process operating parameters, landfill disposal locations, or disposal quantities or dates, or incomplete records on the receipt, inventory, or disposition of waste by commercial storers.

EPA Region II took no action against G&S. Reed testimony, August 19, 2003 Tr. 310:2-312:3.

3) On March 15, 2002 and March 22, 2002, Clean Harbors and G&S notified EPA Region II by certified mail that G&S had processed a PCB transformer in G&S's scrap metal recovery oven. REX 461, admitted at Aug. 20, 2003 Tr. 291; Reed testimony, Aug. 20, 2003 Tr. 289:17-291:13; Sept. 11, 2003 Tr. 393:14-397:23. In press releases on the Internet and made public, EPA Region II Administrator, Jane M. Kenny, stated:

> Strict, continuous, daily compliance with the terms of federal law and state permits is the only way these kinds of facilities can properly safeguard the public's health and the environment. We will continue to be vigilant in monitoring the activities of hazardous waste handling facilities in this region.

See http://www.epa.gov/region02/news/2002/02134.htm; http://www.epa.gov/region02/news/2002/02062.htm. The press releases currently on the Internet document three major TSCA violations:

- The mishandling of 180 PCB capacitors by Clean Harbors for improperly identifying them as PCB debris on Hazardous Waste Manifests and shipping them to Model City Landfill for burial. Clean Harbors settled with EPA for a fine of $87,750.
- The burial of 180 PCB Capacitors at Model City by CWM and the failure to open the containers and identify the contents. Although there was no release of PCB,

CWM agreed to remove and send the PCB capacitors to a TSCA approved incinerator. CWM paid a penalty of $78,475 and incurred $460,000 to remove and relocate the PCB capacitors.

- The mishandling of a PCB transformer by Clean Harbors with a high level of PCB was drained of fluid and processed in a scrap metal recovery oven instead of incinerated, which constituted a violation of TSCA. The processor was G&S and despite the fact that emissions and illegal disposal occurred, EPA Region II took no action against G&S.

4) G&S has acknowledged processing between 12,000 to 18,000 PCB-Contaminated Transformers through its scrap metal recovery oven on an annual basis. REX 412. As reflected in §761.72 and Count III of the Administrative Complaint against EPS, the EPA considers each burn cycle not meeting the minimum required oven times (2.5 hours or greater) and temperatures (between 1000 degrees and 1202 degrees in the primary chamber) to be a high level one violation with a fine of $27,500 per day. In EPA's inspection report of April 8, 1999, G&S advised EPA that a PCB burn takes approximately 2.5 hours. REX 412 (R002843). No EPA official has ever looked at G&S's burn data or analyzed G&S's oven operations and production records, which based on volume of receipts and G&S's limited capacity (discussed at §II.D.5, infra), could not possibly comply with §761.72. EPA Region II has known or should have known that G&S could not comply with the mandatory minimum required burn time of 2.5 hours or oven temperatures; thus, resulting in a minimum of 1200 days of potential violations, for which EPA has taken no enforcement action against

G&S, while simultaneously prosecuting EPS for what even EPA has alleged to be only a handful of burn days.

h. G&S's Illegal import of PCB waste.

On October 16, 2002, G&S advised Finnegan by certified mail that G&S had received PCB regulated waste from Puerto Rico. REX 467 (R006904-R006905); Aug. 20, 2003 Tr. 304:2-307:18. Importation without an exemption, which G&S does not possess, is a violation of §761.93. Pursuant to EPA's PCB Penalty Policy, such violation is a High Level One Violation with a fine per occurrence of $27,500, which covers "[m]anufacturing PCBs without an exemption or in violation of any condition of an exemption, including unauthorized import." No EPA action was taken against G&S.

i. G&S's Illegal export of PCB waste.

On April 14, 1999, Gaby Newmark (President of G&S) stated "that G&S has never exported any equipment. He stated that they had imported equipment from Canada 5-6 years ago, but not since the change in the import regulations." REX 412 (R-002841); Aug. 19, 2003 Tr. 313:8-21. G&S also provided the following information to (Region II) Finnegan:

> Export Issue:
> We questioned Spector about his current exports. He stated that G&S only exports non-PCB equipment. When we asked why they would send this equipment out of the country, he stated that it was done occasionally, and was mostly due to "capacity problems". Spector explained that summer is a busy time for them, since many transformers burn out due to increased demand for electricity. Since PCB-Contaminated transformers "take up too much time in the burners", there is not always enough time or capacity to handle all the non-PCB transformers they receive, and so these non-PCB units are sometimes sent offsite or exported for scrap or reuse. They are shipped on a bill of lading, and listed only by pounds or KVA, not by serial numbers. Although they have an analysis for each transformer they accept, once they have found that a transformer is non-PCB they are not specifically tracked on any shipping documents, but rather shipped in bulk.
>
> We then discussed the load of transformers that was being held by Customs, and asked whether he could verify that the transformers were not PCB Transformers. He told us that since G&S only exports non-PCB equipment, there is no requirement for or need to track the transformers by serial number. Therefore, without identifying specific transformers, he would have no way to backtrack in their files and find the analyses attached to any individual one.

REX 611, admitted at June 29, 2004 Tr. 7-8. As noted above, §II.D.7, infra, capacity problems at G&S also would have occurred as a result of the promulgation of new regulations at § 761.72, adopted on June 29, 1998, which for the first time imposed a minimum burn time of 2.5 hours. 40 CFR § 761.97 provides:

> § 761.97 Export for disposal
>
> (a) General provisions. No person may export PCBs or PCB Items for disposal without an exemption, except that:
> (1) PCBs and PCB Items at concentrations <50 ppm (or <10 ug PCB/100 cm^2 if no free-flowing liquids are present) may be exported for disposal.
> (2) For the purposes of this section, PCBs and PCB Items of unknown concentrations shall be treated as if they contain ≥ 50 ppm.
> (b) [Reserved]
>
> [61 FR 11107, Mar. 18, 1996, as amended at 63 FR 35460, June 29, 1998]

EPA's blind acceptance of G&S's statements stands in stark contrast with EPA's treatment of EPS. In Count III of the Administrative Complaint against EPS, EPA initially assumed without any factual information or evidence that 1237 units burned in EPS's oven were between 50 and 499 ppm PCB, despite the fact that the assumption rule no longer applied to items for disposal. When EPS provided EPA the PCB levels of the 1237 units, which documented that these units were below 50 ppm PCB, EPA would not accept such documentation. Instead, EPA claimed that the values as reflected on an outside laboratory's summary sheets "were not accurate or verifiable" to support EPS's defense. Rice testimony, June 18, 2003 Tr. 118-122, 194:22-196:3, 212:19-213:11.

In the case of G&S, where there exists a regulatory assumption that all PCB items of unknown concentrations shall be treated as if they contain greater than or equal to 50 ppm and despite being told that G&S does not export any equipment, EPA was willing to blindly accept

G&S's word about the PCB concentration of units that G&S could not even identify. Based on the six years since § 761.72 has been in effect, it is conservatively estimated that G&S received 120,000 units per year, which equates to 300 potential export violations. EPA's PCB Penalty Policy classifies such violations to be a High Level One Violation with a fine of $27,500 per occurrence, which covers

> any significant uncontrolled discharge of PCBs, such as any leakage or spills from a storage container or PCB Item, failure to contain contaminated water from a fire-related incident, or any other disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations, including unauthorized export. Failure to comply with the conditions of a TSCA approval for PCB disposal or alternative treatment, other than record keeping, also constitutes a level 1 violation.

Once again, EPA took no action against G&S for these violations.

D. EPA Can Provide No Rational Basis for its Discriminatory and Favorable Treatment of G&S.

1. Region II's Distortion of Facts and Law.

On March 12, 1999, Pavlou responded to an EPS inquiry with a letter, dated March 3, 1999. REX 431 (R0087-R0099); Aug. 20, 2003 Tr. 367. Region II's letter unequivocally, but erroneously, declared that G&S did not receive oil filled PCB-contaminated units or PCB units for disposal. Id.; Reed testimony Aug. 20 2003 Tr. 363-370. This declaration was supposedly supported by a document EPA referenced as "Attachment 3" (REX 431 at R000095-99), which set forth EPA's responses to EPS concerns and was prepared by Region II's TSCA Division, David Greenlaw ("Greenlaw") and Daniel Kraft ("Kraft"). Reed testimony, Aug. 20, 2003 Tr. 364.

EPA's March 12, 1999 letter began the start of Region II's concerted efforts to distort the facts and justify G&S's unapproved and unregulated operations. Region II's efforts at the very least distorted the facts, and at worst misrepresented the facts – but in either case perverted

TSCA and its regulations. By doing so, EPA continued to condone and defend the improper acts of EPA officials, while at the same time discrediting EPS and leaving G&S untouched.

Ignoring the factual evidence in Region II's files and in a concerted effort to circumvent the letter and intent of the PCB regulations, Region II officials concocted a fiction that is not supported (a) in § 761, (b) by EPA's own expert in this Administrative Hearing, (c) by testimony from EPA witnesses (including Dillon, Smith and Simons) and EPS witness Reed, and (d) EPA's own documents, including, among others, the CID Reports. This fiction by Region II created an exemption or exception from TSCA's regulations for G&S by deeming G&S a generator of the PCB-waste, thereby, eliminating G&S's status as a commercial storage facility. This fiction has allowed G&S to avoid its obligations to comply with significant, mandatory PCB regulations, including commercial storage notifications, manifesting and reporting requirements, financial assurance and closure plan obligations.[15] Under direct examination, both Finnegan and Kraft were established to be well-versed in PCB Regulations. In addition, both Finnegan and Kraft testified to the qualifications of Greenlaw, the PCB-Coordinator for Region II. Sept. 11, 2003 Tr. 258:20- 263:23 (Kraft); Sept. 10, 2003 Tr. 138:1-149:19 (Finnegan). EPS does not dispute

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[15] See Dan Kraft testimony (Sept. 11, 2003 Tr. 379:23-381:12) as follows:

Q. ... G&S has no closure plan, does it, for its facility? . . .

A. They don't have a closure plan as part of a commercial storage approval that I'm aware of – well, they don't because they were never issued a commercial storage approval. They -- they -- they prepared one in their application.

Q. (By Ms. Hwang) But they don't have the closure plan, the final -- the closure plan; is that correct?

A. They do not have a commercial storage approval which would include a closure plan under that requirement.

Q. And they're not providing any financial assurance under 761 as a commercial storer; is that correct?

A. That is correct.

Q. So there's no guarantee or trust fund or insurance protection in the event that there's some environmental problem, contamination, or release at G&S; is that correct?

A. Under the provisions of -- of 761, commercial storage provisions, yes.

Q. And under this arrangement of surplus evaluation and resale, G&S is not subject to any maximum storage capacity requirements; is that correct?

A. That is correct.

See also, REX 454 (R-002040), admitted at Aug. 21, 2003 Tr. 179, partially listing benefits to the utility company; See also testimony of Kraft (Sept. 11, 2003 Tr. 378:1-379: 4), testifying as to the benefits realized directly by G&S resulting from G&S's non-approval status as a commercial storer of PCB waste.

that these individuals had or have a complete knowledge of the PCB Regulations; however, such knowledge allowed these individuals to pervert the facts and truth in an effort to protect G&S and themselves against allegations made by EPS to Paul Zammit on March 22, 1999. As noted in the testimony of Finnegan (Sept. 10, 2003 Tr. 176:19-178:9), she was fully aware of EPA's commentary in the Federal Register that "EPA also agrees with the comment that a service company is not a commercial storer when it buys equipment for **resale** and subsequently drains the oil from the equipment for disposal." 54 Fed. Reg. 52719 (Dec. 21, 1989) (emphasis added). As discussed below, this knowledge was used by Region II to create several incorrect, false findings:

- The first fiction was that G&S purchased its regulated PCB equipment for **resale,** when in fact documents, such as utility contracts and interviews, G&S brochures, G&S's Surplus/Evaluation Agreement, among others make clear and prove that the regulated PCB equipment waste being purchased or transferred to G&S was for the sole purpose of disposal.
- The second fiction pretended that a PCB-contaminated unit or a PCB unit sent to G&S was not really PCB-contaminated or a PCB unit until it is tested. Sept. 10, 2003 Tr. 213:9-216:15 (Finnegan testifying that until equipment "is tested, the original status is unknown"); Finnegan testified that the original status of equipment would be "unknown" if not tested; thus, creating a fourth category of transformers.[16]

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[16] Sept. 10, 2003 Tr. 215:1
Q. Well, let me give you an example. If a utility sends a PCB-contaminated transformer out --
A. Uh-huh.
Q. It's not been tested; it doesn't know. But later on it turns out that it's over 50 ppm, it's original status -- even though you didn't know what it was, it hadn't been tested, is its original status a PCB-contaminated electrical equipment?
A. If it's untested, the original status is unknown.

These false pretenses were perpetuated by EPA on numerous occasions.

a) EPA's Response to EPS's Inquiry.

On March 26, 1999, EPS sent Pavlou a follow-up letter requesting an explanation for the conclusions contained in Attachment III. Reed testimony, Aug. 21, 2003 Tr. 7-10. Despite the existence of evidence within Region II's files proving that G&S was receiving oil filled PCB-contaminated units and PCB units for disposal, EPA never responded to EPS's letter. Thus, the following inserts from Region II's Attachment III Response, dated March 12, 1999, remain the most current EPA position with respect to on the issues raised by EPS:

> 1. EPS concern:
> "Section: 761.205
> G&S Technologies has been a major commercial storer since 1979 but has never complied [with] the notification requirements."
>
> EPA response:
> Commercial storage requirements for PCBs were first effective on February 5, 1990. The only equipment containing PCBs at concentrations of 50 parts per million (ppm) or greater, which G&S receives for disposal, is PCB-Contaminated Electrical Equipment which has been drained prior to shipment. It is therefore exempt from PCB storage requirements (see Attachment 1). Since the waste that G&S handles is not subject to the storage requirements at 40 C.F.R. § 761.65, G&S is not a "Commercial Storer of PCB waste" as that term is defined at 40 C.F.R. § 761.3.
>
> G&S does remove residual liquids from drained PCB-Contaminated Electrical Equipment and ships it for disposal as PCB waste. This residual liquid is not removed during servicing but rather during disposal, making G&S the generator of the liquid; a generator's storage of its own waste is not considered commercial storage.

Since documents existing in Region II's files at the time the above language was written documented that G&S received oil filled (un-drained) PCB contaminated units for disposal only (discussed in §II.D.3), G&S should have notified EPA in 1990 that G&S was a "Commercial

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Since the establishment of the PCB Regulations in 1978 there have been three classes of transformers; non-pcb, pcb-contaminated and pcb. In support of the scheme developed by Region II officials for G&S there is now a fourth class of transformers "unknown."

Storer of PCB waste," as required by the regulations and as Region V concluded in its subsequent inspection report.[17]

> 2. EPS concern:
> "Section: 761.202
> G&S Technologies has used transportation firms with no EPA ID numbers to transport regulated PCBs."
>
> EPA response:
> Prior to August 28, 1998 the transportation of drained PCB-Contaminated Electrical Equipment was not subject to manifesting requirements and a PCB Transporter was not required. Since August 28, 1998, firms who transport drained PCB-Contaminated Electrical Equipment to G&S have notified as PCB Transporters. According to G&S's annual records, which were reviewed as part of EPA's October 26, 1998 inspection, shipments of regulated PCB waste from their facility for disposal have been shipped on PCB manifests, have been transported by authorized PCB Transporters, and have been sent to approved PCB commercial storage and disposal facilities.

Pursuant to §761.208, hazardous waste manifests are required for untested oil filled (un-drained) units shipped for purposes of disposal, and the EPA Inspection report of November 18, 1999 documented that EPA knew at the time of its inspection that G&S was receiving units not accompanied by hazardous waste manifests. REX 480, admitted at Aug. 21, 2003 Tr. 136-139.

[17] Aug. 20, 2003 Tr. 229-244, Sept. 10, 2003 Tr. 167-178, Sept. 11, 2003 Tr. 35, 42.

4. EPS concern:
"Section 761.60
G&S Technologies has documented data supporting illegal disposal of PCB fluid and dilution of PCB fluid to allow reselling to fuel blenders. Even the current UTDC brochure states 'There are no oil disposal fees for oil less than 499 ppm."

EPA response:
G&S documentation of PCB fluids indicates all fluids known or presumed to contain PCBs at 50 ppm or greater are sent for disposal as PCB fluid. EPA has seen no evidence of dilution of PCB fluid for sale to fuel blenders. With respect to the "UTDC brochure", UTDC is a consortium of utilities which researches disposal facilities and costs as a group and provides it's members with the advantages of these activities. Actual disposal is arranged directly by the member with the disposer. Initially, UTDC developed arrangements only for disposal of drained PCB-Contaminated electrical equipment. UTDC currently includes arrangements for disposal of PCB electrical equipment with facilities other than G&S and is aware that G&S can only accept PCB-Contaminated electrical equipment which has been drained. EPA has no control over what companies write in their sales brochures or charge for their services.

Notwithstanding EPA's response quoted above, Region II TSCA officials were fully aware that G&S had contracted to take un-drained PCB-Contaminated electrical equipment for disposal. Dillon testimony, June 29, 2004 Tr. 200:20, 201:4; REX 610 (HQCID 6-7); June 29, 2004 Tr. 6-7; REX 413 (R-005185-5191), admitted and discussed at Aug. 19, 2003 Tr. 320-364.

5. EPS concern:
"Sections: 761.207, 761.208, 761.209, 761.210, 761.211
G&S Technologies uses unlicenced - non hazardous waste haulers to transport oil filled PCB contaminated electrical equipment without the requirements of the use of a manifest."

EPA response:
EPA review indicates that G&S does not transport oil-filled PCB-Contaminated Electrical Equipment to their facility; all such equipment is drained prior to shipment. In the State of New Jersey, PCBs are not a hazardous waste and do not require a hazardous waste transporter. As stated in Attachment 1, prior to August 28, 1998, the transportation of drained PCB-Contaminated Electrical Equipment was not subject to manifesting requirements and the use of an authorized PCB Transporter was not required. Since August 28, 1998, firms who transport drained PCB-Contaminated Electrical Equipment to G&S have notified as PCB Transporters. According to G&S's annual records, shipments of PCB waste from their facility for disposal have been shipped on PCB manifests, have been transported by authorized PCB Transporters, and have been sent to approved PCB commercial storage and disposal facilities.

As with EPA's prior responses, this response is factually incorrect in that G&S did and does receive oil-filled (un-drained) PCB-Contaminated Electrical equipment waste and PCB electrical equipment waste transported to G&S for disposal. Dillon testimony, June 30, 2004 Tr. 340-344; REX 610 (HQ CID 1-51).

6. EPS concern:
"Section 761.97
G&S Technologies is the number one exporter of electrical distribution equipment designated for disposal by the actual generators of the waste."

EPA response:
EPA has found no evidence that this statement is correct. PCB electrical equipment may be exported for use (40 C.F.R. § 761.20(c)(1). If the generator/owner of the equipment decides at any point to change the disposal option or to reuse or sell equipment which is authorized for use, there is no specific prohibition against this in the PCB regulations. G&S does have non-PCB equipment which is intended for resale. G&S certifies disposal to their customers.

Again, EPA's response is factually incorrect in that G&S has exported and does export equipment. Documents from EPA Region II files prove that Region II employees knew of G&S's conduct. REX 611 and REX 374, admitted and discussed at June 20, 2003 Tr. 82-83. Further, Elwin Robinson testified that he had a phone conversation with Greenlaw regarding the exportation of equipment by G&S (Aug. 18, 2003 Tr. 124:10-126:14); thus, Greenlaw was aware

of the alleged international containers at G&S's facility during EPA's inspections of G&S in 1999 and took no enforcement action.

7. **EPS concern:**
"Section 761.65
G&S Technologies is a major commercial storer located on a site below the 100 year flood plain. The generated waste by their customers and stored at their site on an ongoing basis mandates that they have EPA approval, Trust fund, Closure Plan, etc. This data has been well documented to USEPA Region II."

EPA response:
As stated in reply to 1, above, G&S is not a "Commercial Storer of PCB waste" as that term is specifically defined in the federal regulations. They would be a commercial storer only if they received PCB waste in the form of undrained PCB-Contaminated Electrical Equipment or other PCBs and/or PCB-Contaminated waste.

Despite G&S's unquestionable and documented status based on EPA Region II's own file documents, G&S has been a major PCB commercial storer for at least the past 10 to 15 years and has been left untouched.

b) G&S's November 8, 1999 Letter.

The components of the scheme further were documented in a certified letter, dated November 8, 1999, from Jay Spector, General Counsel (REX 479 (R000139-R000142), admitted at Aug. 19, 2003 Tr. 106), who personally thanked Finnegan "for setting up this meeting," which occurred November 1, 1999. This meeting, which would have been Finnegan's fourth visit to G&S (based on Region II's prior inspections and reports of October 1998 and two inspections in April 1999), was noted as "a compliance visit only...with no inspection." REX 478, Aug. 20, 2003 Tr. 68-70. G&S's November 8, 1999 letter to Finnegan stated in part:

> It was a pleasure meeting with you, Dave and Dan last Monday to work out the proper arrangement for accepting "in service" transformers for surplus evaluation. In accordance with your request, enclosed please find a copy of our Notification of PCB Activity dated 9/21/99 for "small" commercial storer status. In addition, enclosed is a copy of the revised page of our Fact Booklet (which has already been amended) describing the

surplus/evaluation arrangement, naming us as Generator for any surplus evaluation units testing over 499 ppm PCB.

Thank you for setting up the meeting, which clarified how we should handle the "in service" surplus units.

(Emphasis added). The surplus/evaluation arrangement was revised to reflect that all shipped surplus transformers "are NOT DEEMED SCRAP..." stating:

4. *Surplus/Evaluation Arrangement* – Under this arrangement, you may ship to us untested undrained surplus transformers that are NOT DEEMED SCRAP for evaluation by us for potential rebuilding, resale or for use of spare parts or scrap. Once the units arrive at our facility, we will perform a GC Test by our certified laboratory to determine PCB level of the unit. Only units testing <50 ppm PCB will be further evaluated for surplus value which may be resold, repaired, used for parts or scrapped in our incinerator, at our discretion. Units testing 50>500 ppm PCB will be drained of all free flowing liquids and the liquids will be disposed of at Safety Kleen (see Disposal of Debris). The drained PCB-contaminated units will be disposed of in our metal reclamation furnace (see incineration above). Units testing 500 ppm PCB and over will be removed from service and disposed of by us at a licensed TSCA facility, naming us as generator.

REX 479 (R000142) (emphasis of third sentence added, admitted at Aug. 19, 2003 Tr. 106:15-16. Thus even though G&S's surplus/evaluation arrangement pre-designates all oil filled (un-drained) PCB-Contaminated units (50≥500 ppm) and PCB units (500 ppm+) for disposal, both Region II and G&S would simply ignore such intent or designation, and instead "deem" or pretend that such equipment would be acquired and transported to G&S for purposes of **resale only.**

c) Region II's Investigation.

On November 18, 1999, Kraft, Finnegan and Greenlaw returned to G&S to conduct an inspection. See REX 480, Aug. 21, 2003 Tr. 137-139. Region II's inspection report noted:

Are the "surplus" transformers coming in to G&S for evaluation or for disposal?

> **Although G&S receives most transformers for scrap/salvage/disposal purposes, the surplus equipment comes in for evaluation and potential resale. G&S analyzes the PCB content of these surplus transformers at their facility. Although the transformers can legally be resold, it is G&S's policy to dispose of any that are over 50 ppm, rather than attempt to resell these, since they feel the market is very limited for these particular items. The other equipment (under 50 ppm) is sold only to dealers who rebuild transformers, never to the public, because G&S cannot guarantee from first-hand knowledge that the equipment is actually in good working condition. Any surplus unit over 50 ppm but less than 500 ppm is pumped out by G&S and then treated as a drained scrap unit. They do not resell any equipment that G&S has received for disposal.**

REX 480 (R005154A, R005154-R0054155A) (emphasis added). Thus, ten days after the certified letter was written that formalized the understanding of the Surplus/Evaluation arrangement, Region II returned to G&S to inform G&S that "the original owner," such as the utility, could "retain no control over the fate of the material...G&S cannot buy something as surplus that has been predesignated for disposal." As stated above by Greenlaw and as confirmed in Region II's inspection report (prepared by Finnegan) during a meeting on November 18, 1999 in which Kraft attended, all EPA officials were aware that G&S's surplus arrangement would not be permissible if the utility controlled or "predesignated waste for disposal."

d) Region II Discussions with CID.

Starting on July 27, 2000 (REX 610 (HQ CID 34), admitted at June 29, 2003 Tr. 6-7) through February 2001, Dillon provided copies of his Investigative Activity Reports and discussed the facts and circumstances of the G&S Criminal Inspection with Greenlaw, Kraft and Finnegan. (June 29, 2004 Tr. 26:10-19, 156:20-157:14, 202:4-10, 88:22-89:17, 91:10-92:23). Dillon's reports unequivocally confirmed that G&S was not taking ownership of the units and did not have full control, but that regulated units were intended for disposal. § II.D.3, infra; (June 30, 2004 Tr. 336:25-344:20). Thus, G&S was a commercial storer.

e) Region II E-mails.

Starting on May 2, 2001 and ending on May 14, 2001 a series of emails were initiated by Finnegan to EPA Headquarters to counter the enforcement action recommendations of EPA Region V, which conducted an independent-unbiased inspection of G&S on December 14, 2000.[18] See Sept. 10, 2003 Tr. 161:1-162:8, 176:11-182:11; Sept. 11, 2003 Tr. 239:13-23, 241:18-242:6-245:9, 250:10. Region II's efforts to challenge Region V's findings included:

(a) Finnegan's e-mail, dated May 2, 2001, to Simons (HQs) and Region II (Kraft and Ken Stoller), which stated:

> It seems Region V is taking the position that surplus transformers that are brought for resale but are eventually scrapped instead must be treated as commercially stored material.... Region II does not agree with this position since it is documented that the transformers were bought as "surplus for resale". It is our position that the buyer of such material can later scrap it if he so desires, and that any waste is generated by this new owner rather than commercially stored. We have coordinated with your office on this issue in the past, and you have supported our position. The purpose of this request is to update you on the situation and to verify that your support remains in place.
>
> The basic question, in summary, is this:
>
> A full, untested transformer is bought for resale – the bill of lading states it is surplus for resale.
>
> Upon receipt by the buyer, the transformer is tested and is found to be over 500 ppm. The buyer decides to drain and scrap the transformer, rather than attempt to resell it. Is the drain oil—
> (1) commercially stored since the buyer did not actually resell it?—or –
> (2) generated by the new owner?

REX 459 (R004931), admitted at Aug. 20, 2003 Tr. 277:17-19; REX 459 (R004932).

(b) In response, questions within EPA HQs (Peggy Reynolds and Simons) about G&S were raised:

[18] See Region V's recommendations, REX. 458-459, admitted at Aug. 20, 2003 Tr. 251, 277.

Tom: I got half-way through R2's document and found that one question kept haunting me. Did G&S have a "purchase" policy; i.e., did they intend to purchase only <500 transformers for the purpose of resale? If so, they should have made efforts to determine, prior to purchase, whether the PCB concentration was <500 ppm. On the other hand, if G&S' intent was to purchase any transformer, resell those <500 and scrap 500 ppm or greater, then G&S' motives are questionable (as R5 has done) regardless of the statements on the bill of lading.

Seems to me, if I were an entrepreneur and my business was to purchase and resell <500 ppm transformers for continued use, I would not acquire units that were not in compliance with my business plan. On the other hand, if my business plan was to acquire any transformer, sell those that I can for continued use and scrap the remainder, then I would make sure I had the appropriate permits, etc. to avoid potential run-ins with the law.

REX 459 (R004930), admitted at Aug. 20, 2003 Tr. 258-264 (emphasis added).

(c) Region II (Finnegan) further responds to EPA questions, stating:

G&S does have a predetermined plan of how they will deal with the surplus transformers once they are evaluated.

All units purchased for resale come into the facility untested. (In contract, it is interesting to note that units purchased for scrap are all tested prior to receipt).

As Peggy says, if it is their intention to scrap anything over 50 ppm anyway, it would make sense to determine that before they get the units. Our question is: is it legally required? Their motives might be "questionable", but does this constitute a legally supportable violation? It is our position that it does not, since the seller clearly states on the shipping paper that the units are "surplus for resale" and the new owner of a transformer can do with it as he pleases (within TSCA of course!). In all fairness to them, the records show that the bulk of the transformers they buy as surplus do turn out to be under 50 ppm.

REX 459 (R004929) (Finnegan's e-mail dated May 3, 2001).

(d) Region II's (Finnegan's) response to Simons noted:

Tom,
Your Question: Why were the transformers surplused?
Answer: I don't know the answer in all situations. We did not interview every seller. I did follow up with at least two utilities who stated that they knew they were selling for resale. These sellers gave me several scenarios for transformers to be surplused:

- they are obsolete in an updated system
- they are the wrong size for new service lines
- they were extras that have not been needed

- they were damaged (knocked off pole, etc.) – the utility's repair shop gets overstocked and they sell off some of them
- etc. etc. etc.

> In any case, our concern is that we would have to document a violation in order to take a case. The fact remains that these transformers are identified as surplus by the seller and shipped on a bill of lading. This indicates that the seller considers them to be surplus and NOT waste. There is no documentation to SHOW it was really considered a waste. Since many of the sellers are in other regions, we did not inspect them to see if they had misled us on the bill of lading. I understand that CID did, in fact, interview sellers across the country and they found no documentable violations. Since most of these same utilities ship many other transformers to G&S for scrap, it makes sense to me to "trust" them that they considered these surplus to be potentially reusable.

(REX 459 (R004935), Aug. 20, 2003 Tr. 267-270 (emphasis added)).

(e) Based on this erroneous information provided by Region II, HQs (Peggy Reynolds) finally noted:

> Although we all suspect that something isn't quite right at ***, in the absence or proof that would support these suspicions, we agree with Region II that *** can dispose of the drained oil as the "generator" of the waste.
>
> Since HQ has concurred that *** is the generator, and since the enforcement recommendations were based on commercial (i.e., non-generator) storage issues, there is no basis for further enforcement action.
>
> We did note that *** purchases units that are assumed during use, in the absence of test data or knowledge, to be >50, and that by the time testing is conducted, the units are in ***'s possession. Given that their "business" plan for units which test at >50 is to drain and scrap those units, one might make the argument that waste was "purchased." However, in order to prove that point, Region II would have to get statements either from *** employees or the original owner/employees that:
>
> a verbal/written agreement existed between the two parties to disguise the act of disposal as a sale for reuse with a "charge back" clause for units that must be sent off site for disposal; or
>
> the original owner should have known the units(s) were >50 and that they are not intended for resale.
>
> Region II CID has looked into getting incriminating statements from the sellers, and the issue has been closed.

> Finally, a back door approach to finding out what was known and when might be to find out if documentation exists that shows compliance with the DOT manifest requirements for hazardous material. Although we can't quote the DOT regs, we believe DOT requires that hazardous materials (in this case PCBs – we think at 50 ppm or greater) be manifested during transport and that vehicles be marked with a hazardous materials label.

REX 459 (R004940) (Reynolds e-mail dated May 10, 2001), Aug. 20, 2003 Tr. 282-285.

In summary, if, like Region II, one suspends all logic and pretends that the PCB-contaminated units are not really PCB-contaminated until they are tested and PCB units are not really PCB units until they are tested, then one can further pretend that the original generator utility company, which intends that all PCB-contaminated and PCB waste to be disposed, is not really the "generator" of that waste until tested – at which time the disposal facility, such as G&S, becomes the generator. Region II's positions, however, were contradicted by statements given to CID. Dillon confirmed that Finnegan even advised Mr. Bushofsky of Duquesne that "any transformer over 50 ppm tested or untested must be manifested," thus, demonstrating her full understanding of the applicable regulations. June 29, 2004 Tr. 161:1-163:10 (emphasis added); REX 610, HQ CID 16 (interview report dated November 9, 2000); June 29, 2004 Tr. 6-7.[19] Notwithstanding such acknowledgement, Region II and the testimony of Finnegan only highlight the extremes Region II has taken to perpetuate this fiction and to impermissibly rationalize a means for G&S to avoid being a commercial storer.

Ignoring the clear documentation and evidence within Region II's own files at the time, the above e-mails clearly document the extensive lobbying efforts by Region II (Finnegan) in providing EPA Headquarters with patently false information regarding G&S purchasing or

[19] Finnegan's notes with Duquesne state clearly that all equipment sent from Duquesne to G&S was intended for disposal. REX 413 (R003173-R003174), admitted at Aug. 19, 2003 Tr. 325-331. Utility contracts with G&S expressly state that the shipments from utilities to G&S were for disposal. REX 485, Aug. 20, 2003 Tr. 135; REX 462, Aug. 20, 2003 Tr. 298; REX 406, Aug. 19, 2003 Tr. 165.

receiving units for **resale and not disposal.** EPS does not dispute the fact that equipment purchased for **resale** would not be considered commercially stored if later disposed. However, of the numerous bills of lading and utility shipping records documented in the record, not one bill of lading by the original owner to G&S indicates that such units were intended for "**resale**." REX 408, 411, 413, 415, 420, 433, 470, 471, 472, 473, 475, 476, 477,482 and 484; June 19, 2003 Tr. 108:18-109:14, 112:7-113:16 (Simons). Moreover, the numerous utility contracts and statements to EPA proved that G&S received PCB waste intended for disposal. See discussion §II.D.3.a. None of the related shipping papers indicate "clearly [or otherwise that] the units were for **resale**" as Finnegan had repeatedly and incorrectly stated in her emails to EPA Headquarters.

In fact at the time of writing these emails, Finnegan was most likely aware of Dillon's CID Reports, which confirmed statements by the utilities that its shipments of PCB waste were intended for disposal. All of the shipping papers in this chart are in the Appellant Exhibits referenced above. REX 610 and the testimony of Dillon (June 29, 2004 Tr. 6-7), unequivocally show that the four utilities interviewed were shipping units with PCB levels greater than 50-ppm PCBs for the sole purpose of disposal. See Dillon testimony, June 30, 2004 Tr. 336:25-344:20.

Thus with a full knowledge of the regulations, Finnegan in her emails repeatedly and erroneously asserted that the units were purchased for **resale** to get concurrence on her interpretation of the regulation. Finnegan (with the full support of Greenlaw and Kraft) contrived and misrepresented these facts to support an interpretation of a regulation that is not applicable to oil filled (un-drained) PCB waste purchased or transported to G&S for the sole purpose of disposal. The record is now complete and the complainant has not presented one document or any testimony from G&S or any of its customers to support the notion that G&S purchased or acquired only oil filled (un-drained) units greater than 50-ppm PCBs for **reuse or**

resale. If in fact G&S's customers sold units greater than 50-ppm PCBs specifically to G&S for **resale or reuse** the EPA could have simply requested copies of G&S's or the original owners' annual PCB document logs, as required by § 761.180 (2) (IX), which requires that "whenever a PCB Item... with a concentration of [>]50 ppm is distributed in commerce for reuse..., the name, address, and telephone number of the person to whom the item was transferred, date of transfer, and the serial number of the item or the internal identification number, if a serial number is not available, must be recorded in the annual document log...." Curiously, no document to date indicates that EPA Region II ever requested such log, or that such a log was ever maintained or inspected.

f) Hearing Testimony.

At the hearing Finnegan was asked to reconcile the G&S surplus/resale arrangement (discussion at §III.D.2. and §III.D.4.a.) with Duquesne's use of a manifest. In response, Finnegan reviewed a Duquesne manifest, and explained that the use of the manifest "was a mistake on the part of Duquesne; that it should have been on a bill of lading. ... As far as I'm concerned, it is now not a waste; therefore, no Certificate of Disposal is required. No commercial storage has occurred." Sept. 11, 2003 Tr. 181:16-192:20. See also Region II inspection of G&S conducted by Region II TSCA officials on April 18, 1999 and EPA's inspection report of G&S prepared on June 01, 2000 by Finnegan (REX 412),

stating:

He stated that G&S's first and only client currently under contract for this type of resale business is Duquesne Lighting, a utility in Pennsylvania. To date, G&S has received three such loads of "surplus" material from Duquesne. We viewed the incoming bills of lading for these three loads and noted that the transformers came in to G&S's facility filled with oil and untested for PCBs, as Spector had described.

We asked to review paperwork for a 2-19-99 shipment of transformers from Duquesne Lighting, and noted that the load came in on both a bill of lading and a manifest - the transformers were filled with oil, and neither paper indicated that the transformers were for resale as opposed to the disposal typically indicated by the presence of a manifest. Spector explained that they never take filled units over 50 ppm for disposal; the fact that these ones came in on a bill of lading indicates that they were in service (surplus to be sold for rebuilding). He stated that the use of a manifest was a mistake on the part of the Duquesne employee, since this was the first load he had sent and he was unsure of the necessary paperwork. Subsequent to the inspection, EPA contacted

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REX 412, admitted at Aug. 19, 2003 Tr. 319-320:

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Mr. Jim Bushofsky of Duquesne and inquired about the shipment. Mr. Bushofsky explained that the transformers were surplus for testing and possible resale; he stated that it was the first shipment they had ever sent to G&S, and that he erred by preparing a manifest and by not noting that the equipment was surplus on the shipping papers. (attachment 4). We noted that paperwork for the subsequent loads indicated that they were "surplus". Spector also explained that some utilities (e.g. Cinergy) insist on all loads being transported on a manifest, whether the regulations really require it or not.

In the paperwork we reviewed, we noted that of the surplus transformers in the Duquesne load, test results indicated that twelve of them were PCB-Contaminated and one was a PCB Transformer over 500 ppm. Spector explained that any transformer over 500 ppm is rejected by G&S, and that in such a case, the responsibility for disposal reverts back to the original owner. G&S personnel assisted Duquesne in disposing of this PCB Transformer by finding a disposal company and arranging for proper TSCA disposal. Duquesne sent a signed manifest to G&S, and the transformer left the G&S facility under a manifest that represented it as going from Duquesne Lighting, PA (listed as generator) to Safety Kleen (Philadelphia, PA) for disposal (attachment 2, item 6). Subsequent to the inspection, EPA contacted Mr. Ed Kappler of Duquesne, who verified that their agreement with G&S (which was not in writing) did include the understanding that any transformer over 500 ppm would be disposed at Duquesne's expense (attachment 5). Mr. Kappler further stated that while he was "open to the idea" of the under 500 ppm transformers being resold, he would want to check with his legal department before this occurred.

As documented in the CID Reports and Dillon's testimony, EPA Region II's June 1, 2000 inspection report was incorrect - - and a blatant effort by EPA Region II to defend G&S and itself against charges of wrongdoing by EPS. As Dillon testified, Finnegan actually called Duquesne to advise Duquesne that a unit on the fifth shipment tested at greater than 500 ppm PCBs and that all units over 50 ppm PCBs tested or untested must be manifested. June 29, 2004 Tr. 161:1-163:10. CID Reports indicate that five of the eight loads had been manifested and that a fifth load should have been manifested. REX 610 (HQ CID 19). In addition to the above, Finnegan had in her possession prior to June 1, 2000, the following documents: REX 413 (R003175, R003170-74, R005185-5192); REX 416 (R003158-3159) and REX 484 (R003348). These documents all state unequivocally that Duquesne had no surplus evaluation arrangement with G&S and that Duquesne was not selling G&S regulated PCB equipment for **resale**. Finnegan's own notes of her interviews and Dillon's own interview reports with Duquesne document that Duquesne had shipped all oil-filled equipment to G&S for disposal - - not resale. REX 413 (R-003173-3174) (stating G&S had "better not" resell equipment and "flat-out" Duquesne's "intention" is for disposal); REX 610 (HQCID 20).

Thus the cover-up continued and despite having solid evidence, Region II failed to enforce the PCB regulations with respect to G&S, or to take any enforcement action. Instead Complainant is asking this court to accept Region II's false testimony to support G&S's receipt of oil filled (undrained) units greater than 50 ppm PCBs for the purpose of **resale** in order to defend Region II's position of no wrongdoing and to attack the credibility of EPS. This assertion is simply unfounded and is contrary to the plain language of the regulations, the facts and testimony of EPA's own expert, as EPA's own independent and unbiased inspection by Region V concluded and EPS had alleged all these years.

EPS was and has been steadfast in its resolve to require that the TSCA regulations be equally enforced with respect to similarly situated facilities. Notwithstanding such resolve, all efforts on the part of EPS failed to result in any meaningful investigations of G&S. Rather than spur EPA to investigate G&S, EPS's persistence was viewed as an annoyance and inconvenience by the EPA. EPA officials described the submission of evidence regarding G&S' violations by EPS as "their [EPS's] blitz mode" and "This company [EPS] is costing EPA (and the public) undue expense!" REX 455 (R-006326). Further, e-mails between Finnegan and Lisa Jackson noted that EPA just wanted EPS to "go away." REX 451 (R-006874). Lisa Jackson in her e-mail to other EPA officials (William Musszynski, Walter Mugdan, Ken Stoller, Finnegan and George Pavlou) stated "After a lot of aggravation, I was able to open this letter. I assume that Reed is sending a hard copy but I intend to confirm this by responding to his email. Not surprisingly, after reading the Region V inspection report." REX 449 (R-004590).

2. EPS's Exercised its Constitutionally Protected Rights to Challenge and Question EPA Region II Officials' Failures to Properly Investigate G&S and to Enforce the TSCA PCB Regulations.

After all efforts at requiring the EPA to enforce its regulations against G&S had failed, EPS requested a full investigation of the EPA Region II staff. REX 432, admitted at Aug. 20, 2003 Tr. 372. By letter of March 22, 1999, EPS requested that the OIG investigate Region II staff's relationship with G&S. Aug. 20, 2003 Tr. 370-376. Neither Kraft nor Finnegan, lead inspector responsible for G&S, were ever questioned by OIG regarding their involvement with G&S. Id. at 227:2-227:17, 354:22-356:6. To avoid any conflict, Kraft testified that Greenlaw and he were immediately removed from any involvement with G&S; however, Finnegan continued her responsibility as the lead inspector responsible for G&S. Id. at 227, 275. The request for an internal investigation resulted in neither greater scrutiny of G&S nor an inquiry

into the relationship between G&S and Region II officials; rather, the request resulted in two inspections of EPS's Wheeling, West Virginia facilities.[20]

E. EPA Region II Pressures Region III to Pursue an Enforcement Action Against EPS.

EPA Regional II officials testified that they were immediately made aware of EPS' accusations against them. Finnegan testimony, Sept. 11, 2003 Tr. 224-227, 353-356. The Region II officials conceded that the accusations deeply angered them. Kraft testified that he was "**very upset**" about the request for an investigation. Id. at 354. He also was oddly concerned about the impact that EPS's continued submission of evidence regarding G&S's noncompliance was having on G&S's finances.[21] Finnegan also shared EPA's concerns that it had "dedicated an enormous amount of resources to looking into this." Id. at 229-230.

At the Hearing, Webb testified that EPA's Regional Offices operate independently of each other. June 17, 2003 Tr. 190-191. Nevertheless, Region II officials showed an acute interest in Region II, EPS, its enforcement history and the EPA's June 2001 Complaint. In all of the FOIA requests of EPA and testimony in this complaint, with over 18,000 EPA employees, Kraft was the only EPA employee outside of Region III with an interest in an investigation being pursued by Region III and a complaint being filed against EPS. Kraft admitted that just weeks after EPS's request for an investigation of Region II, he instructed a member of his staff to perform a complete compliance check on EPS. Sept. 11, 2003 Tr. 299:12-301:18. Kraft "asked Linda Hall, who is our branch data coordinator, to inquire from Mr. Johnson the inspection status or inspection history and enforcement history of EPS." Sept. 11, 2003 Tr. 303:10-13. Although

[20] EPS was inspected by the EPA in July and November of 1999.

[21] On a subsequent occasion, Mr. Kraft testified about his further interest in saving G&S money, commenting that x-raying the whole container to determine if G&S was transporting/exporting oil-filled units would cost G&S extra fees. Mr. Kraft testified, "The costing G&S more in extra fees was a comment I made, based on my belief. They talked about x-raying the whole container and maybe x-raying all of the containers. If that's done, my -- my understanding was that the exporter would be charged in extra fees." See Sept. 11, 2003 Tr. 365:21-366:2.

such information could not possibly have been relevant to any Region II matter, Kraft testified that he was simply "curious to know whether they [EPS] had been inspected and -- and what their [EPS] compliance history was." Id. at 303:24-304:1 (emphasis added).

On July 15, 1999, a little over ninety days after EPS formally requested a full investigation of PCB enforcement officials in Region II and shortly after Kraft's inquiries to Region II about EPS, Region III inspectors (McPhilliamy and Rice) were ordered to conduct an inspection of EPS. CEX. 7. McPhilliamy's and Rice's inspection reports indicated that the reason for EPA's inspection was because of a "Special Request by the Regional Office Toxics Programs and Enforcement Branch," and that EPS originally was not on the pre-planned list of facilities to be inspected during 1999. June 17, 2003 Tr. 192:18-193:19. Then again, on November 2, 1999, McPhilliamy and Rice inspected EPS for a second time. CEX 11. There was no indication following either of the 1999 inspections that Rice or McPhilliamy had found any violations at EPS. CEX 7; CEX 11. McPhilliamy's inspection report confirmed that EPS was not advised of any of EPA's findings from the July 1999 inspection. Contrary to EPA's own PCB Inspection Manual at 3.8,[22] no closing or exit interview was ever conducted.

Although EPA in its Complaint charges EPS with major high level violations, following EPA's investigations, EPA's first contact with EPS was a meeting on August 30, 2000 with EPA Inspector McPhilliamy (nine months after the November 1999 inspection). This meeting was initiated by Scott Reed EPA. During the meeting, McPhilliamy mentioned for the first time a concern about the furnace temperature and times, as documented in EPA's report (CEX 14) prepared by McPhilliamy, dated October 2, 2000, and later testimony of Scott Reed and McPhilliamy. June 18, 2003 Tr. 14:8-17:17, 52:13-54:15 and August 18, 2003 Tr. 47-48. EPA's report also confirmed that EPS was not made aware of the potential storage violations. The

[22] http://www.epa.gov/compliance/resources/publications/monitoring/tsca/manuals/pcbinspect/

record is complete, and the EPA has made no attempt to explain why, if EPS was committing major PCB storage violations, EPA would not have advised EPS of such a "major" concern during the two-year period leading up to the issuance of EPA's Administrative Complaint in June of 2001.

F. EPA Singled Out EPS and Brought an Unsupported Complaint Against EPS.

In pursuing this baseless Complaint against EPS, EPA selectively singled out EPS for enforcement because of EPS's own complaints.

In August of 1998, Keith R. Reed,[23] President of EPS, met with David Barto ("Barto"), EPA Region III Inspector, and presented Barto with a handwritten document (REX 422 (R2782-2783) summarizing violations by Allegheny Energy, located in Connellsville, Pennsylvania, for shipping oil filled (un-drained) PCB-Contaminated transformers to G&S in New Jersey on a bill of lading and used a transporter that was not licensed to haul PCB waste. Reed testimony, Aug. 20, 2003 Tr. 311-315. Barto recommended that Reed return to discuss this issue with EPA Region III Inspector McPhilliamy. Id. That same week Reed returned and advised McPhilliamy of the significant and detrimental harm being suffered by EPS and other PCB disposal facilities as a result of G&S not being required to conform to numerous PCB regulations. Id. Reed informed McPhilliamy that for the previous two years EPS had attempted to get Region II to require G&S to operate in accordance with current PCB regulations, but all efforts had failed and EPS was not getting any cooperation from EPA Region II officials. Id. McPhilliamy stated that since the PCB regulations had been in place for almost twenty years, it was hard to conceive of these types of violations. Id.

After Region III officials failed to provide a reasonable explanation for its non-enforcement of the PCB regulations with respect to G&S, EPS, in September of 1998, began

[23] Unless otherwise noted, all references to Keith R Reed will be noted as "Reed."

contacting Region II officials directly and providing Region II with significant evidence that G&S was violating the PCB regulations, including, but not limited to, the improper use of bills of lading for the disposal of PCB oil filled electrical equipment, without use of manifests or licensed hazardous waste haulers as required by §761.208. Id. at 341-346.

For example, EPS provided EPA with a copy of G&S's Surplus/Evaluation Agreement, given by G&S to its customers. The G&S Agreement stated that "units testing greater than 50 and less than 500 will be drained of all free-flowing liquids and the liquids will be disposed at Safety Kleen and they will go through their furnace. REX 479 (000142); Reed testimony, Aug. 19, 2003 Tr. 89-100. This provision is a specific admission and acknowledgement by G&S that PCB-contaminated and PCB oil-filled electrical equipment were being shipped and received by G&S for the sole purpose of disposal. Despite this fact, G&S neither notified the EPA of its storage and disposal of PCB contaminated and PCB oil filled electrical equipment at its Kearny, New Jersey facilities, nor used the proper documentation (manifests), or licensed haulers when transporting PCB contaminated and PCB oil-filled electrical equipment. Id. Once again, the evidence submitted by EPS to Region II failed to result in any meaningful investigation or enforcement against G&S. Id. at 89-100. G&S was allowed to operate without a PCB commercial storage authorization, and was able to receive regulated PCB electrical equipment waste without manifests and without licensed haulers, as required by TSCA. Id.

EPS's persistent efforts to seek enforcement of TSCA remained unheeded. Reed, by letters and phone calls, began contacting the Office of Inspector General ("OIG") and providing OIG documents regarding G&S's violations of the PCB regulations. Id. The information submitted by letter, dated March 22, 1999, from EPS was provided to Paul Zammit of OIG, who eventually turned the documents over to George Pavlou ("Pavlou"), Region II's Division

Director of DECA in February 1999. Reed testimony, Aug. 20, 2003 Tr. 349-351, 355-358. Several months later, July 1999, EPA initiated its first investigation of EPS. EPA's Complaint was not brought until after EPS strongly criticized EPA for its lack of enforcement efforts during a September 15, 2000 meeting at EPA's office on Broadway in New York, as further discussed herein and §II.D.7, infra. See also, June 17, 2003 Tr. 133-134; June 19, 2003 Tr. 21-50. Moreover, prior to the September 15, 2000 meeting, EPA had developed no new evidence with respect to EPS and never expressed any concern about EPS's compliance status.

During the Hearing, James Webb ("Webb"), EPA Region III Director for Enforcement in the Waste and Chemical Manifest Division, testified that he first became aware of EPS following the completion of EPA Region III's investigation of EPS in July and November 1999, when he received a recommendation four to six months following EPA's inspections. Webb testimony, June 19, 2003 Tr. 29. However, based on this recommendation, Webb testified "...[i]t appeared that there was insufficient information to move forward. And just like in any other case...we would move forward and continue the investigation and prepare the enforcement action." Id. at 45:10-16 (emphasis added). This lack of factual, substantive evidence is also underscored by the testimony of EPA Region III Inspector Rice, who testified that following his inspections in July and November of 1999, he neither requested nor received any additional information to clarify any of the allegations eventually raised in the June 2001 Complaint. REX 558 at 60-71 admitted and discussed at Aug. 21, 2003 Tr. 279-280. EPA witness Aquanetta Dickens also testified during the Hearing that she did not recall reviewing any additional evidence. Dickens testimony, Sept. 10, 2003 Tr. 123-124.

The impact of EPA's failure to request and obtain any further information regarding the PCB concentrations, weights, and ultimate disposition of any unit allegedly stored in EPS's PCB

commercial storage area on July 15 and/or November 2, 1999, is that EPA filed its Complaint without sufficient factual evidence. (See §IV, supra). Thus, if the June 2001 Complaint was not supported by any evidence of a violation on September 15, 2000 or any additional evidence at the time the Complaint was filed, as stated by Webb (June 19, 2003 Tr. 45-46), then EPA's underlying reasons and purpose for its Complaint against EPS must be seriously questioned, and can be answered with only one inescapable conclusion: The June 2001 Complaint was filed against EPS to punish EPS for its audacity in questioning and exposing Region II's failures to enforce the PCB regulations against G&S and accusing Region II officials of wrongful conduct based on its non-enforcement of G&S and favorable treatment of G&S.

Indeed, while Webb testified that during the September 15, 2000 meeting, participants did not discuss EPS's compliance status or any issues regarding the two 1999 inspections of EPS during the New York meeting (Id. at 32-33; 45-46), the record is clear that between the September 15, 2000 meeting and the date Webb executed the Complaint, the EPA collected NO additional evidence with respect to EPS.

As demonstrated during Webb's testimony, there was insufficient information during the New York meeting to issue a Complaint against EPS. As also demonstrated by the testimony of Rice and Dickens, no additional evidence was collected to support the Complaint after the New York meeting. The only additional information that was received by Region III between the time the inspections took place in 1999 and the time the Complaint was filed in June 2001, as discussed below, were: (a) EPS's persistent efforts to have EPA Region II officials investigate a competitor's violations of the PCB regulations; (b) EPS's persistent efforts to have EPA Region II officials themselves investigated for their failures to enforce the PCB regulations with respect to G&S; and, (c) Region II's efforts to inquire about and pressure Region III officials to

prosecute an enforcement action against EPS in reaction to EPS's charges of wrongdoing at the September 15, 2000 meeting.

G. EPS Exercised its Constitutionally Protected Rights to Complain About EPA Region II Officials and Their Lack of Enforcement.

EPS was not dissuaded by EPA's two investigations of its facility and in August 2000, Reed sent a fax to McPhilliamy requesting a joint meeting with Scott Rice and Marty Robins of the Criminal Division of Region II EPA. Aug. 21, 2003 Tr. 40:20-42:20; REX 441, admitted at Aug. 21, 2003 Tr. 42. The letter explained that EPS had lost its largest utility customer, GPU, which EPS had serviced from 1990 to August of 2000. Id. EPS alleged that GPU, which had shipped all oil filled untested units to EPS on hazardous waste manifests for ten years, had decided to ship such waste to G&S on bills of lading because G&S did not have a PCB Commercial Storage Permit, an allegation which was confirmed by Dillon's (CID) interviews with GPU. Reed Testimony, Aug. 21, 2003, Tr. 27-32; Dillon Testimony, June 29, 2004 Tr. 75-151; REX 610 (HQ CID 21-HQ CID 27).

On September 15, 2000, EPS met in New York City at EPA's offices. In attendance at that meeting were: William Muszynski ("Muszynski") (Deputy Regional Administrator); George Pavlou ("Pavlou") (Director-Division of Enforcement and Compliance); and his counterpart in Region III, James N. Webb ("Webb") (Associate Director for Enforcement, Waste and Chemicals Management Division). At this meeting, EPS advised EPA that there was a well-documented case against G&S in EPA's files dating back to 1980. Reed testimony, Aug. 21, 2003 Tr. 91:12-92:17. EPS reiterated the two main themes that had been discussed with various Region II officials over the previous several years: a) that for the previous ten years G&S violated even the most simple of PCB regulations, which was the failure to notify the EPA of G&S's commercial storage activities; and b) that since EPA had now changed its position and

acknowledged that G&S had received oil filled PCB-contaminated units, based on all of G&S's utility contracts it would be impossible for G&S to keep below the 500 gallon limit of the regulations. EPS further advised EPA that: a) G&S was the largest receiver of electrical equipment in the United States, receiving approximately 150 to 200 thousand units on an annual basis; b) it took only about ten to fifteen oil filled units to reach the 500 gallon threshold limit; and c) in EPS's operations, which received less than one-third of the units G&S received, EPS received an average of 5,000 gallons every seven days. Reed testimony, Aug. 21, 2003 Tr. 93:21-94:14. Further, EPS advised the participants that G&S was required by G&S's air permit to file quarterly operating hours on G&S's furnace. Id. at Tr. 145-47. The records showed a maximum operating average of eight hours a day for five days a week. In comparison, EPS operated its furnace 24 hours a day and had a factor of two times the capacity of G&S's furnace pursuant to the permits. Thus when one factored in the 3 to 1 ratio of receipt of electrical items, G&S's furnace had an effective productivity gain ratio of 18 to 1. In other words, G&S's furnace had 18 times more material to burn than did EPS's, but operated less than 1/3 of the time that EPS had to operate in order to maintain compliance with the PCB regulations. Id. at Tr. 94:11-95:3. EPS also informed EPA of a letter G&S sent to its various customers at the time of the mega-rule advising G&S customers to store their PCB-Contaminated units for processing in the fourth quarter of 1998, and that instead of one burn it would now take three burns to process completely a contaminated transformer in accordance to § 761.72. REX 403, 404, admitted at Aug. 19, 2003 Tr. 137-150. Despite the tripling of burn time and the large amount of electrical equipment processed by G&S, G&S's records showed a reduction in burn hours in the fourth quarter of 1998.

At the conclusion of the meeting, Muszynski advised all parties that he would make straightforward efforts to conduct a thorough investigation of the allegations, and stated that it was totally inappropriate for Pavlou to have used his staff (that was accused of wrongdoing) to conduct the inspections. Reed testimony, Aug. 21, 2003 Tr. 97:1-100:2. Muszynski advised the participants that he would arrange for an independent inspection of G&S utilizing EPA staff from the National Enforcement Investigation Center ("NEIC"), located in Denver, Colorado. Id. at Tr. 100:3-101:13, 103:19-106:1. During the meeting, Webb made no reference to any alleged violations of the PCB regulations by EPS that were later raised in the Administrative Complaint.

As a result of EPS's request for an investigation and the New York meeting in December of 2000, Region V officials from Chicago (in lieu of NEIC) were assigned to conduct an inspection of G&S. Id. at 106:2-9. Correspondence between Region V and Region II officials clearly show that Region V officials confirmed the same list of violations against G&S that EPS had originally presented to Pavlou. Reed testimony, Aug. 20, 2003 Tr. 181:10-251:21. Specifically, Region V found that: (a) G&S was commercially storing transformers without the required commercial storage permit and committing other storage violations that otherwise would be addressed within a commercial storage permit; and, (b) G&S's facility was located within the 100-year flood plain in violation of the regulations. REX 457, 458; Aug. 20, 2003 Tr. 192-244.[24]

However, rather than concur with the findings of the independent inspection by Region V, Region II (accused by EPS of wrongdoing) actively lobbied and responded to e-mails from Pavlou's successor, Lisa Jackson ("Jackson"), asserting that Region V neither understood the regulations, nor understood how G&S operated and that G&S was operating in compliance with

[24] Finnegan acknowledged that Region V "made four different recommendations for enforcement action [sic] that they might look further into pursuing" against G&S. See Sept. 10, 2003 Tr. 168.

the PCB regulations. Finnegan testimony, Sept. 10, 2003 Tr. 171-191; Kraft testimony, Sept. 11, 2003 Tr. 276-280. Accordingly, NO compliance action was instituted against G&S making the Region V "independent" inspection completely meaningless, as in the end one of the very individuals accused of wrongdoing actively lobbied to thwart Region V's recommended enforcement actions against G&S.

Rather than pursue an administrative action against G&S based on the findings of an independent inspection by Region V, on June 29, 2001, Webb executed and issued a Complaint against EPS with not a shred of evidence, while EPA had full documentation in its own files to prove G&S's numerous violations of TSCA and its regulations.

Once Kraft learned of the 1999 inspections, he admits that he inquired into whether Region III was going to bring an enforcement action and whether that enforcement action would be in the form of an Administrative Complaint. Sept. 11, 2003 Tr. 357. On June 26, 2001, Kraft e-mailed Rice regarding the progress of the complaint against EPS inquiring specifically "Has it been issued?" Rice pacified Kraft and assured him that "I'm told it will go out by the end of July." Aug. 21, 2003 Tr.118-119; REX 449 (R-006330). Kraft continued to be oddly interested in the enforcement action against EPS even after the complaint was filed.[25] Sept. 11, 2003 Tr. 364. Kraft admitted that he requested a copy of the Complaint against EPS (Sept. 11, 2003 Tr. 356:13–359:22), and that he continued to inquire regarding the status of the Complaint against EPS. Kraft testified, "I had asked Aquanetta Dickens about the status of -- of the Complaint.

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[25] Mr. Kraft testified as follows:

Q. Did you ask -- did you ask to be kept apprised of the status?
A. I -- I -- I did ask Aquanetta. And I may have asked -- I may have asked the person that informed me that I would be interested in seeing a copy of the Complaint.
Q. And in fact, you inquired from time to time as to the status of that enforcement action, didn't you?
A. Occasionally. Not -- not like every week or something like that, maybe -- maybe a couple of times at National meetings --

See Sept. 11, 2003 Tr. 360:14-24.

And on this e-mail, I asked Scott [Rice] if there was any -- for any progress on the Complaint. I did not encourage them to take a Complaint; I merely asked what the status was." Sept. 11, 2003 Tr. 357. REX 455 (R006326).

H. EPA's Selective Enforcement of EPS Continued Throughout These Proceedings.

Under the Equal Protection Clause of the Constitution, any agency decision to prosecute must be based on justifiable standards. United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)). In this matter, EPA stepped well beyond the bounds of its powers. EPA in this case initiated an enforcement proceeding and undertook considerable investigation against EPS, while EPS's competitor, G&S, had effectively been given permission to violate EPA regulations by EPA officials.

EPA's actions not only violated the Congressional intent that TSCA protect public health, but also violated EPS's Constitutional rights. EPS's right to equal protection under the law was violated by EPA's selective enforcement of the PCB regulations promulgated under TSCA. See United States v. Pretty Products. Inc., 780 F. Supp. 1488, 1501 (S.D. Ohio 1991) ("To establish a claim for selective prosecution or enforcement of a statute, a claimant must establish a violation of ordinary equal protection standards.").

The selective enforcement of the law undertaken by EPA did not end with the initiation of this enforcement proceeding. The improper motivation exhibited by EPA's intentional decision not to prosecute G&S was also on display in the proceedings before the Tribunal. As set forth above, the testimony of Finnegan and Daniel Kraft only served to perpetuate the discriminatory actions taken by EPA in its prosecution of EPS and lack of enforcement with respect to G&S.

Under Cross Examination, both Finnegan and Kraft continued to testify about the simple fictitious theme that G&S was purchasing regulated PCB items (greater than 50 ppm PCB's) for the sole purpose of **resale,** when in fact Kraft and Finnegan both knew on September 10 and 11, 2003, that the documents proved that all of these units were coming to G&S for disposal only; and thus G&S was a Commercial Storer of PCB waste as defined by § 761. Kraft and Finnegan in testimony demonstrated their full knowledge of the regulations, but, nevertheless relied on the fiction that the units were for **resale** to accommodate the regulations and to protect themselves and G&S.

EPA's continued efforts to shield G&S from prosecution were not the only evidence of EPA's continued selective enforcement against EPS at the hearings before the ALJ. EPA stated in Motions submitted in this matter that EPA counsel did not have potentially relevant CID documents until the week prior to April 16, 2004. This assertion by EPA is contradicted by the testimony of Special Agent David Dillon. In Complainant's Response in Opposition to Respondent's Supplemental Motion to Reopen Hearing, dated August 20, 2004, EPA's counsel asserts:

> In addition, Counsel of Record did not receive the CID Investigative Summary Reports attached to Respondent's Motion until Respondent sent such reports to Counsel of Record one week prior to the filing of the April 16, 2004 Motion. Decisions on the releasibility of a confidential document under the Freedom of Information Act are typically made by the generator of the documents.

However, Special Agent Dillon of the Criminal Investigation Division testified that he had given the CID documents to EPA's counsel in June 2003, and that he had not been involved in the withholding or redaction of information. June 30, 2004, Tr. at 210. On June 29, 2004, Special

Agent Dillon of the Criminal Investigation Division testified to the following (June 29, 2004, Tr. 209-10):

Dillon testimony, June 30, 2004 Tr. 209-10:
Q. Mr. Dillon, the documents that we've been looking at that in some form came from your office, HQCID 4 through 51, are redacted,

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and I believe that you told me yesterday that you didn't do this redaction?
A. That is correct.
Q. And you don't know who did --
A. No, sir.
Q. -- is that correct?
When you last saw these documents in unredacted form, who did you give them to within EPA?
A. I believe that was in last June I sent a copy to Cheryl Jamieson.
Q. Anybody else?
A. No, sir. I think that's -- To the best of my recollection I think it was just Miss Jamieson.

Dillon also testified, at 19-20, that he had also met with EPA Counsel.

On September 10-11, 2003, Complainant's counsel (Lee Spielmann, Cheryl Jamieson) and EPA Region II TSCA officials (Kraft and Finnegan) with full knowledge of the contents of Dillon's Criminal Activity Reports (REX 610), containing Dillon's notes and interviews with four separate utility companies prior to the hearing, came forth in a concerted effort, to perpetuate inaccurate testimony in this proceeding. Kraft and Finnegan, with full knowledge of the facts documented in EPA's CID Reports, testified that G&S was transporting and receiving PCB regulated waste (oil filled, un-drained, PCB-Contaminated and PCB Electrical Equipment) specifically and only for resale --- even though EPA's CID Reports confirm that such waste had been sent to G&S only and solely for disposal purposes as dictated by the utility companies.

I. The Initial Decision's Findings Ignored the Record With Regard to EPA's Selective Enforcement.

In summary, to make a *prima facie* selective enforcement defense, the defendant must establish that

- Defendant was singled out while other similarly situated violators were left untouched, and
- That the government selected defendant for prosecution invidiously or in bad faith, i.e., based upon such impermissible considerations such as to prevent the exercise of the defendant's constitutional rights.

Both of these criteria as demonstrated above have been met.

a. EPS has demonstrated that a similarly regulated company, i.e., G&S, was left untouched, while EPS was singled out.

b. EPS has demonstrated that it exercised its constitutional right to seek enforcement of the environmental laws for over a ten-year period, which included numerous letters and meetings, dating from 1998.

In the context of EPS's more than ten year effort to seek regulatory enforcement of G&S, the nature of EPS's accusations of wrongdoing against EPA, the failure of EPA Region III's investigation to support its complaint and the failure of EPA to implement TSCA uniformly and clearly, EPS has more than satisfied its burden of demonstrating that it was singled out for prosecution. The above evidence was ignored by the ALJ.

a. Impermissible Intent Can Be Inferred From Evidence.

As noted by the First Circuit, "impermissible intent is difficult to demonstrate . . . when wearing its prosecutor hat, the government has a great number of legitimate, non-discriminatory reasons for the actions it takes to engage in or decline prosecution." McGuire v. Reilly, 386 F.3d 45, 63 (2004). In this case, EPA's actions and intentions have been completely

inconsistent and contradictory – on the one hand requiring overbroad and overreaching enforcement of EPS as to all of the PCB waste laws, while applying none at all to G&S. Thus, the fact that Region III hangs its "hat" on a pretextual reason to inspect EPS does not excuse in any way the Agency's failure to validly and reasonably enforce G&S. Based on the above facts, EPA had no valid enforcement reason to inspect EPS other than to selectively prosecute EPS.

b. EPA's Reason For Its Inspection of EPS Is Pretextual

EPA's pretext for its investigation was a purported concern over EPS's request to change its financial assurance mechanism. For the following reasons, EPA's concern was pretextual.

1) At all times, EPA held an irrevocable trust issued by EPS to satisfy EPS's financial assurance obligations and, thus, EPA's financial assurance interests were fully protected and controlled by the Regional Administrator of Region III. Moreover, the only change requested by EPS to its financial assurance mechanism was to substitute an insurance policy for the trust corpus; the amount of funds available to EPA for any necessary site cleanup was the same. Reed Tr. at Aug. 21, 2003 Tr. 234:6-241:8; Aug. 22, 2003 Tr. 11:8-15:8; 40 C.F.R. 761.65(g).

2) EPA's investigation of EPS in July 1999 occurred ten months after EPS requested in September 1998, to change its financial assurance mechanism. (CEX 30 at C001019);

3) During this ten-month period, EPA Region III never identified EPS to be scheduled as part of the Region's planned inspections, and the inspector was bewildered as to why he was doing the inspection. McPhilliamy Depo. REX 570 at 60:12-63:19; Rice Depo. REX 558 at 28:30-30:10.

4) EPA Region III"s inspection of EPS in July 1999 occurred three months after EPS officially requested an investigation of Region II officials to Paul Zammit of the Office of Inspector General for the EPA. REX 432;

5) EPA in all of its documentation with respect to its inspection of EPS had not generated any follow-up documentation with regard to the purported financial assurance issue.

Against this backdrop, EPA suggests and the Initial Decision contends that the purpose of EPA's investigation was a result of EPS's request for a change in financial assurance. The sole document submitted to support such contention by EPA is Complainant's Exhibit 30 at C001019-1020, a copy of which is attached hereto at Attachment C. It is significant that this document, a memorandum, is not only undated, but by utilizing at least three different font styles was in fact prepared during several periods of time. The first page of the memorandum does not reference any undue concern or alarm by EPA with regard to EPS's purported "rush" to release trust fund dollars. This is because there was no such alarm. Such concern is not expressed until the second page of the memo at C001020, which took place some time after June 24, 1999, as documented in the Memo.

Furthermore, EPA's purported concern is unfounded as it is clear that an irrevocable trust fund by its terms and the regulatory requirements found at 40 C.F.R. Part 264.151, cannot simply, unilaterally be rescinded and revoked by EPS; rather, EPS provided financial assurances for closure in accordance with § 761.65(g) wherein a "closure trust fund" was provided. As required by the regulations, EPS's closure trust fund satisfied the requirements of § 264.143(a) and § 264.151(a)(1). Pursuant to the required wording of trust agreement instruments at § 264.151, only the EPA Regional Administrator is allowed to direct the trustee to make

payments for any closure costs from the trust fund. 40 C.F.R. § 264.151 at Section 4. In addition, the trust fund is irrevocable and can only be terminated by a written agreement of the grantor, the trustee and the EPA Regional Administrator. § 17 at Id. Accordingly, EPA was at all times protected by this irrevocable trust fund, and any purported "rush" to judgment was illusory and pretextual.

c. Evidence Exists of Region II's and Headquarter's Influence Over Region III

EPS has not and cannot be privy to every single thought and conversation that has not been either documented or provided to EPS through FOIA.[26] While the Initial Decision at 45 concludes that "there is absolutely no evidence to suggest that Region II directed, or in any way influenced Region III to inspect EPS," the Initial Decision ignores the evidence which documented that: 1) Region II and its inspector, Daniel Kraft, inquired of and conferred with Region III about Region III's inspection of EPS and Region III's Complaint, which directly demonstrated Region II"s efforts to influence Region III; 2) EPS's complaints concerning G&S to Region II and Region II's responses were [all] communicated and copied to Region III; 2) Region III's Enforcement Head, James Webb, attended the meeting in September, 2000 when EPS outlined its complaints of Region II's non-enforcement of G&S, 3) all of the communications regarding Region II and G&S were also copied to and circulated within Headquarters and to Region III, and 4) Region II requested a compliance history of EPS and sought continued inquiries concerning Region III's investigations and enforcement efforts of

[26] Throughout discovery in this case, EPS's efforts to obtain discovery of EPA's dealings and communications with regard to G&S have been thwarted. EPS's Motion for Request for Production of Documents filed Nov. 8, 2001 was denied by Orders, dated Jan. 18, 2002. EPS's second Motion for Request for Production of Documents filed May 7, 2002 was denied in part and granted in part on Feb. 28, 2003. Thus, EPS was required to pursue not only formal Freedom of Information Act requests, but was compelled to challenge EPA's FOIA responses in Federal Court over nearly a three year period from June 26, 2002 through March 23, 2005. EPS's efforts to obtain further discovery by deposition also were denied by the ALJ. EPS's Limited Prehearing Requests to Take Depositions of multiple witnesses (filed Apr. 3, 2003) were substantially denied by Order filed Apr. 25, 2003.

EPS. Even the Initial Decision at 44, acknowledges that Region II had contacted Headquarters concerning EPS.

d. Denial of Non-Preferential Treatment is Not Credible Based on Facts of EPA's Non-Enforcement of G&S.

The Initial Decision at 49-51 also relied extensively on hearing testimony from the EPA Region II Inspector Ann Finnegan, who was primarily responsible for the inspections at G&S. Ms. Finnegan's self-serving testimony and references to similar testimony from Ms. Finnegan's supervisor simply denied any intention by EPA to treat G&S preferentially or less than objectively. The Initial Decision's reliance on this testimony at face value ignores the aggressive and incorrect advocacy by Region II on G&S's behalf, and the illegal justification for EPA's non-enforcement of G&S. G&S has not been regulated, which as a matter of law cannot be justified as simply discretionary enforcement or difference of opinion.

e. "Differences of Opinion" Cannot as Matter of Law Justify No Regulation Whatsoever

What is strikingly and most contradictory in the Initial Decision and the outcome of the case is that EPA's purported "routine review" of the facts learned from its inspections of EPS (Decision at 43) and its purported "valid enforcement" of a financial assurance mechanism were not at all applied to G&S which had no TSCA storage approval, had no storage limit, had no financial assurance mechanism whatsoever, and was not subject to any valid enforcement. In fact when Region II arranged for Region V to conduct a purported "independent inspection" of G&S as a "routine review," the findings of Region V were rejected by Region II. The ALJ, rather than objectively evaluating all of the evidence, which should have included the G&S records introduced into evidence by EPS and the Region V findings, chose instead to rely on the self-serving verbal testimony of the Region II investigators, whose original opinions had been challenged by Region V. The contrary views of Region V and Region II are summarily rationalized by the Initial Decision at 54 as simply a "professional difference of opinion."

A simple analysis of the record shows that while there exists no difference in interpretation of any PCB regulation under Part 761 by any of the parties of the EPA or EPS, EPA Region II and Headquarters have allowed G&S to be unregulated on the erroneous pretext that G&S received and still receives all un-drained PCB-contaminated items and PCB items for resale and, thus, were not PCB waste. Nonetheless, the full record shows all items received by G&S were received for disposal and thus should have been considered PCB waste and subject to Part 761.

If in fact G&S customers sold units greater than 50-ppm PCBs to G&S for resale or reuse, the EPA could have and should have simply requested copies of G&S's or the original owners' annual PCB document logs, as required by § 761.180(2)(IX), which requires that

"whenever a PCB Item . . . with a concentration of [>]50 ppm is distributed in commerce for reuse . . ., the name, address, and telephone number of the person to whom the item was transferred, date of transfer, and the serial number of the item or the internal identification number, if a serial number is not available, must be recorded in the annual document log. . . ." Such logs have never been requested of or produced by G&S or by EPA.

As a matter of law, an initial threshold question that should have been addressed was whether G&S's PCB activities were for disposal or for resale/reuse. The Initial Decision never addresses this fundamental question. Based on the record, there can be no difference of opinion. If in fact G&S's units were and continue to be for disposal as clearly documented in the record, G&S needed and still needs a commercial storage permit. The record is complete and disposal is disposal. When a "difference of opinion" relates to whether an entity is not at all licensed or permitted, there should be no professional difference of opinion and the EPA and Initial Decision should not and cannot opt simply to ignore such evidence as a "professional difference of opinion." The difference is not how the regulations are applied, but whether the most fundamental and basic regulatory requirements (such as licenses, permits or approval requirements) are being applied at all to each entity intended by the drafters to be absolutely subject to regulation – or only those few that an agency singles out for prosecution. Either you are or are not a commercial storer of PCB waste. The essential responsibility of the EAB is to assure "consistency in Agency adjudication . . . the appeal process of the CROP gives the Agency an opportunity to correct erroneous decisions . . . The EAB assures that final decisions represent the position of the Agency as a whole, rather than just a position of one region, one enforcement officer, one Presiding Officer. EPA considers this a necessary and important

function." Likewise, EPS considers these objectives to be a necessary and important function of the EAB.

VI. CONCLUSION

If the Board finds that G&S is not a Commercial Storer of PCB Waste as defined by Part 761, then the Board should find likewise for EPS. Alternatively, if the Board finds that EPS is a Commercial Storer subject to Part 761, then it must also find G&S to be a commercial storer, in which case G&S and EPS would have been treated dissimilarly without any rational basis. In either case, EPS must prevail.

Appellant further submits that EPA has not proven the allegations in Counts I, II and III, and that EPA's Complaint arose out of EPA's selective prosecution and enforcement of EPS. WHEREFORE, Appellant, Environmental Protection Services, Inc., respectfully requests the Board to find in favor of Appellant on Counts I, II and III of the Amended Complaint and its defense of selective enforcement and dismiss EPA's claims entirely. In addition, Appellant requests the Board to find that Appellant shall pay no penalty to EPA in the instant matter.

Respectfully submitted,

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	
ENVIRONMENTAL PROTECTION SERVICES, INC.	)	**TSCA Appeal No. 06-(01)**
	)	
Docket No. TSCA-03-2001-0331	)	
	)	

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May 2006, service of the foregoing ENVIRONMENTAL PROTECTION SERVICES, INC.'s APPEAL BRIEF, was made by overnight express mail delivery to the following:

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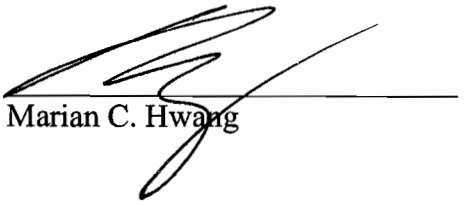

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