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

Jun. 30, 2006

Re: *In the Matter of Environmental Protection Services, Inc.*
TSCA Appeal No. 06-01

Dear Clerk of the Board:

Enclosed please find for filing in the above-captioned matter, the original and six copies of *Appellee's (Region III's) Response* to the Notice of Appeal and Appeal Brief from Appellant/Respondent Environmental Protection Services, Inc.

Sincerely yours,

A handwritten signature in cursive script that reads "Cheryl L. Jamieson".

Cheryl L. Jamieson
Sr. Asst. Regional Counsel

Enclosures

cc: Regional Hearing Clerk- U.S. EPA Region III
Honorable Carl C. Charneski
Lee A. Spielmann, Esq.- U.S. EPA Region II
Marian Hwang, Esq.
Edward Kropp, Esq.



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ENVIR. APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of: : TSCA Appeal No. 06-01

Environmental Protection Services, Inc. :
4 Industrial Park Drive :
Wheeling, West Virginia 26003 :

Docket No. TSCA -03-2001-0331 :

Appellee EPA Region III's Response
to
Environmental Protection Service, Inc.'s Appeal of Initial Decision

June 30, 2006

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FEDERAL CASES

Bolling v. Sharpe, 347 U.S. 497 (1954)

Central and South West Services, Inc. v. EPA, 220 F.3d 683 (5th Cir. 2000)

First Nat. Bank v. Hurricane Elkhorn Coal Corp., 763 F.2d 1888, 1990 (6th Cir. 1985)

Futernick v. Sumpter Tp., 78 F.3d 1051 (6th Cir. 1996)

Golden Grain Macaroni Co. v. F.T.C., 472 F.2d 882 (9th Cir. 1938)

Grid Radio v. FCC, 278 F.3d 1314, 1320-21 (D.C. Cir. 2002)

Modine Mfg. Corp. v. Kay, 791 F.2d 267 (3^d Cir. 1986)

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Ostrer v. Aronwald, 567 F.2d (2nd Cir. 1977)

Oyler v. Boles, 386 U.S. 448 (1961)

Schehl v. Commissioner, 855 F.2d 364, 367 (6th Cir. 1988)

Swierkiewicz v. Sorema, 534 U.S. 506 (2002)

United States v. Anderson, 923 F.2d 450 (6th Cir. 1988)

United States v. Armstrong, 517 U.S. 456 , 463-464 (1996)

United States v. Brown Transport Corp., 448 F.Supp. 773 (N.D. Ga 1978)

United States v. First City National Bank of Houston, 386 U.S. 361, 366 (1967)

United States v. Production Plated Plastics, Inc., 742 F. Supp. 956 (W.D. Mich. 1990)

United States v. Smithfield Foods, Inc., 969 F. Supp. 975 (E.D. Va. 1997)

United States v. Unitank Terminal Service, 724 F. Supp. 1158 (E.D. Pa.1989)

Yaffee Iron & Metal Co., Inc. v. EPA, 774 F.2d 1008 (10th Cir. 1985)

DOCKET CASES

In re: 3M Company, TSCA Appeal No. 90-23, at 14-19 (February 28, 1992)

In re: Bruce Williams, et al, No. 92-50546, at 2-3 (March 30, 1994)

In re: DIC Americas, Inc., TSCA Appeal No. 94-2, at 6 (September 27, 1995)

In re: DMB North Carolina2 LLC, EPA CWA 04-2002-5005 (Jul. 10, 2003, at 3

In re: Dow Chemical Co., Docket No. TSCA (16(a)), 1984 WL 50096 (CJO, July 28, 1984)
Environmental Defense Fund v. Environmental Protection Agency, 636 F.2d 1267, at 1270-1271 (D.C. Cir. 1980)

In re: Everwood Treatment Company, Inc., RCRA Appeal (3008) Appeal No. 95-1, at 16
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In re: General Electric Company, TSCA Appeal No. 92-2a, at 20, (November 1, 1993)

In re: Mark Fastow and Fiberglass Specialties, Inc., Docket No. EPCRA- 09-97-0013 (ALJ July 13, 1998), 1998 WL 482762 (E.P.A)

In re: Norman C. Mayes, EPA Docket No. RCRA-UST-04-2002-0001 (Feb. 27, 2004), Slip Op. at 18-19.

In the Matter of Samsonite Corp., Docket No. TSCA-VIII-86-36, TSCA Appeal No. 87-6.

In the Matter of the U.S. Department of the Navy, Naval Air Station Oceana, Docket No. RCRA III-9006-062, 2000 EPA ALJ LEXIS 76 (Nov. 15, 2000)

ENVIRONMENTAL APPEAL BOARD CASES

In re: B.J. Carney Industries, 7 E.A.D. 171, 194 (EAB 1997)

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In re: Consumers Scrap Recycling, Inc., Docket Nos. EAB Appeal (Jan. 29, 2004) Slip Op at 21, citing *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)

In re: Friedman, CAA Appeal No. 02-07 (EAB, Feb. 18, 2004) Slip Op. At 17 n.15

In re: International Harvester Co., 2 E.A.D. 341, 1987 WL 120037, CAA (120) Appeal No. 87-1 (CJO, Mar. 23, 1987) (citation omitted)

In re: Julie's Limosine & Coachworks, CAA Appeal No. 03-06 (EAB, Jul. 23, 2004) Slip Op. At 13 n. 19

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In re: Spitzer Great Lakes Ltd., 9 E.A.D. 302, 311 (EAB 2000)

In re: Standard Scrap metal Co., 3 E.A.D. 267, 272, n.9 (EAB, Aug. 2, 1990)

In re: William E. Comley Inc. and Bleach Tek Inc., 11 E.A.D. (EAB 2004), 2004 WL 78849

In re: Woodkiln, Inc., 7 E.A.D. 254, 269 (EAB 1997)

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In re: Globe Aero Ltd., Inc., 27 Env'tl. L. Rep. 47157, 47161 (CJO 1996)

REGULATIONS & STATUTES

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45 Federal Register 59773
53 Federal Register 37436, 37440, 37458
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63 Federal Register. at 35402

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I. Introduction:

Appellee, the Associate Director of the Waste and Chemicals Management Division, U.S. Environmental Protection Agency, Region III (hereinafter “the Region” or “Appellee”), through counsel, respectfully submit this appellate response brief. A hearing was conducted on *In the Matter of Environmental Protection Services, Inc.*, U.S. EPA Docket No. TSCA-03-2001-0331, on June 18-20, August 18-22 and September 8-11 of 2003, and in June 29-30 of 2004 before Administrative Law Judge Charneski. The violations at issue arise from Section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615 (“TSCA”), and the Polychlorinated Biphenyls (PCBs)¹ Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 40 C.F.R. Part 761, promulgated pursuant to TSCA Section 6(e), 15 U.S.C. § 2605(e).

The Initial Decision was issued on March 7, 2006 finding that Appellant, Environmental Protection Services, Inc. (“Appellant” or “EPS”) had violated the Maximum Storage Capacities of its *TSCA Approval to Commercially Store Polychlorinated Biphenyls (PCBs)* (hereinafter “*TSCA Storage Approval*”) as alleged in Counts I and II of the Second Amended Complaint, Initial Decision at 4, 18 and 23, and that on certain specific alleged dates in 1999, Appellant violated 40 C.F.R. § 761.72(a)(3), by failing to adhere to the time and temperature requirements in such regulation while burning regulated materials, that is PCB-contaminated materials with concentrations of 50 to 499 parts per million (ppm), as alleged in Count III of the Second Amended Complaint. Initial Decision at 4 and 37. ALJ Charneski also held that Appellant’s

¹PCB and PCBs means any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substances. 40 C.F.R. § 761.3. Refer to Section 761.1(b) for applicable concentrations of PCBs.

affirmative defense of selective prosecution was rejected. Initial Decision at 4 and 43. The ALJ assessed a penalty of \$151,800.00. Initial Decision at 4 and 61.

On April 10, 2006, Appellant filed a Notice of Appeal, and on May 12, 2006, filed an appellate brief. Appellant raising the following issues for review: (1) [w]hether EPS's three count Amended Complaint should have been dismissed or rejected in light of the absence of evidence produced by EPA to substantiate its claim against EPS, Brief of Appellant at *x*; and (2) [w]hether EPA's administrative complaint was the result of 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." Brief of Appellant at *xiii*.

The Appellant has greatly overstated and misstated the evidence to advance their argument on appeal. As noted in Attachment 2, the Appellant misstated the facts of record, made generalized or misleading characterizations of the evidence that are unsupported by record citations. Any inconsistencies in their arguments were never reconciled or satisfactorily explained. The most egregious errors are those involving the citations. Inaccurate cites suggest that other portions of the brief may be incorrect or unreliable. These numerous instances demonstrate that a degree of wariness is well-founded in evaluating the arguments set forth in their brief. Appellee notes four categories of careless and misleading characterizations of the evidence.

As the evidence in the record and the Initial Decision clearly establish, and as set forth below, Appellee fully met its burden of proof on Counts I, II and III of the Second Amended Complaint. Appellant failed to meet its burden of proof regarding its affirmative defense of selective prosecution. ALJ's Initial Decision should be upheld in its entirety.

II. BACKGROUND

A. Statutory and Regulatory Background

The manufacturing, processing, distribution in commerce, and use of PCBs has essentially been banned in the U.S. since June 1979, with the exception of activities specifically authorized by regulation. 15 U.S.C. § 2605(e). TSCA § 6(e) provides that the Administrator may issue regulations authorizing certain PCB handling activities but only upon a finding that such activities will “not present an unreasonable risk of injury to health or the environment.” 15 U.S.C.

§ 2605(e)(2)(B). Such regulations are set forth at 40 C.F.R. Part 761.

1. TSCA Commercial Storage of PCB Waste

40 C.F.R. § 761.65(d), Storage for Disposal, sets forth an EPA commercial storage approval process for persons who wish to commercially store PCB waste. “PCB waste” includes items such as PCB transformers and PCB capacitors designated for disposal. 40 C.F.R. § 761.3.

A “commercial storer of PCB waste” is defined as:

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 the alternative criteria of § 761.65(b)(2), 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.

40 C.F.R. § 761.3. [Emphasis added]. An application for a commercial storage approval must be approved in writing by the Regional Administrator (“RA”), 40 C.F.R. § 761.65(d)(2) and meet the criteria for commercial storage set forth in 40 C.F.R. § 761.65(d)(2)(i) through (vii). The applicant for a commercial storage approval must satisfy, among other requirements, that: “. . . the facility possesses the capacity to handle the quantity of PCB waste which the owner or operator of the facility has estimated will be the maximum quantity of PCB waste that will ever

be handled at the facility.” 40 C.F.R. § 761.65(d)(ii). The RA shall include in the *TSCA Storage Approval*, among other conditions, the following :

. . .[a] condition imposing a maximum PCB storage capacity which the facility shall not exceed during its PCB waste storage operations. The maximum storage capacity imposed under this condition shall not be greater than the estimated maximum inventory of PCB waste included in the owner’s or operator’s application for final approval.

40 C.F.R. § 761.65(d)(4)(iii).

2. TSCA Regulation of Scrap Metal Recovery Ovens

40 C.F.R. Part 761 includes regulatory requirements for scrap metal recovery ovens for persons who dispose of certain specified PCB wastes including but not limited to residual PCBs associated with PCB-contaminated² articles regulated for disposal under 40 C.F.R. § 761.60(b) as described more fully at 40 C.F.R. § 761.72. The scrap metal recovery oven shall meet the requirements of 40 C.F.R. § 761.72(a)-(d). 40 C.F.R. § 761.72(a)(3) states that :

. . . the primary chamber shall operate at a temperature between 537 C and 650 C for a minimum of 2 and one-half hours and reach a minimum temperature of 650 C (1,202 F) once during each heating cycle or batch treatment of unheated, liquid-free equipment.

Appellant’s scrap metal recovery oven is also subject to the requirements of a state air permit. CX 26. It is undisputed that Appellant owns and operates a scrap metal recovery oven at its Wheeling, West Virginia facility, subject to 40 C.F.R. § 761.72(a)-(d), as discussed more fully *infra*.

B. Factual Background:

1. EPS’s Operations

Appellant is a business corporation which owns and operates a PCB waste storage and

² The term “PCB-contaminated” is defined, in pertinent part, as “. . . a non-liquid material containing PCBs at concentrations greater than or equal to 50 ppm but less than 500 ppm.” 40 C.F.R. § 761.3.

disposal business in Wheeling, WV. Tr. 11 (Vol. VI); CX 1, 2, 56. In conducting its PCB waste disposal business, EPS receives PCB and PCB-contaminated waste (capacitors and transformers) from industry (primarily the utility industry) for a fee, stores certain waste prior to disposal, and or disposes of PCB-contaminated waste in its scrap metal recovery oven or, in some instances, arranges for the disposal of certain PCB waste items. CX 1, 2, 56. Prior to conducting PCB waste disposal activities, EPS stores PCB waste generated by others at its commercial storage facility. CX 1, 2.

a. TSCA Commercial Storage Approval

On Dec. 29, 1992, Appellant chose to submit an application to the RA of EPA Region III pursuant to 40 C.F.R. § 761.65(d) for an approval to operate a commercial PCB waste storage facility. CX 1. On Nov. 10, 1993, EPA issued to the Appellant an approval or permit: *TSCA Approval to Commercially Store Polychlorinated Biphenyls (PCBs)*. On Apr. 9, 1998, EPS submitted a letter requesting a five-year renewal of its *TSCA Storage Approval*. CX 66. On Sept. 29, 1998, the RA issued a *Renewal of Approval to Commercially Store Polychlorinated Biphenyls (PCBs)* which was effective from the date of issuance until Oct. 1, 2003 (hereinafter "*TSCA Storage Approval*"). CX 2.

Appellant's *TSCA Storage Approval* contains mandatory limits on the quantities of PCB materials, by type, that can be stored at Appellant's PCB waste storage facility (hereinafter "the Facility"). CX 2. These mandatory limits are identified in the *TSCA Storage Approval* as "***Maximum Storage Capacities***", (hereinafter "MSCs). *Id.* Appellant's application for commercial storage approval included its proposed MSCs for various types of PCB wastes

including, but not limited, to PCB transformers³ and PCB capacitors⁴, a closure plan for the Facility, and a financial assurance mechanism to assure adequate funding for closure of the Facility in an environmentally sound manner. CX 1. According to the terms of the *TSCA Storage Approval*, all modifications of the *TSCA Storage Approval* require written approval from the RA. CX 2, General Conditions, A-1, at 3-4; 40 C.F.R. § 761.65(d). Despite Appellant's argument to the contrary, as found in the Initial Decision, and as discussed more fully *infra*, EPA Region III did not modify the *TSCA Storage Approval* which was issued in 1998. Initial Decision at 15, Tr. 90 (Vol. I), Tr. 30 (Vol. XII).

b. Scrap Metal Recovery Oven

In addition to operating a commercial PCB waste storage facility, EPS owns and operates a PCB scrap metal recovery oven at the Facility. Appellant burns PCB-contaminated waste in its scrap metal recovery oven. Tr. 212-13 (Vol. VIII). The scrap metal recovery oven is a large furnace that must be operated according to regulatory specifications to ensure the destruction of PCBs. 40 C.F.R. § 761.72(a). CX 1, 56. On Feb. 16, 1999, the West Virginia Division of Environmental Protection issued an air pollution control permit (WV Air Permit⁵) for EPS's scrap metal recovery oven to burn PCB-contaminated electrical equipment. CX 26. The WV Air Permit specifically requires that Appellant keep records of the PCB concentrations of all items burned in its scrap metal recovery oven. CX 26 at 4, Section B. 2, 3 and 5.

³ PCB transformer means any transformer that contains greater than or equal to 500 ppm PCBs. 40 C.F.R. § 761.3.

⁴ PCB capacitor means any capacitor that contains greater than or equal to 500 ppm PCB. 40 C.F.R. § 761.3.

2. EPA Region III's Inspections of EPS

a. July 15, 1999 Inspection

In September 1998, EPS informed EPA Headquarters that it wished to change its closure cost coverage from a trust fund to a third party insurance policy.⁵ CX 7, Att. 1; Tr. 21 (Vol. XII). Because Appellant was seeking the immediate release of cash from its financial assurance trust fund and requesting to terminate the trust fund and seek third party insurance, EPA Region III became concerned about the status of PCB waste in storage for disposal at EPS in relation to its financial assurance. Tr. 21 (Vol XII); CX 7, Att. 1; CX 60. In an intra office memorandum which was written prior to EPA's July 1999 inspection of EPS and was attached to the July 1999 inspection report, the need for an inspection of EPS is stated by Bobbie Wright⁶, the EPA staff person assigned to review correspondence from the EPS facility at that time:

In September, 1998, Environmental Protection Services (EPS), located in Wheeling, WV, informed the Region III Office of their immediate plans to request to change their closure cost coverage from a trust to an insurance policy.

* * *

EPA has expressed serious concern regarding EPS and their extreme rush to release trust fund dollars. An inspection is warranted to verify the following: 1. EPS's maximum containment capacity as per their permit requirement 2. EPS's compliance with the time requirements for transporting waste off-site.

CX 7, Att.1. The PCB coordinator, Charlene Creamer, noted similar concerns in an internal memorandum prior to the November 1999 inspection of EPS:

Other areas of concern with EPS include:

- Selecting another financial mechanism for closure costs: EPS has submitted to EPA, at least twice, a request to modify their current financial assurance mechanism. However, on

⁵Commercial PCB waste storage facilities are required to establish financial assurance for closure. 40 C.F.R. § 761.65(g).

⁶Ms. Wright was no longer employed by EPA at the time of the hearing on this case.

both occasions, after a review of the changed document, EPA could not agree with the proposed modification. The requirement for accessible monies for EPS appears to suggest that their facility is managing more waste than permitted as stated in their approval.

CX 60. EPA scheduled an inspection to verify the types and amounts of PCB waste being stored by Appellant to determine whether EPS was in compliance with its *TSCA Storage Approval* and with the time requirements for transporting waste offsite. Tr. 21 (Vol. XII); CX 7, Att.1.

On July 15, 1999, two inspectors from the EPA Wheeling Field Office, Scott McPhilliamy and Scott Rice, conducted a PCB inspection of the EPS facility. Tr. 237 (Vol. I). The inspectors physically viewed PCB waste items in storage for disposal and requested and received documents from Appellant concerning such items. Tr. 247-52, 254-56 (Vol. I); CX 7, Att. 5; CX 10.

Following the inspection, the inspectors compared the MSCs in the *TSCA Storage Approval* to the quantities of PCB waste items in storage for disposal at EPS, and memorialized the comparison in an inspection report. CX 7; Tr. 238 (Vol. I).

b. November 2, 1999 Inspection

On Nov. 2, 1999, the EPA inspectors returned to the facility to conduct a follow-up inspection of Appellant's PCB waste items in storage for disposal and its scrap metal recovery oven. Tr. 258 (Vol. I); CX 11. The reasons for the inspection are stated in the Oct. 6, 1999 Status Memorandum of Charlene Creamer, PCB Coordinator: the storage exceedances in July of 1999 inspection, the financial assurance issue in relation to storage as referenced *supra*, and public inquiries regarding EPS's use of its scrap metal recovery oven.

- Decontamination process: As required by the regulations, a scrap metal recovery oven using specific operating parameters may decontaminate PCB transformers and then have the metal ultimately disposed at a smelter. Based on public inquiries, it is unclear if EPS is operating as a scrap metal recovery oven or as a smelter. Currently, EPS's operations have

not been evaluated to determine if EPS may operate as a smelter.

CX 60.

The inspectors physically viewed PCB waste items in storage for disposal and conducted a limited inspection of the records pertaining to the operation of Appellant's scrap metal recovery oven. Tr. 267-69 (Vol. I); CX 11. The inspectors requested documentation concerning the operation of the oven for three one-week periods selected at random from 1999. Tr. 267-69 (Vol. I). A portion of the requested information was later delivered by Appellant's representative to the EPA Wheeling Office. Tr. 269 (Vol. I); CX 16A, 16B, 16C.⁷

In August of 2000, Inspector McPhilliamy returned to the EPS facility to discuss EPA's findings from the November 1999 inspection. Tr. 14 (Vol. II). A discussion between Scott Reed, the EPS Vice President, and Inspector McPhilliamy occurred regarding the operation of the scrap metal recovery oven. Tr. 18 (Vol. II). One issue discussed was EPA's finding that during a number of oven cycles, Appellant's oven "did not reach the required temperature in the primary chamber of the scrap metal oven for the required 2 ½ hours. In 76 oven cycles, the correct temperature was attained for the proper time on only 25 occasions." CX 14 at 3⁸; Tr. 18 (Vol. II); Appellant's vice-president claimed that during some of the cycles when Appellant failed to attain the regulatory temperature, Appellant was not burning regulated material (that is material which was between 50 and 499 ppm) and therefore did not have to adhere to the requirements of 40 C.F.R. § 761.72(a)(3)

⁷ The information provided by appellant at 16 A, B and C consisted of scrap metal oven operating records and furnace burn records which were lists of individual pieces of equipment burned on specific dates and times. As discussed *infra*, the information provided at this time did not contain PCB concentrations for the individual pieces of equipment burned.

⁸ The admission of CX 14 occurs at Tr. 17 (Vol. II). It was inadvertently omitted from the court reporter's list of admitted exhibits on Tr. 6 (Vol. II).

for oven operating times and temperatures. CX 14; Tr. 18 (Vol. II). Therefore, EPA requested data on the PCB concentrations of the oven contents or items burned to determine whether Appellant's claim, that it was burning unregulated materials, could be verified. Tr. 17-20 (Vol. II); CX 14. Appellant agreed to revisit the records for the three weeks in question, CX 14 at 3. "EPS further agreed to provide to EPA the contents of the scrap metal oven for each cycle when EPA reported the oven was operating outside the requirements of the regulations." *Id.*

Appellant failed to provide such data on the oven contents to EPA. Tr. 17-20 (Vol. II); CX 14. McPhilliamy recorded the meeting with Scott Reed, Appellant's vice-president, contemporaneously with its occurrence:

However, [Scott] Reed did not provide any records relative to oven contents to counter EPA's earlier findings that the oven did not always maintain the required times/temperatures. Reed stated that when EPS began to pull the records relative to oven contents for these periods, they also determined the oven had not always met the required time/temperature required by 40 C.F.R. § 761.72(a)(3) ***while burning regulated items.*** Reed acknowledged the fact that the oven did not always operate in compliance with 40 C.F.R. § 761.72(a)(3) when burning regulated materials. His estimate was that ***as many as one-third of the burns noted by the EPA review had included regulated items during periods the required time/temperature was not achieved.*** (Emphasis added).

Tr. 18 (Vol. II); CX 14.

McPhilliamy's contemporaneous record of the conversation which took place is the reliable, credible evidence on Scott Reed's admission. CX 14.

Subsequently, the Region reviewed the transformer storage data, the scrap metal recovery oven documentation, and the inspectors' findings. Tr. 101 (Vol. II). Based upon that review, EPA issued a three-count complaint in June of 2001.

C. Procedural Background:

1. Issuance of Complaint, First Amended Complaint and Second Amended Complaint

On Jun. 29, 2001, EPA filed a *TSCA Complaint and Notice of Opportunity to Request a Hearing* (“Complaint”) alleging violations of the PCB waste storage for disposal and disposal regulations by EPS at its Wheeling, WV facility against EPS . Appellant filed an Answer on Aug. 14, 2001 denying the violations, asserting several affirmative defenses, most significantly selective enforcement, and requesting an administrative hearing. The Complaint was subsequently amended with minor corrections (changing certain dates at issue in Count III) on Jan. 29, 2002 (First Amended Complaint). Appellant filed an Answer to the First Amended Complaint on Feb. 11, 2002.

The Second Amended Complaint with minor corrections, to which Appellant agreed, changing the phrase “PCB transformers in Count III to PCB-contaminated transformers”, was filed on April 23, 2003. The Second Amended Complaint set forth violations in three counts. Count I alleges that Appellant violated its *Renewal of Approval to Commercially Store Polychlorinated Biphenyls (PCBs)*, dated Sept. 29, 1998, by storing PCB transformer waste in excess of its EPA-approved Maximum Storage Capacity (*hereinafter* “MSC”) of 5,000 pounds on two separate dates: Jul. 15, 1999 and Nov. 2, 1999. Count II alleges that Appellant stored PCB capacitor waste in excess of its EPA-approved MSC of 1,000 pounds on Jul. 9, 1999. Count III alleges that Appellant failed to adhere to the required temperature standard set forth in 40 C.F.R.

§ 761.72(a)(3) while burning regulated material, that is, PCB-contaminated material with concentrations of 50-499 PCB, in the primary burn chamber of its PCB scrap metal recovery oven during various dates in March, September, and October of 1999. Appellant filed an Answer to the

Second Amended Complaint which incorporated its Feb. 11, 2002 Answer by reference. On Aug. 28, 2003, Appellant filed an Amended Answer to the Second Amended Complaint.

2. Proceedings

Following a brief alternative dispute resolution period, the case was assigned to the Presiding Officer at the end of October 2001. Between October 2001 and June 2003, the parties engaged in settlement discussions followed by extensive motion practice, prehearing exchanges and a period of court-ordered discovery.

Pursuant to 40 C.F.R. Part 22, the first phase of an administrative hearing was held before the Presiding Officer on Jun. 17-20, 2003 in Wheeling, WV. A second phase of the hearing was held on Aug. 18-22, 2003, in Wheeling, WV. A third phase of the hearing was held on Sept. 8-11, 2003 in Philadelphia, PA. A fourth phase of the hearing was held on June 29-30, 2004 in Philadelphia.

The Initial Decision was issued on March 7, 2006. Appellant filed a Notice of Appeal on April 10, 2006, and an appellate brief on May 12, 2006. By order dated May 25, 2006, Appellee hereby submits its response brief which is due on July 3, 2006.

III. Argument

A. EAB Standard of Review

EPA's regulations provide that in an enforcement proceeding, "[t]he Environmental Appeals Board shall 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." 40 C.F.R. § 22.30(f). In an enforcement proceeding, the Board thus reviews an ALJ's factual findings and conclusions of law *de novo*. See, e.g. *In re Bricks, Inc.*,

CWA Appeal No. 02-09, slip op. at 3 (EAB, Oct. 28, 2003), 11 E.A.D. ___; *In re Norman C. Mayes*, RCRA (9006) Appeal No. 04-01, slip op. at 11 (EAB, Mar. 3, 2005), 12 E.A.D., ___; 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.”).

However, the Board generally defers to an ALJ’s factual findings where those findings rely on witness testimony and where the credibility of the witnesses is a factor in the ALJ’s decision making. *See In re Friedman*, CAA Appeal No. 02-07, slip op. at 17 n.15 (EAB, Feb. 18, 2004), 11 E.A.D. ___ (citing *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998)).

This approach recognizes that the ALJ is able to observe first-hand a witness’s demeanor during testimony and is therefore in the best position to evaluate his or her credibility. *Id.*; *In re Julie’s Limousine & Coachworks, Inc.*, CAA Appeal No. 03-06, slip op. at 13 n.19 (EAB, July 23, 2004), 11 E.A.D. ___.

B. Count I: The finding in the Initial Decision on Count I that Appellant violated TSCA on at least Jul. 15 and Nov. 2, 1999 by commercially storing waste PCB transformers in quantities exceeding the Maximum Storage Capacity Limits established in Appellant’s TSCA Storage Approval Should be Upheld.

The Presiding Officer found that Appellee met its burden of proof for the violations at issue in Count I. Initial Decision at 12 and 18. The court found that Appellee has shown, by a preponderance of the evidence, that on Jul. 15, 1999 and Nov. 2, 1999, Appellant was commercially storing the waste PCB transformers on the lists it provided to the EPA inspectors by EPS contemporaneously with the EPA inspections. The weights further identified by Appellant on such lists exceeded the MSC limitations for PCB transformers in Appellant’s *TSCA Storage*

Approval as further elaborated *infra*.

In its appellate brief, Appellant raises numerous arguments and/or issues relating to its argument that EPA failed to meet its burden of proof for Count I. Specifically, Appellant requests reconsideration of the trial court's holdings as to: whether EPA failed to meet its burden of proof regarding Count I and failed to prove that the PCB transformers at issue were being "commercially stored", whether EPS was the owner of such PCB transformers, and therefore, the generator and not the commercial storer of such waste, whether the processing exemption of 40 C.F.R. § 761.20(c)(2) applied to PCB transformers that were being commercially stored by Appellant, whether Appellant unilaterally modified its *TSCA Storage Approval* effectuating an increase its MSC for PCB waste transformers from 5,000 to 100,000 pounds, whether Appellant received "fair warning" of EPA's interpretation of 40 C.F.R. § 761.20(c)(2), whether the adequacy of Appellant's financial assurance is a defense to commercial storage violations, whether EPA properly applied the PCB Penalty Policy in calculating a penalty for Count I. Brief of Appellant, 17-35. In addition, Appellant cites to an Appendix B to its appellate brief, which is a list of 59 claimed errors of fact and law in the Initial Decision relating primarily to Counts I through III.

Appellee contends that each and every one of Appellant's arguments, *supra*, were fully adjudicated during the hearing, evaluated and considered by the ALJ, addressed in the Initial Decision, and rejected. The rejection of Appellant's arguments by the Presiding Officer should be upheld for all of the reasons set forth herein. Additionally, Appellee refutes Appellant's contention that there are 59 errors of fact and law in the Initial Decision at Exh. I to this Response Brief..

1. EPA Provided Ample Evidence in the Record that Appellant was Commercially Storing PCB Waste Transformers in Excess of its MSCs in its TSCA Storage Approval on July 15, 1999 and on Nov. 2, 1999.

The Presiding Officer found that EPA established a *prima facie* case of violation in regard to Count I:

. . . EPS is a commercial storer of PCB transformers. EPA suspected that EPS was storing waste PCB transformers in excess of its Maximum Storage Capacity. Based upon the inspectors' observations of the Wheeling facility storage area, and based upon the information submitted by appellant, EPA determined that EPS exceed its MSC on both July 15 and November 2, 1999. The record evidence supports EPA on this point. In other words, complainant has established a *prima facie* case of violation on the basis of this evidence.

Initial Decision at 18.

Appellee met each of the elements of proof for the storage violations: (1) Appellant is a "person" as that term is defined at 40 C.F.R. § 761.3; (2) Appellant is a "commercial storer of PCB waste" as that term is defined at 40 C.F.R. § 761.3; (3) Appellant is prohibited by 40 C.F.R. § 761.65(d) from storing PCB waste except in accordance with its *TSCA Storage Approval*; (4) the *TSCA Storage Approval* contains a condition (MSC) limiting the amount of waste PCB transformers (5,000 pounds) that Appellant can store *at any time*; (5) on at least Jul. 15, 1999, Appellant was storing waste PCB transformers in quantities exceeding the MSC of 5,000 pounds (over double the amount) required by its *TSCA Storage Approval*; and, (6) on at least Nov. 2, 1999, Appellant was storing waste PCB transformers in quantities exceeding the MSC of 5,000 pounds (at least triple the amount) required by its *TSCA Storage Approval*.

2. Appellant is a "Person" and is a Commercial Storer of PCB Waste. Appellant's argument that it is the generator of the waste it receives and stores is not supported by the record or as a matter of law.

Appellant is a corporation and a "person" as that term is defined at 40 C.F.R. § 761.3. CX

1 and CX 2. 40 C.F.R. § 761.65(d) sets forth an EPA commercial storage approval process for persons who wish to commercially store PCB waste. “PCB waste” includes items such as PCB transformers and PCB capacitors designated for disposal. 40 C.F.R. § 761.3. A “commercial storer of PCB waste” is defined as:

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 the alternative criteria of § 761.65(b)(2), 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.*

40 C.F.R. § 761.3. [Emphasis added].

Appellant is a “commercial storer of PCB waste” because it owns and operates a facility used for the storage of PCB waste generated by others.⁹ 40 C.F.R. § 761.3. EPS commercially stored waste PCB transformers that it received from its utility customers. Those customers, such as American Electric Power, sent the waste PCB transformers to EPS with the expectation that the transformers would be disposed of and, thus, were the generators. EPS’ status as a commercial storer of the transformers at issue in Count I (and the generator status of EPS’ customers) is evident from the following facts.

Beginning in 1992, EPS applied to EPA Region III to become an approved commercial storer of PCB waste in accordance with 40 C.F.R. § 761.65; CX 1. In 1993, Appellant received an *Approval to Commercially Store PCB Waste* from the RA which was renewed in 1998. CX 2. Appellant’s president testified that the nature of the business is primarily disposal (Tr. 11 (Vol. VI) and that in 1999, Appellant’s business was primarily disposal. Tr. 67 (Vol. X).

⁹Appellant’s facility is subject to 40 C.F.R. § 765.65(b)(1) because it is used for the storage of PCBs and PCB Items designated for disposal. The exceptions set forth in 40 C.F.R. § 765.65(b)(2), (c)(1), and (c)(9) do not apply to Appellant.

Appellant's president also testified that EPS provides "assurance and insurance to utilities and other companies that we would handle their PCBs in a proper way." Tr. 13 (Vol. VI). EPS' customers rely on EPS to comply with the laws because according to its president:

Well they're basically under the scenario of being a generator in the cradle to grave scenario. They're ultimately responsible for what happens to their materials. So if EPS were to or any company were to illegally dispose of their material or do whatever they do with it, it would come back eventually on the original generator.

Tr. 21 (Vol. VI). EPS' audit report given to potential customers described by Appellant's president as "major utilities" (Tr. 34 (Vol. X)) states:

Environmental Protection Services, Inc. A fully licensed "USEPA PCB Commercial Storer" is a Corporation established for the specific purpose of providing major Power Companies, Municipalities and Industries across the United States with an environmentally safe avenue for the processing of non regulated and regulated electrical equipment.

CX 59 at 1.

As the Presiding Officer determined, Appellant's argument that it is the owner, and therefore the generator of the waste it receives, is "... contrary to the evidence" and "... totally inconsistent with its actions in seeking and maintaining an EPA-approved permit to store waste PCB transformers." Initial Decision at 23. An examination of CX 64 (CBI) reveals that the utility company customers send their waste PCB transformers to EPS with hazardous waste manifests with the utility company's names filled out on the generator lines of the manifests. Appellant, as the disposer, sends certificates of disposal to the generators (Tr. 43 (Vol. X)) as further described in Appellant's brochure. CX 56; Tr. 42 (Vol. X). EPS, as the disposer, provides to the generators of PCB waste "a documented 'Cradle-to-Grave' disposal process." CX 56; Tr. 41 (Vol. X). Therefore, all of the waste PCB transformers as alleged in Count I were being commercially stored prior to disposal, and the Maximum Storage Capacities in Appellant's *TSCA Storage Approval* applied to

such materials. There is nothing in the record to show that Appellant received waste PCB transformers for servicing, rebuilding, repair or reuse.

As a commercial storer, Appellant has been subject to the rules requiring that each person who applies to become a commercial storer of PCB waste must set forth in a written application to the RA, the maximum amount of PCBs and PCB-contaminated waste, by type such as PCB transformers and capacitors, which will ever be handled at the Facility at any time. This requirement is clearly set forth in 40 C.F.R. § 761.65(d)(3)(vi) and in the rulemaking history: “For each PCB storage area, and the facility overall, the owner or operator must identify the extent of PCB storage that will occur relative to other wastes, **and the maximum projected inventory that will ever be handled at one time.**” 54 *Fed. Reg.* 52716, 52738 (Dec. 21, 1989) [Emphasis added].

The reasons for the maximum storage limitations are clearly set forth. The closure plan for the Facility, the financial assurance mechanism, and amount of money to be established for the financial assurance are directly related to the amount of PCB waste that will be present at a facility at any time. 40 C.F.R. § 761.65(f).

This information is essential, because it bears upon the facility’s ability to demonstrate that it in fact has the capacity to store PCB waste in accordance with the § 761.65 storage requirements. Further, the maximum projected inventory of PCB wastes forms the basis for designing a maximum storage capacity for the facility, and for estimating the costs of closure. 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.

54 *Fed. Reg.* 52738.

An approval to commercially store PCBs can only be granted by the RA if the regulatory requirements of 40 C.F.R. § 761.65(d) are met by the Appellant. 40 C.F.R. § 761.65(d). These requirements include, among other things, the submission of a detailed written application a written

closure plan which delineates the steps which will be taken by the approved commercial storer in the event of the facility's closure, 40 C.F.R. § 761.65(d)(3)(viii) and (e), and a demonstration of financial responsibility to close the facility. 40 C.F.R. § 761.65(d)(3)(x) and (g). 40 C.F.R. § 761.65(d)(3)(vi) requires that applicants for commercial storage approvals submit a written application that contains, among other things, "the owner's or operator's estimate of maximum PCB waste quantity to be handled at the facility." The RA must only approve, for storage, the maximum amounts of PCB waste for which the owner or operator can provide sufficient financial assurance to close the facility in an environmentally sound manner. 40 C.F.R. § 761.65(f) and (d)(2)(v). This includes the costs of cleanup and disposal of all PCB wastes stored at the time closure becomes necessary due to voluntary or involuntary conditions.

On Dec. 29, 1992, Appellant chose to submit an application to the RA, EPA Region III, to become an approved commercial storer of PCB waste. CX 1. In its application, Appellant set forth the types and corresponding amounts of PCB waste, including PCB transformers and capacitors, to be stored at the EPS facility. *Id.* Appellant also set forth the closure plan which described the actions to be taken in the event of facility closure and the estimated costs of implementing the closure plan. *Id.*

On Nov. 10, 1993, pursuant to 40 C.F.R. § 761.65(d), the RA issued to the Appellant: a *TSCA Approval to Commercially Store Polychlorinated Biphenyls (PCBs)* which had a five-year expiration date of Oct. 1, 1998. On Apr. 9, 1998, Appellant sent a written request to the RA requesting a renewal of its TSCA Commercial Storage Permit which would expire on Oct. 1, 1998. CX 66. In such letter, Appellant stated: "EPS has not changed its work practices, operation or any other procedure described in the original permit. **All storage of PCB items has remained the**

same.” *Id.* (Emphasis added.) Appellant did not request a change in the pounds of waste PCB transformers or PCB capacitor waste to be stored. *Id.* Appellant requested that EPA base the renewal on the original Dec. 29, 1992 application which requested approval for the storage of 5,000 pounds of waste PCB transformers and 1,000 pounds PCB capacitor waste. CX 66, CX 1. On Sept. 29, 1998, the RA issued a *Renewal of Approval to Commercially Store Polychlorinated Biphenyls (PCBs)* for a five-year term with those exact same limitations. CX 2, Storage of PCBs, at 5.

3. Appellant was subject to the Maximum Storage Capacities in its TSCA Storage Approval on both dates alleged in Count I of the Second Amended Complaint.

The *TSCA Storage Approval* issued September 29, 1998 was in effect at the time of the July and November 1999 EPA inspections. CX 2. The *TSCA Storage Approval* established specific limits for the storage of each type of PCB waste including waste PCB transformers and capacitors. CX 2 at 5-6. Such limits are entitled “Maximum Storage Capacities” (MSCs). *Id.* The limits in the *TSCA Storage Approval* are the same as the Appellant’s estimate of the maximum quantity of each type of PCB waste as set forth in its application dated December 29, 1992 which is incorporated by reference in its request for renewal of the approval to store PCB waste. CX 1 at § 2, Disposal of PCB Waste Inventory, Para. 2.1; CX 2, Conditions of Approval, at 3.

The TSCA PCB commercial storage regulations set forth the process for determining the MSC in a commercial storage approval. Pursuant to 40 C.F.R. § 761.65(d)(4)(iii), the RA based the MSC on Appellant’s estimate of the maximum quantity of each type of PCB waste that Appellant estimated it would handle “at any one time” at its Facility as Appellant set forth in its application to become a commercial storer. CX 1. Thus, on the dates of the EPA inspections, the MSCs applicable to Appellant’s Facility were identical to what Appellant proposed in its application dated

Dec. 29, 1992 and incorporated into Appellant's *TSCA Storage Approval*. CX 1, 2. These MSCs were the maximum amount that the RA was authorized to approve under 40 C.F.R. § 761.65(d)(4)(iii). Appellant's approved MSC for waste PCB transformers in the *TSCA Storage Approval* is 5,000 pounds "at all times." CX 2, at 5. Simply put, by regulation, the RA could only approve the amounts of each type of PCB waste that Appellant applied for. Appellant applied for a MSC for PCB waste transformers of 5,000 pounds and the RA approved a MSC for waste PCB transformers of 5,000 pounds. CX 1, 2. Similarly, Appellant applied for a MSC of 1,000 pounds of PCB capacitor waste, and the RA approved a MSC of 1,000 pounds of PCB capacitor waste. CX 1, 2.

4. Appellee has shown by a preponderance of evidence that on July 15, 1999, Appellant was storing waste PCB transformers in quantities which exceeded the Maximum Storage Capacity limit in its TSCA Storage Approval.

On Jul. 15, 1999, McPhilliamy, accompanied by Rice, inspected the EPS facility. Tr. 237 (Vol. I); CX 7. The purpose of the inspection was to "look at the maximum storage capacities and compare the quantity of material that was in storage at the time to those quantities that were listed in their approval." Tr. 238 (Vol. I); CX 7. The inspectors obtained EPS documents which were written about and attached to an inspection report. Tr. 238-40 (Vol. I); CX 7. The inspectors inspected EPS's waste PCB transformer storage area. Tr. 243 (Vol. I). The inspectors took a photograph and conducted a count of the transformers in that area. Tr. 244 (Vol. I); CX 8. Some of the objects in the photo had yellow tags which were 6 x 6 inch PCB labels indicating that the units contained PCBs at concentrations greater than 500 parts per million (ppm). Tr. 246 (Vol. I); CX 8. The inspectors counted approximately 32 transformers. Tr. 247 (Vol. I). Because the storage area was extremely crowded and because an unknown number of transformers were being stored in

drums, McPhilliamy made a verbal request to Appellant for “a count of the actual number of PCB transformers that were in storage and the respective weight of those units.” Tr. 250 (Vol. I).

In response to McPhilliamy’s request for an inventory of waste PCB transformers in storage on Jul. 15, 1999, Appellant provided a list of PCB transformers in storage on Jul. 15, 1999 via telefacsimile. Tr. 247-48, 250 (Vol. I); CX 7, Att. 5. The facsimile list provided by EPS indicated that there were actually 36 waste PCB transformers in storage, and the weight of those waste PCB transformers in storage on Jul. 15, 1999 totaled 10,898 pounds. CX 7, Att. 5. The waste PCB transformers were identified by EPS with six-digit barcode numbers as described above.¹⁰ Tr. 250-51 (Vol. I); CX 7 Att. 5 (also at CX 9). The waste PCB transformers in storage on Jul. 15, 1999, which were individually identified by barcode numbers were listed as follows:

<u>Barcode No.:</u>	<u>Weight in Pounds:</u>	<u>Barcode No.:</u>	<u>Weight in Pounds:</u>
292916	260	450882	320
292923	720	282577	280
272948	200	301007	266
272950	130	290655	160
272949	110	291378	160
272944	130	279583	380
272956	50	284381	360
272945	170	329527	160
272946	130	286657	480
455838	160	280436	170
272947	110	282076	460
272943	130	313873	470
284182	160	286292	360
283896	160	282503	260
447449	971	287321	170

¹⁰Appellant utilizes a unique barcode system to uniquely identify each item that is received by EPS from the generators. Tr. 219-21 (Vol. I); CX 56. The barcode is used by the company to track each piece of waste equipment received from the generator until Appellant ships it for disposal or disposes of it on-site at the Facility. Tr. 38 (Vol. V), CX 56. The barcodes employed by EPS in 1999 were six digits long. Tr. 110 (Vol. II); CX 7, Att. 5, CX 11, Att. 3; CX 16A-Mar. 30-48, 16B-Sept. 44-116, 16C Oct. 55-112. The barcodes are entered into a computerized data base at EPS and EPS maintains detailed records for each piece of equipment as it progresses through the Facility. Tr. 43 (Vol. V); CX 56.

450746	980	293139	360
291760	250	301003	468
284380	230	301005	<u>563</u>
TOTAL: 10, 898 lbs.			

CX 7, Att. 5 (also CX 9). McPhilliamy testified that the amount of PCB transformers in storage on Jul. 15, 1999 at EPS was more than double the quantity authorized by the *TSCA Storage Approval* which set a MSC of 5,000 pounds for PCB transformers to be met “at all times during the operation of [Appellant’s] facility.” CX 2. § B; Tr. 251-52 (Vol. I). McPhilliamy contemporaneously recorded his observations regarding the waste PCB transformers and attached Appellant’s faxed list to his inspection report. CX7, Att. 5.

Appellant claims that the two EPS documents listing PCB transformers being commercially stored at EPS on Jul. 15, 1999 and Nov. 2, 1999 which were given to the EPA inspectors contemporaneously with inspections of Appellant’s facility in July and November of 1999 are somehow now invalid or not what EPS purported them to be at the time of the inspections. The lists of PCB transformers in storage were provided to Appellee in response to the government official’s request for identification of the number of PCB transformers in storage and their respective weights. After making a count of the PCB transformers (or units) in storage on Jul. 15, 1999, Inspector McPhilliamy asked for an actual count of the PCB transformers (units) and the respective weights of those units that were in storage on the 15th of July. Tr. 248 (Vol. I). EPS supplied such a list: “PCB Units Weights July 15, 1999”. Tr. 248-49 (Vol. I); CX 7, Attach. 5, also set forth at CX 9. Similarly, in November 1999, Appellee’s inspector, McPhilliamy, asked for and received list of PCB transformers (units) in storage on Nov. 2, 1999. Tr. 264-67 (Vol. I); CX 11, Attach. 3: “PCB units in Storage as of Nov. 2, 1999”.

5. Appellee has shown by a preponderance of the evidence that on Nov. 2, 1999 Appellant was storing waste PCB Transformers in quantities which exceeded the Maximum Storage Capacities in its TSCA Storage Approval.

On Nov. 2, 1999, McPhilliamy and Rice conducted a followup inspection of Appellant's Facility to identify the PCB waste in storage and compare it to the MSCs in the *TSCA Storage Approval*. Tr. 259 (Vol. I). EPA also reviewed Appellant's scrap metal recovery oven operation. Tr. 268 (Vol. I). McPhilliamy and Rice observed waste PCB transformers in storage for disposal at EPS and attempted to make a count of the waste PCB transformers. Tr. 266 (Vol. I). The inspectors counted 34 waste PCB transformers in storage. *Id.* No one was working on the PCB waste transformers at the time of the inspection. *Id.* The waste PCB transformers were intact and not leaking. *Id.* Due to the crowded conditions, McPhilliamy requested and received additional information concerning these waste PCB transformers from Appellant. *Id.* Specifically, McPhilliamy asked Appellant for a count of the actual number of waste PCB transformers in storage for disposal on Nov. 2, 1999 and the respective weights of those units. Tr. 250 (Vol. I). On Nov. 2, 1999, McPhilliamy received a facsimile from Appellant of PCB units in storage on Nov. 2, 1999. CX11, Att. 3; Tr. 263-66 (Vol. I). Appellant identified 45 PCB units in storage on the list by placing an asterisk next to each item in storage on the left hand column. Tr. 265 (Vol. I); CX11 Att. 3.

Although EPA's inspectors counted 34 PCB transformers in storage at the inspection, Appellee relied on Appellant's facsimile of PCB units in storage on Nov. 2, 1999 for purposes of determining the amount of waste PCB transformers in storage. CX11, Att. 3. From Appellant's list of 45 PCB units, Appellee identified 16 waste PCB transformers in storage on Nov. 2, 1999, with an approximate total weight of 15,330 pounds. Each PCB transformer counted as in storage for

disposal on Nov. 2, 1999 is marked on the faxed list with arabic numbers from 1 through 16 on the extreme lefthand side of Appellant's list. CX 11, Att. 3. The items counted by Appellee for the Second Amended Complaint as PCB transformers in storage for disposal were marked with the following abbreviations written by the Appellant: "T" for transformer, "Pad" for pad mounted transformer, and "pole" for polemount transformer. CX 11, Att. 3. The 16 PCB transformers counted as in storage for disposal on Nov. 2, 1999 for the Second Amended Complaint are:

<u>Item:</u>	<u>Barcode:</u>	<u>Pounds:</u>
1. T	300346	520
2. T	340346	320
3. T	292916	260
4. PAD	311068	3150
5. Polemount	292929	440
6. Polemount	325927	450
7. Polemount in drum	714914	420
8. Polemount	292928	160
9. Polemount	337884	890
10. Pole	337885	750
11. Pad	337882	5440
12. T	279583	280
13. Pole	301003	460
14. Pole	302404	310
15. Pole	361480	120
16. Pole	318522	<u>1360</u>
Total:		15,330 lbs

CX11, Att. 3 (PCB Units, 11/2/99).

Appellant admitted that "Pad" and "Pole" were abbreviations for transformers. Tr. 107-09 (Vol. X). Appellee also counted four items that were marked on the list with the symbol "T". CX 11, Att. 3. Appellant testified that the "T" next to four of the listed items could have stood for tanks.

Tr. 109 (Vol. X). However, the first item on the list marked with “T”, Barcode number 300346, is a polemount transformer which is further identified in CX 64 (CBI). Item Barcode number 300346 is listed on a manifest in CX 64 (CBI) as a polemount transformer. CX 64, p. CD-0042 (CBI).

Appellant’s president was wrong about the “T ” being an abbreviation for Tank with respect to barcode number 300346. It is logical to conclude that he was also wrong about the abbreviation of the other three items also marked as “T” which were, most likely, transformers.

Rebuttal to Appellant’s Additional Defenses:

6. Appellant Lacked the Authority to Unilaterally Modify its TSCA Storage Approval, and, therefore, did not Unilaterally Increase its Approved MSC for Waste PCB Transformers or Capacitors.

One week following EPA’s Jul. 15, 1999 inspection of Appellant’s facility, Appellant submitted, by letter, a request to modify its *TSCA Storage Approval*, seeking to increase the storage of PCB transformers from 5,000 pounds to 100,000 pounds. CX 52. Appellant argues that this July 21, 1999 letter unilaterally effectuated a modification of its *TSCA Storage Approval*. This argument can only be applicable to the second storage violation on Nov. 2, 1999, because Appellant’s unilateral modification letter was written and sent to the Region, one week after the violation of Jul. 15, 1999 occurred.

As a factual matter, Appellee contends that the *TSCA Storage Approval* was not modified by the RA. Appellee’s TSCA program witnesses, Webb, the Associate Director for Enforcement, Waste and Chemicals Management Division, and Charlene Creamer, the former PCB coordinator, testified at the hearing that the *TSCA Storage Approval* issued Sept. 29, 1998 was not modified. CX 3, Tr. 90 (Vol. I) (Webb), Tr. 30 (Vol. XII) (Creamer). The ALJ cited to the testimony of Creamer in finding that: “. . . at no time did the Regional Administrator approve the MSC increase

to 100,000 pounds.” Initial Decision at 15. Tr. 30 (Vol. XII).

As a matter of law, the express language of the *TSCA Storage Approval* requires that all modifications to the approval must be approved by RA of EPA in writing:

Any departure from the Conditions of Approval, modifications of this Approval, or the Environmental Protection Services application approved by EPA, requires prior written authorization from the Regional Administrator.

CX 2 at 3-4. In addition, Appellant’s *TSCA Storage Approval* incorporated Appellant’s 1992 approval or permit application by reference.

CX 2, § A, at 3 states:

Environmental Protection Services shall, at all times, operate in accordance with the provisions of the PCB regulation (40 C.F.R. Part 761), the Conditions of this Approval, **the Environmental Protection Services December 29, 1992 application.**

[Emphasis added]. The final page of Appellant’s own Dec. 29, 1992 application, clearly states that Appellant shall submit a modification to EPA for EPA approval whenever there are increases in the estimate of maximum inventory. CX 1. Specifically, Appellant’s application states:

Closure Plan Modification

This closure plan will be modified and submitted to the U.S. EPA for approval if:
a. A change in operating plans or facility design affects the closure plan, for example:
Increases/Decreases in facility size and/or capacity;
Increases/Decreases in the estimate of maximum inventory;

Id. (Emphasis added.) Since it was the Appellant who wrote the above language in its *TSCA Storage Approval* application, Appellant has been fully aware that a modification of its closure plan to increase the estimate of its maximum inventory of PCB waste must be submitted to the RA of EPA Region III for approval. Despite claims or arguments to the contrary, Appellant did not unilaterally modify its *TSCA Storage Approval* when changing the maximum estimate of waste

PCB transformers from 5,000 to 100,000 pounds. CX 1; CX 63.

In addition to the express *TSCA Storage Approval* language, and the language in Appellant's Approval application which is incorporated into the *TSCA Storage Approval* by reference (CX 2), the regulations require that: "The commercial storer of PCB waste shall submit a written request to the Regional Administrator . . . for a modification to its storage approval to amend its closure plan whenever: (i) changes in ownership, operating plans or facility design affect the existing closure plan. 40 C.F.R. § 761.65(e)(4). The RA may approve modifications of the closure plan in accordance with § 761.65(e)(5). Appellant's argument that EPS could unilaterally amend its *TSCA Storage Approval* (Tr. 233 (Vol. VIII)) must fail because it is contrary to the entire regulatory scheme which authorizes only the RA to issue the approval for commercial storage. 40 C.F.R. § 761.65(d). There would be no logic in allowing anyone other than the RA to approve modifications and nothing in the regulations or preamble authorizes unilateral changes such as those proposed by Appellant. 40 C.F.R. § 761.65.

The Presiding Officer found that "EPS's claim that it can unilaterally modify the terms of an EPA-approved permit is contrary to the clear regulatory scheme of Part 761 and is rejected." Initial Decision at 15. The ALJ further stated that:

Acceptance of respondent's argument would result in the chaotic situation where a permittee is free to arbitrarily change key permit provisions concerning the storage of PCB-contaminated material after careful review and approval of its permit application by the Regional Administrator. Such a procedure, as advanced by EPS in this case, makes no regulatory sense.

Initial Decision at 15.

Appellant makes argument that because Appellant did not get a response to its unilateral modification letter, EPA ". . . should have waived any right it had to complain about the effect of

EPS's notice letter." Brief of Appellant 28. 40 C.F.R. § 761.5(d) clearly establishes that "... the approval of a TSCA PCB Commercial Storage Approval lies with the EPA Regional Administrator. The Region III PCB Coordinator at the time of the Appellant's requested modification testified that it was necessary to collect further information in regard to Appellant's request for modification and due to public inquiry about the EPS operation, and that resources in the PCB program were extremely limited during 1999 through 2001. Her recollection was that the regional staff in the PCB program was down to two persons, and that EPS was not the only facility Region III was focusing on at the time. Tr. 76 (Vol. XII).¹¹ Appellant's unilateral modification was not approved by the Regional Administrator. The ALJ correctly held that: "Respondent cannot avoid liability for the violation alleged in Count I on the ground that EPA did not promptly inform it that its unilateral MSC increase argument (which is contrary to the plain language of the regulation) was wrong." Initial Decision at 21.

7. The Processing Exemption of 40 C.F.R. § 761.20(c)(2)(i) did not apply to the PCB Waste Transformers which were Being Commercially Stored at Appellant's Facility on July 15, 1999 and November 2, 1999 and subject to the MSC Established by its TSCA Storage Approval.

Appellant argues that the PCB waste transformers in storage at its Facility were exempt from the MSC in the *TSCA Storage Approval* because the transformers would eventually be decontaminated by Appellant in accordance with a self-implementing decontamination procedure set forth at 40 C.F.R. § 761.79(c). Tr. 260-61 (Vol. XIII). Appellant claims that because EPS used the self-implementing decontamination process, the waste PCB transformers were being

¹¹ This testimony was substantiated by Ms. Creamer's supervisor, Aquanetta Dickens who testified that three out of five persons in the Region III TSCA branch left the branch in 1999. Tr. 106 (Vol. XII).

“processed” pursuant to 40 C.F.R. § 761.20(c)(2)(i) discussed *infra* and thus, entitled EPS to an exemption from the *TSCA Storage Approval* for commercial storage.

Appellee contends that the PCB units viewed by the EPA inspectors on the dates at issue were being commercially stored regardless of any claims regarding the ultimate disposition of such units. The processing exemption of 40 C.F.R. § 761.20(c) does not exempt such commercially stored units from the Maximum Storage Capacities for PCB transformers, CX 2, of Appellant’s *TSCA Commercial Storage Approval*. Simply stated, because all PCB waste must be disposed of in accordance with 40 C.F.R. § 761.60, the manner of disposal does not affect the applicability of 40 C.F.R. § 761.65 to PCB waste storage prior to the time of its disposal.

Appellant’s claimed exemption from its *TSCA Storage Approval* is an affirmative defense. Therefore, Appellant has the burden of proving that the waste PCB transformers were exempt from the MSC for PCB waste transformers in the *TSCA Storage Approval*.¹² “By seeking to invoke exemptions to the regulations, Appellant is raising affirmative defenses and bears the initial burden of production and the ultimate burden of persuasion for each affirmative defense.” *In the Matter of Norman C. Mayes*, EPA Docket No. RCRA-UST-04-2002-0001 (Feb. 27, 2004), Slip Op. at 18, citing *In re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 540 n. 20 (EAB, Oct. 20, 1994); *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272, n.9 (EAB, Aug. 2, 1990); *In re Globe Aero Ltd., Inc.*, 27 Env’tl. L. Rep. 47157, 47161 (CJO 1996); *U.S. v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967). “Accordingly, in every instance of where Respondent seeks the

¹²40 C.F.R. § 22.24(a). “The EPA must prove its prima facie case by proving each jurisdictional element and the factual allegations supporting the violations charged. Upon the prima facie showing, the burden of production and persuasion shifts to respondent to establish by a preponderance of the evidence the applicability of any affirmative defenses he wishes to raise.”

protection of a regulatory exemption, he must prove by a preponderance of the evidence each raised defense.” *In Re Norman C. Mayes*, Slip Op. at 19.

Appellant has failed to meet its burden of proof on its affirmative defense that any of the waste PCB transformers identified by Appellee on pages 12 and 14 of the *Second Amended Complaint*, were exempt from Appellant’s MSCs for PCB Transformers in its *TSCA Storage Approval* through application of the processing exemption at 40 C.F.R. § 761.20(c)(2)(i). 40 C.F.R. § 761.20(c)(2)(i) states in pertinent part:

Processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval.

Appellant’s argument seeks to completely circumvent the storage requirements of the *TSCA Storage Approval* by interpreting a regulatory exemption to exclude the exact waste that is regulated by the *TSCA Storage Approval*. The EAB has held that, as a general proposition, exemptions from regulations are to be narrowly construed. *In Re: Consumers Scrap Recycling, Inc.*, Docket Nos. EAB Appeal (Jan. 29, 2004) Slip Op. at 21, *citing Comm’r v. Clark*, 489 U.S. 726, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule).

The ALJ found that the facts of this case do not establish that appellant’s activities with respect to the PCB transformers satisfied the regulatory exemption. Initial Decision at 19. Inspector McPhilliamy testified that the waste PCB transformers he viewed were in storage. Tr. 247 (Vol. I). The PCB waste transformers were intact and there were no company employees working to decontaminate the equipment in the PCB transformer storage area at the time of the inspection. CX. 8; Tr. 247 (Vol. I). The photograph taken during the Jul. 15, 1999 inspection shows that the

PCB waste items which were being stored in a small area had little or no space between them and they were being stored close together and on top of each other with no room for processing activities or decontamination activities. CX. 8. In fact, the inspectors could not make a complete count of the PCB waste transformers due to the tightly spaced manner in which they were being stored. Tr. 96 (Vol. II); CX 8. Indeed, the storage area was so cramped that the equipment would need to be moved to another location before workers could begin to decontaminate any of the equipment. Tr. 247 (Vol. I). The transformers did not appear to have been disassembled or taken apart in any way. *Id.*

In addition, Appellant was storing transformers for much longer than the time needed to “process” them if indeed Appellant was actually ultimately processing them. Some of the PCB transformers in storage on Jul. 15, 1999 were still in storage on Nov. 2, 1999. Transformers with the following barcode numbers were present on both inspection dates: Barcode No. 279583 received by EPS on Jun. 28, 1999, Barcode No. 292916 received by EPS on Jul. 6, 1999, Barcode No. 301003 received by EPS on Jul. 6, 1999. CX 11, Att.3. Appellant’s list of transformers in storage on Nov. 2, 1999, provides the receipt dates for the sixteen waste PCB transformers which were identified by EPA for calculating the amount of waste PCB transformers in storage. CX11, Att. 3. The sixteen items were identified by EPA with arabic numbers. *Id.* The sixteen PCB waste transformers are the subject of the Nov. 2, 1999 storage violation. The information regarding the PCB waste transformers in storage on Nov. 2, 1999 is summarized below. CX 11, Att. 3. This list shows that Appellant was storing PCB waste transformers for long periods of time prior to any ultimate disposition as shown in the table below. The fifth column from the left on CX 11, Att. 3 has the heading “Rec. Date”. This, logically, is the date each waste PCB transformer was received by

EPS.¹³ The first transformer, Barcode number 300346, was received by EPS on Sept. 25, 1999. On Nov. 2, 1999, this transformer had been in storage for 39 days. Similarly, the remaining fifteen PCB transformers were stored longer than any “processing” time claimed by Appellant:

	<u>Barcode</u>	<u>Rec. Date</u>	<u>No. of Days in Storage by Nov. 2, 1999</u>
1.	300346	9-25-99	39
2.	340088	8-16-99	79
3.	292916	7-6-99	119
4.	311068	9-28-99	36
5.	292929	9-3-99	60
6.	325927	8-25-99	69
7.	714914	8-24-99	70
8.	292928	9-30-99	64
9.	337884	8-19-99	76
10.	337885	8-19-99	76
11.	337882	8-19-99	76
12.	279583	6-28-99	127
13.	301003	7-6-99	119
14.	302404	10-27-99	7
15.	361480	10-27-99	7
16.	318522	10/26/99	7

CX 11, Att. 3.

Appellant provided no evidence which proves that any of the waste PCB transformers were decontaminated at any time prior to the inspection dates, or thereafter, other than Appellant’s president’s testimony and affidavit. During the hearings, no documents were entered into the record which purport to show that specific barcoded PCB transformers were ultimately decontaminated by EPS. But even if the waste PCB transformers were ultimately decontaminated as Appellant’s president claims, they were still being commercially stored from the time that they arrived at the facility until any type of “processing” began. Appellant’s application of the processing exemption at

¹³The first and primary definition for the abbreviation “rec.” in Webster’s New World Dictionary, 3d College Ed. is “Receipt.”

40 C.F.R. § 761.20(c)(2)(i) to its storage activities would defeat the purpose of requiring MSCs for PCB equipment in a commercial storage approval. “Congress emphasized when it enacted TSCA that it would allow the continued use of PCBs only subject to restrictions designed to protect the public and the environment from exposure to these chemicals.” *In the Matter of Samsonite Corp.*, 3 E.A.D. 53 (Dec. 26, 1989), 1989 EPA App. LEXIS 3, at *11; *rev’d in part on other grounds*, 3 E.A.D. 196 (May 29, 1990). As previously stated, the rules requiring PCB waste tracking and requiring commercial storers to have EPA approvals reflects Congressional concern that storers of PCB waste may abandon facilities and the waste necessitating that the PCB waste be cleaned up by the government. 54 *Fed. Reg.* 52716 (Dec. 21, 1989).

Processing PCB equipment to facilitate disposal does not exempt such equipment from being subject to a TSCA commercial storage approval. The exemption from having a commercial storage approval under 40 C.F.R. § 761.20(c)(2)(i) applies only to “processing activities which are **primarily associated with and facilitate storage or transportation for disposal.**” Emphasis added. Appellant’s activities pursuant to 40 C.F.R. § 761.79(c) were primarily associated with disposal of equipment in its own scrap metal recovery oven. Appellant’s claim is that it was employing 40 C.F.R. § 761.79(c)(2)(i) for the purpose of tearing down PCB transformers (with concentrations of over 500ppm) to reduce the PCB concentrations to below 500 ppm so that the PCB transformers could be burned or disposed of in Appellant’s scrap metal recovery oven. Appellant’s president describes the way in which Appellant utilizes the self-implementing procedures of 40 C.F.R. § 761.79(c). At the end of the decontamination process (“dip cycle”), Reed claims: “Then they’re nonregulated. All right? **And actually, in our process, we just put them through the furnace at that—at that point, anyway.** But they’re nonregulated.”, Tr. at 263-269

(Vol. VIII) (K. Reed). Emphasis added. See also Brief of Appellant at 15. Appellant's actions in tearing down PCB transformers were not facilitating "storage" or transportation for disposal. Rather, Appellant is merely claiming that it was processing PCB transformers to facilitate disposal at its own facility. Such processing is not within the exemption cited by Appellant. Under the PCB regulatory scheme, disposal facilities are required to comply with 40 C.F.R. § 761.65. 40 C.F.R. 40 C.F.R. § 761.3. 761.60(b)(7).

8. Appellant's Fair Warning Argument is not Supported by the Record.

Appellant argues that "EPA failed to provide EPS fair warning of its interpretation of 40 C.F.R. § 761.20(c) before it decided to "use a citation" "for making its interpretation clear" to EPS." Appellant's Appellate Brief at 31. The ALJ held that "Respondent's fair warning argument is inapposite to the facts and legal issues raised in this case." Initial Decision at 21. Appellant failed to prove that the 40 C.F.R. § 761.20(c)(2) processing exemption applied to its commercial storage of waste PCB transformers. *Id.* at 20. The Region proved the commercial storage violation. Appellant's TSCA Storage Approval clearly sets forth the MSCs limitation for waste PCB transformers. CX 2. There simply is no language in the TSCA Storage Approval which provides for the application of the processing exemption to the MSC limitations in the permit. *Id.*

EPS also appears to make a "fair warning" argument regarding its claim that it unilaterally modified its permit to increase its MSC for waste PCB transformers to 100,000 pounds. This argument is also inapposite to the facts and law of this case. Appellant's TSCA Storage Approval was not modified by Appellant. Initial Decision at 15. Appellant's claim that it was approved by the Region to receive 97,000 pounds of CERCLA waste was not proven at the hearing, and is not a defense to the storage violation. Initial Decision at 21.

9. “All Applicable Regulations in Effect Including 40 C.F.R. § 761.20(c)” Argument

It is unnecessary for the EAB to address this argument because Appellant has not met the 40 C.F.R. § 761.20(c)(i) exemption.

10. The Status of Appellant’s Financial Assurance for Closure is not a Defense to the Storage Violations.

Appellant argues that “[s]ince 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.” Brief of Appellant at 37. Whether or not Appellant believes that there was sufficient funding in Appellant’s closure plan for storage of items above the Maximum Storage Capacity (MSC) limitations is not at issue in this case. Initial Decision at 22. Neither Appellant’s TSCA Approval, CX 2, nor 40 C.F.R. § 761.65(g) regarding financial assurance for closure for commercial storage facilities provides a mechanism for a commercial storer to unilaterally increase the amount of PCB materials being commercially stored when the interest in a closure trust fund happens to increase the total amount of money in a closure trust fund.

11. The PCB Penalty Policy was Properly applied to Count I.

Appellant argues that:

...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. 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.

Brief of Appellant at 39. The violation, including the amount of PCBs involved, the extent of deviation from the TSCA Storage Approval requirements, and its gravity was well-established in

the record. Appellant provides no support from the record for this argument other than citations to CX 24 which is the PCB Penalty Policy. The Initial Decision at 56-59 sets forth the finding in relation to the calculation of the penalty for Count I holding that the "extent" by which Appellant exceeded its MSCs is "significant", and upholding EPA's finding as to "gravity". Appellee set forth a detailed explanation of the application of the penalty policy to the storage violation at CPHB, Section IV at 64-79. The calculation which was upheld by the ALJ should be affirmed.

C. Count II: Appellee has shown by a preponderance of the evidence that Appellant was storing PCB Waste Capacitors in an amount which exceeded the MSCs in its TSCA Storage Approval in June and July of 1999.

Evidence collected during the July 1999 inspection proves that Appellant stored waste PCB capacitors in excess of its MSC in the *TSCA Storage Approval* on at least Jul. 9, 1999, as alleged in Count II of the Second Amended Complaint. Initial Decision at 23. Appellant raises the following issues on appeal: whether EPA filed its Complaint without any supporting evidence, whether EPS was operating a "transfer facility" with respect to the PCB waste capacitors at issue, whether the 40 C.F.R. § 761.20(c)(2) (i) processing exemption applies to the capacitors at issue, and whether EPA improperly applied the PCB Penalty Policy in regard to Count II.

Appellee has proved by a preponderance of the evidence that: (1) Appellant is a "person" as that term is defined at 40 C.F.R. § 761.3; (2) Appellant is a "commercial storer of PCB waste" as that term is defined at 40 C.F.R. § 761.3; (3) Appellant is prohibited by 40 C.F.R. § 761.65(d) from storing PCB waste except in accordance with its *TSCA Storage Approval*; (4) the *TSCA Storage Approval* contains a condition (MSC) limiting the amount of waste PCB capacitors (1,000 pounds) that Appellant can store *at any time*; and, (5) on at least Jul. 9, 1999, Appellant was storing a quantity of waste PCB capacitors above the MSC of 1,000 pounds (at least 26 times that

amount) required by the *TSCA Storage Approval*.

1. Appellant was commercially storing waste PCB capacitors in Quantities above its TSCA Storage Approval MSCs.

Appellant violated its *TSCA Storage Approval* by storing 26,367 pounds of PCB waste capacitors on Jul. 9, 1999 which is twenty-six times greater than the MSC for PCB waste capacitors in Appellant's *TSCA Storage Approval* of 1,000 pounds. CX 2. The elements of proof for this violation are the same as those listed for Count I. However, the MSC in Appellant's *TSCA Storage Approval* for PCB capacitor waste is 1,000 pounds. During the Jul. 15, 1999 inspection, McPhilliamy requested to inspect the number of PCB capacitors being stored onsite. Tr. 253 (Vol. I); CX 7. McPhilliamy was told by Appellant that there were no PCB capacitors onsite, and that 26,367 pounds of waste PCB capacitors had been shipped offsite by EPS on Jul. 9, 1999. Tr. 253-54 (Vol. I); CX 7. EPA requested and received a copy of the Jul. 9, 1999 manifest for the capacitor shipment. Tr. 253-54 (Vol. I); CX 10. The outgoing manifest and the incoming manifest show that the capacitors at issue were waste which was generated by Appellant's customer, American Electric Power, and received by EPS as waste. CX 10; RX 515. Appellant was storing approximately 26,367 pounds of PCB waste capacitors on Jul. 9, 1999. *Id.* McPhilliamy confirmed that number with Appellant. Tr. 254 (Vol. I). Appellant's MSC for PCB capacitors in its *TSCA Storage Approval* is 1,000 pounds "at all times." CX 2. The waste manifest documenting the shipment and delivery of the capacitors to Appellant's Facility shows that Appellant had stored the PCB waste capacitors at its facility since Jun. 28, 1999. Tr. 45 (Vol. IX); RX 515. Appellant testified that the PCB waste capacitors were "pure PCBs . . . they were a form of askarel." Tr. 48 (Vol. IX). Appellant violated the 1000 pound MSC of its *TSCA Storage Approval* for PCB waste capacitors by

storing 26,367 pounds of PCB capacitors on Jul. 9, 1999 and the eleven days prior thereto, back to Jun. 28, 1999. Appellant's president testified that on Jun. 28, 1999, EPS received a capacitor bank on a 45 foot trailer. Tr. 43, 46 (Vol. IX). The capacitor bank EPS received is a large unit which was an interconnected assembly of individual capacitors, *Id.*, which was described by Appellant's president as a "gigantic rack." Tr. 67 (Vol. IX). The waste PCB capacitor bank was shipped to EPS from a customer, American Electric Power (AEP), which is a utility company in Indiana, on Jun. 28, 1999, and listed on a hazardous waste manifest as electrical equipment less than 500 parts per million. Tr. 43 (Vol. IX); RX 515; CX10. Appellant's president further testified that the capacitors were received at EPS as unlabeled, non-PCB items. Tr. 46 (Vol. IX); RX 515; CX 10. The manifest lists AEP as the generator of the capacitor waste. Tr. 58-59 (Vol. IX); R's Ex. 515. The AEP manifest lists EPS as the "designated facility."¹⁴ Tr. 59 (Vol. IX); RX 515. Appellant's president further testified that:

A. So upon arrival at EPS, we have overhead cranes. They were unloaded. And then we had – we have people that start working in taking these apart and breaking them down into their individual components, just the capacitors by itself. So that's the process that was taking place. And then eventually after receipt, it was determined because they were not labeled PCB capacitors or non-PCB capacitors plus they didn't have the fluid labeled on them, EPS did–took a GC test and sent it out, a sample of one of the capacitors, And it was determined that it was a PCB capacitor.

Tr. 46 (Vol. IX).

After the unit was received, and assuming the capacitors were non-PCB, Appellant's employees began to tear apart the "rack" of capacitors into smaller units in order to burn them in EPS's scrap metal recovery oven. Tr. 46 (Vol. IX). Appellant then sampled the capacitors, sent a

¹⁴The definition of a "designated facility" at 40 C.F.R. § 761.3 is "the off-site disposer or commercial storer of PCB waste designated on the manifest as the facility that will receive a shipment of waste."

sample out for analysis, and discovered that they were “pure PCB” (over 500,000 ppm). Tr. 46 (Vol. IX); CX 10. Because Appellant cannot burn PCB materials over 500 ppm in its scrap metal recovery oven, EPS then decided to ship the capacitors to a TSCA-approved disposal facility, an incinerator belonging to Safety- Kleen. Tr. 46 (Vol. IX). In doing so, Appellant remanifested the waste in order to ship it to Safety-Kleen. CX 10; Tr. 64 (Vol. IX).

2. Appellant was not operating a “transfer facility” with respect to the waste PCB capacitors at issue.

Appellant was not operating a transfer facility or a storage area at a transfer facility within the meaning of 40 C.F.R. §§ 761.3 and .65(d)(5) with respect to the PCB waste capacitors at issue.

Section 761.65(d)(5) states that:

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 waste is stored at these facilities for a period of time greater than 10 consecutive days.

A “transfer facility” is defined at 761.3 in pertinent part as:

Transfer facility means 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. . . . 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) and the recordkeeping requirements of 761.80, unless the same PCB waste is stored there for a period of more than ten consecutive days between destinations.

40 C.F.R. § 761.3.

The key part of this definition is the phrase “held during the normal course of transportation.”

Appellant’s testimony regarding the capacitors at issue clearly demonstrates that the capacitor waste was not being “held during the normal course of transportation.” Tr. 46-48 (Vol. IX). Appellant testified that the capacitors were received at EPS and taken apart, and that “eventually” they were

tested for their PCB concentration because they were unlabeled. Tr. 46 (Vol. IX).

A “transfer facility” is simply a loading area where trucks arrive to pick up PCB waste and/or add additional waste to the truck load in order to consolidate waste which is to be taken to the ultimate disposer as described in the preamble to this rule: “The 10-days of consecutive storage limitation is allowed to provide trains, trucks, and other transport vehicles a period in which to unload the PCB waste until the PCB waste can be loaded onto the next connecting transport vehicle.” 54 *Fed. Reg.* at 52720. Appellant was not holding the PCB waste capacitors at issue to load onto the next transport vehicle. Tr. 46 (Vol. IX). The transfer facility definition does not contemplate the unloading, tearing apart, sampling of PCB waste items, and/or remanifesting of PCB waste as described by Appellant’s president. Tr. 46-48 (Vol. IX); 40 C.F.R. §§ 761.3, 761.65(d)(5). Removing the PCB capacitor unit from a truck, taking it apart and breaking it down into smaller units for burning in the scrap metal recovery oven, sampling them, and remanifesting them as waste is not holding PCB waste during the “the normal course of transportation” as set forth in 40 C.F.R. §761.3. Tr. 46-47 (Vol. IX). Conducting sampling activities and disassembly of PCB equipment are not activities which can be characterized as “during the normal course of transportation.” By definition, when hazardous waste or PCB waste arrives at a transfer facility as defined in TSCA, the containers are simply held for consolidation to be trucked together to a final destination. The containers are not pulled apart, or sampled. A transfer facility for PCBs, has a very limited role in the cradle to grave waste disposal process. 40 C.F.R. § 761.3. Upon learning that the capacitors were 500,000 ppm PCB, Appellant realized it could not process them in its scrap metal recovery oven (Tr. 149, lines 8 - 9 (Vol. X)) which is limited to items containing less than 500 ppm PCB. The capacitors which had been taken apart for processing were being commercially

stored on at least July 9, 1999.

The manifest form produced by Appellant's customer provides for multiple transporters at Box 13. RX 515. EPS is not listed on the manifest as a transporter. *Id.* The fact that Appellant was listed and signed as the "designated facility", and not as a second "transporter" on the manifest from AEP at Box 13, is further evidence that Appellant was not operating a transfer facility in regard to the PCB waste capacitors at issue. RX 515. As a designated facility, one can be either a commercial storage or a disposal facility, not a transportation or "transfer" facility. *See* 40 C.F.R. § 761.207(g). A commercial storage facility that is the "designated facility" for a particular shipment of waste cannot function as a transfer facility with respect to that waste. The arrival of a manifested shipment of waste at the "designated facility" completes the transportation phase and the transfer facility provision no longer applies.

Appellee recognizes that a party may play many roles under the PCB regulations regarding electrical equipment. However, Appellee does not agree that a party can engage in such roles simultaneously for the same piece of equipment as Appellant suggests. Whether the PCB waste capacitors were present at Appellant's facility for ten days, as Appellant claims, is not relevant because Appellant was not operating a "transfer" facility in regard to the 26,367 pounds of waste PCB capacitors at its facility in July 1999. Rather, Appellant was operating as a "commercial storer" of the PCB capacitors at issue.

3. The Processing Exemption at 40 C.F.R. Section 761.20(c) does not apply to the Waste PCB Capacitors at Issue.

In response to Count II, Appellant testified that it was processing the capacitors for disposal and therefore, the 29,367 pounds of capacitors which were present at the facility on Jul. 9, 1999

were exempt from the 1,000 pound MSC in Appellant's *TSCA Storage Approval* by application of 40 C.F.R. § 761.20(c)(2)(i). Tr. 66 (Vol. IX). As a factual matter and as a legal matter, Appellant cannot avail itself of the "processing for disposal" exemption at 40 C.F.R. § 761.20(c)(2)(i) for the storage of the PCB capacitors.

The ALJ correctly found that:

... it is the testimony of Keith Reed that dispositive of this issue. Reed testified that "if they were non-PCB capacitors, they would have been processed at EPS." Tr. 46-47 (Vol. IX). The fact of the matter is that they were PCB capacitors. The only reason that these capacitors were not processed at its Wheeling facility is because they tested at 500,000 parts per million. The overall testimony of Reed in describing the receipt at the facility of the 229 capacitors from American Electric Power was not that the capacitors were being broken down to facilitate their transportation for disposal off-site. Rather, his testimony shows that they were being broken down to be sent to respondent's own scrap metal recovery oven.

Initial Decision at 28.

First, Appellant's president testified that it normally takes "eight to ten hours with two or three people" to dismantle the rack of capacitors. Tr. 67-68 (Vol. IX). The dismantling of the PCB waste capacitors activity at EPS, described by Appellant's president, only took 8 to 10 hours of an 11 day period. Tr. 67-68 (Vol. IX); CX 10; RX 515. Even if one were to characterize Appellant's 8 to 10 hours of activities as "processing for disposal" as that term is explained in the preamble, exempting them from the MSCs in the *TSCA Storage Approval*, Appellant was storing the capacitors for the remainder of the eleven days and was subject to the 1,000 pound MSC of its *TSCA Storage Approval*. CX 2.

Second, the "processing for disposal" exemption is designed for facilities that do not otherwise require a TSCA commercial storage approval, and not for persons who are operating commercial storage facilities under a *TSCA Storage Approval*. The "processing for disposal"

exemption states that:

(2) 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 do not require a TSCA PCB storage or disposal approval.

40 C.F.R. § 761.20(c)(2)(i). The preamble to the regulation states that:

Processing for disposal activities which are primarily associated with and facilitate storage or transportation for disposal are disposal, but do not require a TSCA disposal approval. 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 or components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.

63 *Fed. Reg.* at 35392.

The actions EPS took with respect to the capacitor bank are not analogous to any of the examples stated in the Preamble, *supra*. Tr. 43-47 (Vol. IX). According to the manifest for the PCB waste capacitors, EPS did not remove the capacitors from service. Rather, EPS received the PCB waste capacitors on a manifest as the destination facility. EPS's customer and the generator of the PCB capacitor waste, American Electric Power, removed the capacitors from service at a location distant from Appellant's facility. Tr. 43 (Vol. IX); RX 515. According to Appellant's testimony, EPS did not drain the liquids from the capacitors or pump liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility or disposal facility. Tr. 43-47 (Vol. IX). EPS was not dismantling or disassembling **serviceable** equipment pieces and components, because the capacitors were not sent to EPS for service, the PCB capacitors were shipped to EPS for disposal as waste on a hazardous waste manifest. RX 515. Therefore, they were not "serviceable equipment", they were waste. *Id.* Prior to testing the PCB capacitor waste,

EPS was tearing down the equipment for disposal, not packaging or repackaging it. Tr. Aug. 22 at 46-48. EPS was not combining materials from smaller containers, rather EPS was taking a large unit and breaking it down to burn it in its scrap metal recovery oven: “So the capacitors . . . were skidded up because originally, if they were non-PCB capacitors, they would have been processed at EPS.” Tr. Aug. 22 at 46-47. Further, it was unnecessary to dismantle the capacitors to facilitate transportation or storage because the capacitors had already been transported from American Electric Power to EPS which was the destination listed on the manifest. RX 515. Appellant failed to meet its burden of proof regarding the “processing for disposal” exemption as it would apply to the PCB capacitor waste.

4. The PCB Penalty Policy was Properly Applied to Count II

Appellant repeats the same penalty policy application argument for Count II that it advanced for Count I:

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. 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.

Brief of Appellant at 45.

Appellant offers no support for its allegation other than citations to the PCB Penalty Policy. The Region proved its prima facie case as to Count II. A complete and detailed discussion of the application of the PCB Penalty Policy is provided in CPHB at Section IV, pp. 64-79. The ALJ ‘s finding relating to the penalty for Count II should be upheld.

D. Count III - Appellee has shown by a preponderance of the evidence that on eleven specified dates in March, September and October of 1999, Appellant failed to maintain the operating temperature required by 40 C.F.R. § 761.72(a)(3) while burning regulated material.

1. Appellee had a sufficient factual basis for the allegations in Count III.

Appellant raises several arguments in its appellate brief regarding Count III which Appellee addresses herein. Appellant begins its defense of Count III with the assertion that “EPA filed Count III without having any transformer PCB concentration data whatsoever on the day it filed its Complaint” Brief of Appellant at 46. However, that assertion is misleading for reasons explained below.

The sufficiency of Appellee’s allegations in the Complaint are evident based upon a consideration of the relevant standard and the record in this case. Appellee contends that an examination of the Second Amended Complaint illustrates that it satisfies the requirements of 40 C.F.R. § 22.14(a) (1)-(4) and Fed. R. Civ. Pro. 8(a) regarding notice pleading. The use of simplified notice pleading was affirmed in *Swierkiewicz v. Sorema*, 534 U.S. 506 (Feb. 26, 2002) stating that simplified notice pleading relies on liberal discovery rules and other pretrial procedures, judgements and motions to define disputed facts and issues and to dispose of unmeritorious claims. In *In the Matter of DMB North Carolina 2, LLC*, EPA CWA 04-2002-5005, (Jul. 10, 2003) *Order on Appellant’s Motion to Dismiss*, J. Biro noted that: “It is axiomatic that a complaint does not need to provide evidentiary support for the allegations contained in the Complaint.” Slip Op. at 3. Because 40 C.F.R. § 22.19(e) allows for discovery of additional evidence after the filing of a complaint, as do the Federal Rules of Civil Procedure, a appellee need not allege in the complaint all of the facts ultimately entered into the record. Accordingly, a complaint need not allege the specific factual details that prove each of the elements of the violation to meet the following standard.

Federal courts have stated that the "complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory".

Id., citing *Griffin v. Sheahan*, Civ. No. C 2398, 1999 U.S. Dist. LEXIS 7899 (N.D. Ill., May 12, 1999); *Peaceful Family Limited Partnership v. Van Hedge Fund Advisors, Inc.*, Civ. No. C 1539, 1999 U.S. Dist. LEXIS 1838 (N.D. Ill., February 17, 1999); *Chawla v. Klapper*, 743 F. Supp. 1284, 1285 (N.D. Ill. 1990).

The Second Amended Complaint is sufficient as to its claims that on the alleged dates at issue, Appellant violated Section 2615 of TSCA and 40 C.F.R. § 761.72(a)(3) which require that Appellant adhere to a minimum temperature for two and one half hours while burning regulated material in a PCB scrap metal oven. As explained *infra*, the Second Amended Complaint (as well as the First Amended Complaint) set forth direct and inferential allegations that Appellant failed to adhere to the temperature standard in the primary chamber of its scrap metal recovery oven. *Second Amended Complaint* at Count III, Paras. 24 - 28, pp. 4-5. These paragraphs state the temperature standard for the scrap metal recovery oven and that Appellant failed to meet the temperature standard. The dates of the allegations are listed in the *Second Amended Complaint* at page 10 (the dates remained the same as those set forth in the First Amended Complaint).

The evidentiary record shows that Appellee's allegations in Count III of the Complaint, as well as the Second Amended Complaint, are based, in part, on the admission by Appellant's vice-president (Scott Reed), that EPS was burning regulated items during as many as one-third of the scrap metal recovery oven burn cycles that did not comply with the required time and temperature standard set forth at 40 C.F.R. § 761.72(a)(3). Tr. 18:8 and 20:5 (Vol. II); CX 14 at 3-4. That admission is consistent with, among other things, the descriptions of Appellant's Scrap metal

recovery oven operations included in its advertising brochure (CX 56 at 3 unnum.) and the WV Air Permit (CX 26 at 1 (“Type of Facility or Modification: Scrap metal recovery furnace, specializing in PCB contaminated equipment”) and 4:B.3). That admission is also consistent with the testimony of Appellant’s president who acknowledged that 10-15% of the waste transformers received by Appellant were PCB-contaminated. Tr. 135 (Vol. X). Although EPA Inspector McPhilliamy requested Appellant to provide PCB concentration information on August 30, 2000, prior to the initiation of this proceeding, Appellant failed to provide written information showing the PCB concentrations of the items Appellant burned during the three one-week periods in 1999 for which EPA inspectors Rice and McPhilliamy reviewed scrap metal recovery oven operating data. In his report summarizing discussions with Scott Reed, McPhilliamy recorded: “Reed did not provide any records relative to oven contents to counter EPA’s earlier findings that the oven did not always maintain the required times/temperatures.” Tr. 20:12 (Vol. XI); CX 14 at 3.

Appellant implies that it was unable “to review its records and provide EPA with the PCB concentrations” of the transformers burned in violation of the regulations until EPA provided it with “the dates and burn cycle start and end times.” Brief of Appellant at 46. Although Appellant’s ability to review its records does not affect Appellant’s liability for the alleged violations, Appellee emphasizes that the record demonstrates that Appellant has *always* had knowledge of which burn cycles in 1999 failed to satisfy the time and temperature standard. Appellant has always been in possession of the time and temperature data it recorded, it has always been in possession of the lists of items its scrap metal recovery oven operators prepared to identify which specific transformers were burned during each burn cycle (as evidenced by the “Transformer Furnace Data” sheets for the three one-week periods of scrap metal recovery oven burn cycles at issue, which Appellant provided

to EPA in November 1999), and it has always had access to or possession of the PCB concentration data it received from its customers and the laboratory(s) to which it sent samples of dielectric fluid for analysis. See CX 16A, B, and C; RX 571 at R004569:31; CX 44 (CBI); CX 59 at 20-24; CX 46 (examples of laboratory reports received by Appellant); Tr. 221-23 (Vol. I); Tr. 52:18 to 54:9 (Vol. V). Thus, Appellant has always had continuous and comprehensive knowledge of scrap metal recovery oven time and temperature readings for each burn cycle, of the bar code numbers identifying the items burned during each burn cycle, and of the PCB concentrations of the transformers it burned. Indeed, since 1999, Appellant has always had the ability to review those records to determine whether it was in violation during the three one-week periods in question and to provide that information to EPA when EPA's inspector requested the information on August 30, 2000 and when the Presiding Officer ordered its disclosure on March 5 and June 3, 2003. For this reason, Appellant's assertion, at p. 46 of Brief of Appellant, that "[f]or the first time, EPS was also able to provide EPA with the number of transformers processed on the dates in question" is patently inaccurate.

Appellant asserts that "[n]inety-nine plus percent of the transformers processed on the dates¹⁵ initially cited by EPA were non-regulated *based on laboratory analyses conducted by an independent, certified laboratory, ACTI*. RX 551 (R004640-R004677)." Brief of Appellant at 47 (emphasis added). However, a careful review of pages R004640-R004677¹⁶ readily reveals that *Appellant never identified any laboratory – independent and certified or otherwise – as the source*

¹⁵The list of dates cited in the Complaint filed initially by EPA contained typographical errors affecting two dates which were corrected in the First Amended Complaint. Since the filing of the First Amended Complaint on January 29, 2002, the dates at issue in this case have not changed.

¹⁶Not all of the pages referenced by Appellant are included in RX 551, but they are included in RX 571, Ex. G and CX 55.

of the data on those pages. Further, Appellant did not indicate which of the PCB concentrations reported on those pages were derived from the testing of discrete samples from individual transformers and which results were derived from the “batch” testing of a single sample from a tank of liquid removed and commingled from a large number of transformers.¹⁷ Nor did Appellant provide copies of the reports created by the laboratory that performed the sample analyses from which Appellant obtained the PCB concentrations reported in RX 571, Ex G (R004640-R004677). That Appellant was able to and did in fact receive laboratory reports from ACTI is illustrated by Appellant’s inclusion of certain of such reports as an attachment to Keith Reed’s Affidavit dated May 1, 2003. *See* CX 46. *See also* CX 44 (CBI) which contains the sampling data of individual pieces of PCB equipment subsequently burned by Appellant, discussed *infra*.

Appellant’s president testified that some PCB concentrations relied on by Appellant to comply with waste PCB disposal regulations were based on “batch” testing and that the PCB concentrations reported for as many as 37, 50, or even 100 transformers might be based on the analysis of a single sample. He also stated that the PCB concentration based on such an analysis could not be related directly to the “bar code” of an individual transformer listed among those disposed of in a particular burn cycle. Tr. 54:19 to 55:15 (Vol. X). Yet it is clear from the evidence that Appellant was also collecting discrete samples from individual transformers in accordance with the requirements of some of its customers in 1999, including its largest customer, American Electric Power. Tr. 48-49 (Vol. X); CX 29 ;Tr. 65:15 (Vol. V).

¹⁷An examination of the data on these pages reveals that many of the concentrations are the result of the “batch” testing of a tank of liquid because identical PCB concentrations are reported by Appellant for large numbers of transformers, which would be extremely unlikely if discrete samples were analyzed from individual transformers. This pattern of identical results reported for multiple transformers is evident throughout the exhibit. One of the many examples of such a pattern in the pages of this exhibit are the reported concentrations of “4.2” for more than 60 burned transformers identified on pp. R004640 to R004643 of RX 571.

As demonstrated later in this brief, where Appellant determined PCB concentrations from both the testing of discrete samples from individual transformers and from “batch” testing of a sample from a tank of commingled liquids from a group of transformers that included the individually tested transformers, it would be misleading and a violation of the PCB regulations to report and rely on the “batch” sample concentration rather than the concentration determined through the analysis of a discrete sample obtained from a single transformer. EPA has published its clear position that:

The assumption policies in § 761.2 do not apply when electrical equipment is being disposed of. *At that time, the owner or operator of PCB equipment must know its actual PCB concentration and use the proper disposal method.*

63 *Fed. Reg.* 35384, 35389 (emphasis added). Further, the batch testing regulation is, on its face, applicable only to the determination of the concentration of PCBs in dielectric fluid that has been collected in a common container after it has been removed from mineral oil dielectric fluid electrical equipment. 40 C.F.R. § 761.60(g)(1). Thus, “batch” testing is acceptable only for characterizing the liquids removed from the transformers but not for determining the PCB concentrations of the individual drained transformers, which Appellant subsequently burned in its Scrap metal recovery oven. Further, this provision states, in pertinent part:

This common container option does not permit dilution of the collected oil. Mineral oil that is assumed or known to contain at least 50 ppm PCBs must not be mixed with mineral oil that is known or assumed to contain less than 50 ppm PCBs to reduce the concentration of PCBs in the common container. . . .

40 C.F.R. § 761.60(g)(1)(i). *See also* 44 *Fed. Reg.* at 31520-21 (May 31, 1979). For reasons, explained by Dr. Smith a discrete sample from a single transformer may contain a PCB concentration that is higher or lower than the result obtained by “batch” testing a sample for a set of

transformers that included the one tested individually. Dr. Smith testified that if one commingled or “batched” oil from eleven transformers, and the sampling result, on average, was 18 ppm PCB, one of those components could have been 198 parts per million, and the other 10 would have to be zero. Tr. 213-15 (XI). At the other extreme, all eleven could contain the same concentration, 18 ppm. *Id.* at 215-16.

If the actual concentration of PCBs in a transformer were above 50 ppm and known to be higher than the average concentration of the “batch” as determined by sampling from a common container, an impermissible dilution would have occurred, which is prohibited pursuant to 40 C.F.R. §§ 761.1(b)(5) and .60(g)(1)(b)(5). Thus, it would be a violation of those rules if the method of disposing of a certain transformer were based on the lower PCB concentration determined after such dilution of the dielectric fluid rather than on the known or assumed higher concentration of that transformer.¹⁸

Appellant now asserts that it has had the capability of matching the laboratory results (PCB concentrations) with specific bar codes identified on the “Transformer Furnace Data” sheets (included in CX 16A, B, and C). *See* Brief of Appellant at 46 (last para.). However, this claim is in direct conflict with Appellant’s claim that it was unable to identify the transformers at issue in order to defend itself in this proceeding.

Appellant’s president evaded his responsibility to provide a direct response to Appellee’s requests for PCB concentration data by asserting that “drained PCB-Contaminated transformers are not regulated for disposal” RX 571 at R004579:¶58. Appellant’s president repeated that

¹⁸“No person may avoid any provision specifying a PCB concentration by diluting the PCBs, unless otherwise specifically provided.” 40 C.F.R. § 761.1(b)(5).

assertion during the hearing and steadfastly refused to acknowledge the regulated status of PCB-contaminated transformers, which is clearly evident from the plain language of the PCB regulations.¹⁹ Tr. 157-50 (Vol. IX), Tr. 45-46 (Vol. 10). Consequently, every assertion by Appellant that it was not burning “regulated material” at the time of the shortened burn cycles identified by Appellee must be read in the context of Appellant’s misinterpretation of the PCB regulations.

2. Appellant has always known the dates and times when the burn cycles of its scrap metal recovery oven did not satisfy the time and temperature requirements of 40 C.F.R. § 761.72(a)(3).

Despite Appellant’s repeated assertions to the contrary, it has known since January 29, 2002--18 months prior to the beginning of the hearing in this matter--the dates for which Appellee alleged that the scrap metal recovery oven was not operated in accordance with 40 C.F.R. § 761.72(a)(3).²⁰ First Amended Complaint at 10-11. Appellant has also been aware of the specific three one-week periods during which the alleged violations occurred since the date it provided the

¹⁹Any person disposing of PCB-Contaminated Electrical Equipment . . . shall do so in accordance with [40 C.F.R. § 761.60(b)(6)(ii)(A)].

40 C.F.R. § 761.60(b)(4). 40 C.F.R. § 761.60(b)(6)(ii)(A) provides, in relevant part:

any person disposing of a PCB-Contaminated Article must do so by removing all free-flowing liquid from the article, disposing of the liquid in accordance with paragraph (a) of this section, and disposing of the PCB-Contaminated Article with no free-flowing liquid by one of the following methods:

* * * *

(3) In a scrap metal recovery oven or smelter operating in compliance with § 761.72.

²⁰The dates alleged in the First Amended Complaint include: March 23 and 25; Sept. 27, 28, and 30; and Oct. 1, 2, 26, 27, 28, 29, and 30, 1999. The same dates of violation are alleged in the Second Amended Complaint. Rice identified the same dates (with the exception of March 25, for which Appellee withdrew the allegation) as days of violation when he testified on June 20, 2003. CBI Tr. Jun. at 34-42. The same days of violation are identified in Complainant’s Opening Post-Hearing Brief. CPHB at 40-41 and 48-58 (CBI). **However, Complainant notes that it has erroneously listed, on page 93 of its Post-Hearing Brief, November 27, rather than October 27 which is the correct date as listed in the above-referenced pages.**

burn time and temperature data to Appellee in November 1999. The dates of the burn cycle violations identified by Appellee in the First Amended Complaint are based on Appellee's original analysis of the time and temperature data provided by Appellant. CX 11 and 16A, B, and C ("EPS Furnace Measurement Operating Levels"). Appellee has never attempted to revise those dates even though Appellee learned through discovery that the temperature information provided by Appellant was unsupported and misleading.²¹ See CPHB at 40. Appellee's reliance on the misleading information caused Appellee to allege fewer days of potential violation than were otherwise apparent in the time and temperature data contained in the "EPS Furnace Measurement Operating Levels" of CX 16A, B, and C. After being informed by Appellant that it had no information to substantiate its assertion regarding the primary chamber temperature differential, Appellee included among the list of alleged violations the burn cycles of shorter duration than that required by 40 C.F.R. § 761.72(a)(3) on the dates alleged in the First Amended Complaint only. EPS complains that the corrections are a basis for its due process defense. Since EPS' misrepresentations were the root cause of EPA's misunderstanding, EPS's defense of lack of notice is merely a thinly veiled

²¹Although the "EPS Furnace Operating Measurement Levels" provided by Appellant and included in CX 16A, B, and C indicate that burn cycles on dates other than those alleged in the First Amended Complaint did not remain above 999 °F for a period of 2 and ½ hours, Appellee did not allege those additional dates of violation because Appellee was initially misled by Appellant's unsubstantiated assertion printed at the bottom of every page that "THE PEAK TEMPERATURE REACHED IN THE PRIMARY CHAMBER AVERAGES 150 TO 200 DEGREES HIGHER IN VALUE" than the levels recorded by Appellant. See CPHP at 39-40. As a direct result of Appellant's unsupported assertion regarding the true operating temperatures inside the primary chamber of the Scrap metal recovery oven, Appellee did not include certain burn cycles among the ones identified initially as being too short. *Id.* After Appellant admitted to Appellee that it had no information to substantiate the above claim, Appellee determined that there were additional days when the temperature of the primary chamber did not remain above 999 °F for a period of 2 and ½ hours and, therefore, were potential days of violations that had not been considered for inclusion in the Complaint. Nevertheless, Appellee did not attempt to include in this proceeding the additional dates of the potential violations after Appellee became aware of the misleading information provided by Appellant. However, any burn cycle that failed to meet the above time and temperature standard on a day of violation alleged in the First Amended Complaint was considered for purposes of alleging a violation during the course of the hearing because Appellant was already on notice that burn cycles on those dates were the subject of the violations alleged in Count III and had possession of its own data showing which specific burn cycles failed to meet that time and temperature standard on those specific dates. *Id.*

attempt to derive a benefit from its misleading statements. Fundamental principles of fairness prohibit a party from benefitting from its own misdeeds. For this reason, Appellant cannot rely on the alleged lack of notice of the time of day of the violations. Further, Appellant was aware of the exact dates of violations and was, since the dates of the violations, always in possession of the temperature data and the PCB concentration data that revealed the short burns and what Appellant was burning. Because the dates of the violations alleged in Count III have remained unchanged since the filing of the First Amended Complaint, Appellant was adequately and timely informed of the days of violation. Further, Appellant now admits that it has had the capability of matching laboratory results to the burned transformers at issue. Indeed, Appellant stated during discovery that “during the settlement discussions and for period of over 12 weeks, EPS provided all PCB levels on the units in question.” *Order on EPA’s Motion for Sanctions* at 3 (June 3, 2003).

Appellant cites *Yaffee Iron and Metal Co, Inc. v. EPA*, 774 F.2d 1008 (10th Cir. 1985), as authority to support its defense that it has been denied due process because the complaint did not provide adequate notice of the alleged violation. For the reasons explained above, Appellant’s argument falls far short of proving a due process violation under the principles articulated in *Yaffee*. In *Yaffee*, the Tenth Circuit upheld the decision of an EPA administrative law judge which granted appellee’s motion to amend “an apparent error in the date alleged” in the complaint *after* the hearing in the matter was concluded. As the *Yaffee* court explained “if a appellant to an agency action knows the basis of the amended complaint against it, it has been afforded a full opportunity to meet the charges.” *Yaffee* at 1013. As previously explained, there is substantial evidence in the record which shows that Appellant fully understood the nature and theory of Appellee’s allegations, which are readily apparent in the *Second Amended Complaint*, Paragraphs 24 - 28. The dates of the

violations are listed at p. 10 of the *Second Amended Complaint*. Appellant knew the dates of the alleged violations for 18 months prior to the hearing and Appellant has all along possessed all of the information relevant to the proof of each and every element of the violation. In addition, Appellant did not object to Appellee's Motion for Leave to File a Second Amended Complaint, Mar. 20, 2003 at 1: "Appellant has informed Appellee that it does not object to the proposed amendment, which changed the words "PCB transformers" in Para. 26 to "PCB-contaminated transformer." Further, if Appellee had intended to charge improper disposal of PCB transformers (that is items over 500 ppm PCB), Appellee would have cited 40 C.F.R. § 761.60 as authority instead of 40 C.F.R. § 761.72(a) which is limited to PCB-contaminated transformers.

That complaint and the original one clearly identified Appellant's violation of the time and temperature standard of 40 C.F.R. § 761.72(a)(3) as the underlying regulatory basis of the violations alleged by Appellee. The primary chamber operating temperatures and times of all violations are recorded on the "EPS Furnace Operating Measurement Levels" provided to EPA inspectors in 1999 by Appellant and included in CX 16A, B, and C. Appellant could have referred to this data at any time to determine which burn cycles on the dates alleged in the First and Second Amended Complaints did not meet the two and one-half hour time and temperature standard set forth in 40 C.F.R. § 761.72(a)(3). Appellant has always had possession of its "Transformer Furnace Data" sheets listing all transformers it burned on certain dates and times during the three one-week periods of Scrap metal recovery oven burn cycles at issue. CX 16 A, B and C. Further, the evidence shows that PCB concentrations which are an element of proof of the violations alleged in Count III were sent to Appellant by the laboratory to which Appellant sent the samples for PCB analysis. CX 44 (CBI). Lastly, Appellant admits that it had the capability of using that laboratory data as well as

data from its customers to determine which of the burned transformers exceeded 50 ppm PCBs. CX 14 at 3, Brief of Appellant at 46-47. Accordingly, Appellant has failed to sustain its due process defense which is premised on its claim of lack of timely notice of the factual and regulatory basis of the violations alleged in Count III. Appellant has been in possession of all of the information supporting the elements of Count III since at least the date when Appellee filed the First Amended Complaint. The dates of the violations at issue throughout this proceeding are listed in the First Amended Complaint.

3. Appellee proved its prima facie case as to Count III that Appellant failed to operate its scrap metal recovery oven in accordance with 40 C.F.R. § 761.72(a)(3) on eleven days in 1999 specifically: March 23, September 27, 28, 30, October 1, 2, 26, 27, 28, 29 and 30.

Count III charges that during fifteen separate burn cycles on eleven specific dates in March, September, and October of 1999, Appellant failed to operate the primary chamber of its scrap metal recovery oven in accordance with 40 C.F.R. § 761.72(a)(3). 40 C.F.R. § 761.72 provides, in pertinent part, that:

Any person may dispose of residual PCBs associated with PCB-contaminated articles regulated for disposal under § 761.60(b), metal surfaces in PCB remediation waste regulated under § 761.61, or metal surfaces in PCB bulk product waste regulated under §§ 761.62(a)(6) and 761.79(c)(6), from which all free-flowing liquids have been removed:

(a) in a scrap metal recovery oven:

* * * *

(3) The primary chamber shall operate at a temperature between 537 degrees C and 650 degrees C (1,202 degrees F) for a minimum of 2 and ½ hours and reach a minimum temperature of 650 degrees C (1,202 degrees F) once during each heating cycle or batch treatment of unheated, liquid-free equipment.

The elements of proof for Count III are that: (1) Appellant operates a scrap metal recovery oven that is regulated by 40 C.F.R. § 761.72(a)(3), (2) the operation of Appellant's scrap metal recovery oven failed to comply with the time and temperature requirements of 40 C.F.R. § 761.72(a)(3) on

eleven dates in March, September and October of 1999 specifically March 23, September 27, 28, 30, October 1, 2, 26, 27, 28, 29 and 30, and (3) Appellant was burning regulated material in its scrap metal recovery oven during those eleven dates. Specifically, the evidence shows that Appellant failed to maintain the minimum temperature of 537 degrees C (999 degrees F) for a minimum of 2 ½ hours while burning *regulated materials*, that is, PCB-contaminated electrical equipment of 50 to 499 ppm PCB, regulated for disposal under § 761.60(b)(4), on Mar. 23, Sept. 27, 28, 30, Oct. 1, 2, 26, 27, 28, 29, and 30, 1999.²²

Appellant owns and operates a PCB scrap metal recovery oven consisting of a primary chamber and an afterburner. Tr. 97 (Vol. II); Tr. 219 (Vol. VIII); CX 1, 11, 26. Appellant burns PCBs from PCB-contaminated materials of up to 499 ppm PCB in the primary chamber of its scrap metal recovery oven as Appellant's president states:

Q. But your operations have been limited to under 500 so far?

A. Yes. Yeah. Our furnaces – in the furnace, the electrical equipment is under 500 parts per million.

Tr. 223 (Vol. VIII). An EPS Audit Report provided to potential customers states: "All electrical equipment below 500 ppm PCB will be processed through our furnace which is the largest furnace in the country that meets 40 CFR 761.72." CX 59 at *unnum.* 4. Similarly, the EPS Brochure states: "All non-PCB and PCB-Contaminated electrical equipment is loaded into EPS's custom designed multi-chamber furnaces." CX 56. Appellant has a West Virginia air permit for the operation of its scrap metal recovery oven. CX 26. The WV air permit states that Appellant's scrap metal oven specializes in burning PCB-contaminated equipment: "**Type of Facility or Modification: Scrap**

²²Although March 25, 1999 is set forth in the Second Amended Complaint as a day of violation, Appellee is no longer including March 25, 1999 as a day of violation.

Metal Recovery Furnace, specializing in PCB contaminated equipment.” CX 26 at *unnum.* 2.

Appellant’s oven operator testified that non-PCB and PCB-contaminated equipment is not segregated prior to being burned in Appellant’s scrap metal oven:

Q. Was the PCB concentration indicated physically on any item in each of the batches that you looked at?

A. No.

Tr. 216 (Vol. I). Appellant’s operation of its scrap metal recovery oven which is used to burn PCB-contaminated material is regulated pursuant to 40 C.F.R. § 761.72.

Based on Appellant’s audit report and brochure referred to *supra*, on the testimony of one of the scrap metal recovery oven operators, and on the testimony of Appellant’s president, no effort was made by the Appellant to segregate non-PCB equipment from PCB-contaminated equipment when the equipment was loaded into and burned in the scrap metal recovery oven. Tr. 216-17 (Vol. I), Tr. 136-37 (Vol. X). Further, the oven operator did not know the concentrations of the items he placed into the oven. Therefore, he should have operated the oven as though each and every batch burned contained PCB-contaminated material. Appellant’s president further testified that approximately ten to fifteen percent of the equipment received by EPS is PCB-contaminated. Tr. 135 (Vol. X). Therefore, Appellant had an obligation to run the scrap metal recovery oven in accordance with 40 C.F.R. § 761.72(a) at all times since regulated PCB-contaminated equipment would have been included in every batch or could have been. Indeed, Appellant appears to have been operating under that assumption. Tr. 210 (Vol. I).

Appellant’s PCB scrap metal recovery oven is operated on a continuous basis around the clock, 24 hours per day, in cycles. Tr. 11-12 (Vol. II); CX16A, 16B, 16C. Tr. 167 (Vol. VIII). Oven temperatures in the primary chamber are recorded on a 7-day round chart and the oven operating

parameters are collected every 5 minutes by computer. Tr. 106-08 (Vol. II); CX11, CX16A, 16B, 16C. The oven operating parameters recorded in the computer include, but are not limited to, date, hour, minute (in military time), afterburner temperature (degrees F), and primary oven temperature (degrees F). Tr. 108-09 (Vol. II); CX 11; CX 16A, 16B, 16C.

During the Nov. 2, 1999 EPA inspection of Appellant's facility, the EPA inspectors requested data regarding Appellant's operation of its scrap metal recovery oven. Tr. 9-10 (Vol. II); Tr. 97 (Vol. III); CX 11. Among other things, the EPA inspectors requested seven-day temperature round charts, and computer data for oven operating parameters for three specified weeks in 1999: the week of Mar. 22-26, the week of Sept. 26 - Oct. 2, and the week of Oct. 24-31. Tr. 10-11 (Vol. II); CX11. The weeks were chosen by the inspectors in a random manner. Tr. 10 (Vol. II); Tr. 98 (Vol. III); CX11.

The requested data was delivered by Appellant to the EPA Wheeling office shortly after the Nov. 2nd inspection. Tr. 12 , 100-01 (Vol. II); CX 16A,16B, 16C. Appellant's data was incorporated into Appellee's Nov. 1999 Inspection Report at Att. 6 and 7. CX11. Appellant also provided "Transformer Furnace Data" sheets (also known as inventory sheets) which are lists of equipment and materials burned during each burn cycle. Tr. 102 (Vol. II); CX 16A, 16B, 16C. A separate Transformer Furnace Data Sheet was compiled by various oven operators for each oven burn cycle. Tr. 221-24 (Vol. I), CX 16A, 16B, 16C. The items burned in each burn cycle were identified by each EPS oven operator on the Transformer Furnace Data sheets by six-digit barcode numbers previously described above. Tr. 219-20 (Vol. I); Tr. 101, 110 (Vol. II); CX16A, 16B, 16C.

McPhilliamy gave the above oven data and the Transformer Furnace Data sheets to Rice within a day or two of their receipt for his review. Tr. 13, 99 (Vol. II); CX16A, 16B,16C. Rice

reviewed the data in CX 16A, 16B,16C which consisted of round charts and computer printouts which recorded the (military) time and temperature in five minute intervals of each burn cycle. Tr. 101,106-09 (Vol. III). Rice marked the computer data sheets for each two and one half hour burn and reviewed the temperatures for each two and one half hour period. CX 16 A,16B, 16C. The results of Rice's review of Appellant's scrap metal recovery oven data were recorded in the Nov. 2, 1999 EPA inspection report. CX11.

Rice's review of the computer data revealed that Appellant failed to maintain the minimum regulatory temperature for two and one-half hours as required by 40 C.F.R. § 761.72(a)(3) in the primary chamber of the scrap metal recovery oven for 51 cycles out of 76 cycles that the oven was operating during the three random weeks selected by EPA. CX 11, Table 1, at p. 5; Tr. 111 (Vol. II). From Oct. 24 through Oct. 31, 1999, Appellant failed to maintain the minimum temperature during 21 out of 28 burns cycles. *Id.* During the dates of Sept. 26 through Oct. 2, 1999, Appellant failed to maintain the minimum temperature during 28 out of 36 burn cycles. *Id.* During the dates of Mar. 22 through Mar. 26, 1999, Appellant failed to maintain the minimum temperature during two of twelve burns *Id.* The data reveals that Appellant failed to maintain the oven temperature on a regular basis.

Appellant's computer data of oven times and temperatures contains a note at the bottom of the first page which states that the actual temperature of the oven is 150 to 200 degrees higher than the computer recorded temperature. CX 16A, CX 11; Tr. 113 (Vol. II), CBI Tr. Sept. 10 at 39. Appellee considered the Appellant's claim when selecting the burns to be charged in the Complaint from the 51 burns found to be in violation. CBI Tr. Sept. 10 at 39-40 . Thus, in formulating the Complaint, Appellee gave the "benefit of the doubt" to Appellant's claim by adding 200 degrees to

the beginning and end of each burn cycle. CBI Tr. Sept. 10 at 39- 40 . This reduced the number of burns alleged to be in violation. During discovery, Appellee sought data from Appellant to substantiate this claim regarding the 150 to 200 degrees by providing documents, diagrams and all data to support such a claim. *Order on EPA's Motion for Sanctions* at 6. Appellant admitted in its discovery response to Appellee and in Keith Reed's April 30, 2003 Affidavit that no data existed to substantiate the claim. *Id* at 6. CBI Tr. Sept. 10 at 41-42 . Appellant did not enter any documents into the record to substantiate that claim. Consequently, since there was no evidence to support the claim that the oven temperatures were 200 degrees higher than the computer recorded temperatures in the data Appellant provided to the Appellee, Appellee determined that the actual burn cycles not meeting the time and temperature requirement on the dates alleged were those burns that Rice testified about on CBI Tr. Jun. 20 at 34-42.

Rice used the computer data in C. Ex 16A, 16B,16C to determine the exact dates and times that the Appellant failed to maintain the minimum temperature of 1000 degrees (999) F. CBI Tr. Jun. 20 at 34-42.²³ On the 11 dates in 1999, Mar. 23, Sept. 27, 28, 30, Oct. 1, 2, 26, 27, 28, 29 and 30, the temperature of 1000 degrees F was not maintained for two and one-half hours during fifteen burns, while burning regulated material, as follows:

<u>Date:</u>	<u>Two and a Half Hour Burn Cycle Periods:</u>	<u>Amount of Time During the Burn Cycle Temperature Was Below 999 degrees F:</u>	<u>CX Page No.</u>
3-23-99	8:03A-10:37P	39 minutes	16A, March, at 9-10
	11:50A-2:22P	20 minutes	16A, March, at 10
9-27-99	11:22A-1:54P	20 minutes	16B, Sept., at 12

²³ Although the information being referred to is contained in the CBI portion of the Tr., the information on the burn oven temperatures is not considered to be CBI.

9-28-99	8:57 - (Temp. not recorded)	46 minutes	16B, Sept., at 20
9-30-99	10:14A-12:45P	10 minutes	16B, Sept., at 27
10-1-99	5:13A-7:47A	45 minutes	16B, Sept., at 32-33
	1:50P-4:23P	15 minutes	16B, Sept., at 35
	5:12P-7:46P	40 minutes	16B, Sept., at 35-6
10-2-99	1:25A-3:59A	30 minutes	16B, Sept., at 38
	9:14A-11:47A	5 minutes	16B, Sept., at 40
10-26-99	2:48P-5:21P	1 hr, 10 minutes	16C, Oct., at 19-20
10-26-27-99	11:17P-1:50A	30 minutes	16C, Oct., at 22
10-27-99	10:52P-1:24P	25 minutes	16C, Oct., at 25
	2:28P-5:00P	10 minutes	16C, Oct., at 26
	8:11P-10:43P	5 minutes	16C, Oct., at 27-28
10-28-99	3:23A-5:54A	25 minutes	16C, Oct., 29-30
10-29-99	1:38P-4:09P	5 minutes	16C, Oct., at 38
10-30-99	2:50A-5:20A	30 minutes	16C, Oct. at 41-42

CX 16A, 16B, 16C; CBI Tr. Jun. 20 at 34-42. After determining which burn cycles failed to comply with the two and one-half hour burn standard of 40 C.F.R. § 761.72(a)(3), Appellee attempted to determine whether regulated material was being burned at the above times as explained *infra*.

4. Appellant's Vice-President Made an Admission to Inspector McPhilliamy that Appellant was burning regulated material on the days that Appellant failed to operate its scrap metal oven in accordance with 40 C.F.R. § 761.72(a)(3).

After EPS contacted EPS in August of 2000, Inspector McPhilliamy went to Appellant's Facility to discuss EPA's findings from its Nov. 2, 1999 PCB inspection. Tr. 14 (Vol. II); CX 14.²⁴ One issue discussed was EPA's finding that during a number of oven cycles, Appellant's oven "did not reach the required temperature in the primary chamber of the scrap metal oven for the required 2 ½ hours. In 76 oven cycles, the temperature was attained for the proper time on only 25 occasions." Tr. 18 (Vol. II), CX 14 at 3. Appellant's Vice-President claimed that during some of the cycles

²⁴ The memorandum at CX 14 was admitted into evidence at Tr. 18 (Vol. II) at 17, lines 2-6, but the court reporter did not note this at the list of admitted exhibits at the beginning of the transcript for Jun. 18.

when Appellant failed to attain the regulatory temperature, Appellant was not burning regulated material (that is, material which was between 50 - 499ppm) and therefore did not have to adhere to the requirements of 40 C.F.R. § 761.72(a)(3). CX 14; Tr. 18 (Vol. II). Therefore, EPA requested data on the PCB concentrations of the oven contents or items burned to determine whether Appellant's claim that it was burning only unregulated materials could be verified. Tr. 17-20 (Vol. II); CX 14. Appellant further agreed to revisit the records for the three weeks in question. CX 14 at 3. "EPS further agreed to provide to EPA the contents of the scrap metal oven for each cycle when EPA reported the oven was operating outside the requirements of the regulations." *Id.*

Appellant failed to provide such data on the oven contents to EPA. Tr. 17-20 (Vol. II); CX 14. McPhilliamy recorded the meeting with Scott Reed, Appellant's Vice-President, contemporaneously with its occurrence:

However, [Scott] Reed did not provide any records relative to oven contents to counter EPA's earlier findings that the oven did not always maintain the required times/temperatures. Reed stated that when EPS began to pull the records relative to oven contents for these periods, they also determined the oven had not always met the required time/temperature required by 40 C.F.R. § 761.72(a)(3) while burning regulated items. Reed acknowledged the fact that the oven did not always operate in compliance with 40 C.F.R. § 761.72(a)(3) when burning regulated materials. His estimate was that as many as one-third of the burns noted by the EPA review had included regulated items during periods the required time/temperature was not achieved.

Reportedly, EPS was able to track the periods when the oven was not properly operated to primarily one plant operator. As a result of the oven temperature issue, EPS revised the Furnace Operator Checklist on 01 September 2000. This checklist now requires the operator to record the temperature every 10 minutes during an oven cycle. Att. 5.

Tr. 18 (Vol. II); CX 14.

Appellant admits that the oven was not operated in accordance with 40 C.F.R. § 761.72(a)(3) and that the failure to properly operate the oven was attributed to one operator. *Id.* Appellant created a "revised checklist" on Sept. 1, 2000, for oven operators, which is further

evidence that Appellant acknowledged the violations shortly after the violations occurred. *Id.* There would have been no need to create a revised checklist for adherence to 40 C.F.R. § 761.72(a) if Appellant had not failed to comply with the time/temperature standard while burning regulated materials.

Scott Reed testified that he told McPhilliamy that “not all burns contained PCB contaminated equipment.” Tr. 47-48 (Vol. V). Consequently, by his own admission, some of the burns did contain PCB-contaminated equipment. Scott Reed also testified that McPhilliamy then asked him for PCB data on the equipment—“the PCB test results on the equipment.” Tr. 48 (Vol. V). Scott Reed failed to provide the data, and at the hearing, he denied that he told McPhilliamy that one third of the burns contained PCB-contaminated equipment. Tr. 50 (Vol V). However, Scott Reed’s testimony at the hearing is self-serving and not credible: “So there’s no way I could have made that statement that one third of the burns were for PCB-contaminated items. I was just referring to that, yes, I concurred that one-third of the burns were for not above two and a half hours at 1,000 degrees.” Tr. 50 (Vol. V). Since the data that EPS did provide to EPA on the burn times already showed that EPS failed to meet the time and temperature requirements two thirds of the time (51 out of 76 burns), Reed’s testimony that h was actually referring to one-third of the burns not meeting the time and temperature requirements simply does not make sense. McPhilliamy’s contemporaneous record of the conversation which took place is the reliable, credible evidence on Scott Reed’s admission. CX14.

Appellee believed that the PCB concentration data was in the exclusive control of Appellant based on Appellant’s vice-president’s admission to Inspector McPhilliamy that as many as one-third of the burns noted by the EPA review had included regulated items during the periods when the

required time/temperature operating standards were not achieved. Appellee was also aware that Appellant's WVDEP air permit for the operation of Appellant's scrap metal oven required Appellant to keep records of the PCB concentrations of the items burned by Appellant for a five-year period. CX 26. Because Appellant is prohibited from burning PCB material of 500 ppm and higher in its scrap metal oven, Appellant had to ascertain the PCB concentrations of the materials it was burning. Appellee sought Part 22 discovery of the PCB concentrations of the items burned.

5. Appellee Sought and Received Verifiable Data from the ACTI Laboratory on the PCB concentrations of the items burned by appellant in its scrap metal recovery oven on the days at issue.

Because Appellant failed to comply with the Discovery Order and because Appellee was aware that such analytical results more than likely existed (CX 46), Appellee issued a TSCA subpoena to Appellant's laboratory, Weidmann-ACTI, Inc. ("ACTI"), for the individual sampling results for PCB-contaminated items burned by Appellant in 1999. Tr. 124 (Vol. II). ACTI provided data to EPA in the form of a computerized tabulated list. Tr. 124-28 (Vol. II); CX 43, 44 (CBI) and 45. ACTI submitted the information as Confidential Business Information, CX 44 (CBI). The list contains several columns of information. *Id.* There are two columns of data that are most critical to the instant case. One column is labeled "serial numbers". The "serial numbers" on the ACTI lab data are six digits, and many of them identically match Appellant's six-digit barcode numbers on Appellant's Transformer Furnace Data sheets provided to EPA with the oven operating data. CX 44 (CBI) and CX16A, 16B, 16C; Tr. 15-17 (Vol. X). The other column of critical data is the analytical results in parts per million PCB which correspond to the serial numbers (barcodes). CX 44 (CBI). The dates on the ACTI lab data for samples analyzed correspond to the dates of the oven burns at issue. CX 16A, 16B and 16C (Transformer Furnace Data sheets); CX 44 (CBI).

In regard to the six-digit barcode numbers, Appellant's president testified that a barcode is placed on each piece of equipment that is picked up by the Appellant so that EPS can track each item as the equipment progresses through the Facility. Tr. 43 (Vol. X), CX 56.

EPS provides a fully documented 'Cradle-to-Grave' disposal process. All material is carefully tracked from the time it leaves the customer's site by our unique bar code tracking system.

Tr. 42 (Vol. X); CX 56.

Detailed records are kept as each piece of equipment progresses through the facility. All of this data is gathered electronically for permanent record keeping.

Tr. 43 (Vol. X); CX 56.

Appellant's oven operator testified that prior to each burn, the oven operator enters the barcodes from tags removed from each piece of equipment to be burned, into the computer and then writes the barcodes onto Transformer Furnace Data sheets as a backup. Tr. 219-22 (Vol. I). Rice's review of the Transformer Furnace Data sheets provided by Appellant to EPA revealed that each item listed on each data sheet was listed by a six-digit barcode number. Tr. 110 (Vol. II).

6. The ACTI laboratory data reveals that Appellant was burning regulated material in its scrap metal oven on the days and times at issue.

The evidence which supports EPA's findings for Count III is contained in EPS's computer data of times and temperatures of operation of the primary chamber of Appellant's scrap metal recovery oven in CX 16A, 16B, 16C, the Transformer Furnace Data sheets which consist of inventory sheets of items burned in Appellant's scrap metal recovery oven further identified by six-digit barcode numbers, CX 16A, 16B, 16C, and the analytical results of PCB concentrations contained in the ACTI laboratory data of CX 44 (CBI). CBI Tr. Jun. 20. at 7-42).

The Presiding Officer correctly held that: "EPA has carried its burden of proof on the issue

on the strength of analytical data obtained from a company by the name of Wedimann-ACTI, Inc. (“ACTI”). Initial Decision at 37. The violations found, and the penalty applied, were based solely on those burns which contained pieces of PCB-contaminated equipment for which discrete (individual) samples were reported in the ACTI lab data. See CBI portion of Initial Decision.²⁵

**SEE CONFIDENTIAL BUSINESS INFORMATION (CBI) SECTION OF
COMPLAINANT’S POST HEARING BRIEF SENT UNDER SEPARATE COVER TO EPA
HEADQUARTERS DOCUMENT CONTROL OFFICER (DCO), PP. 48 - 60 OF
COMPLAINANT’S POST-HEARING BRIEF AND CBI PORTION OF INITIAL
DECISION**

Appellant argues that Appellee has relied on “mere suspicions, allegations, and suppositions regarding the PCB concentrations” of the transformers burned by Appellant. Brief of Appellant at 56. Appellant bases that defense on its false claim that the burned transformers at issue and the PCB concentrations (CBI CX 44) obtained by Appellee from the Laboratory (ACTI) that analyzed transformer oil samples for Appellant are not linked in any way by the 6-digit identifiers—the bar codes on Appellant’s Furnace Data Sheets” and the Serial Numbers reported by ACTI with the PCB concentration data from its analysis of Appellant’s samples. Appellant cavalierly argues that the 6-digit serial number reported by ACTI under the heading “Serial Number”²⁶ was simply an

²⁵ The CBI tables are included as a part of the record of this case which was forwarded to the EAB,

²⁶The “Serial Number” column is indicated at the top of page 1 of CX 44(CBI).

“extraneous” data column, not used in the data reporting process. Brief of Appellant at 54.²⁷

Appellee’s analysis described during the hearing by Rice (CBI Tr. Sep. 9 at 9-13) and explained in detail below shows that the patterns apparent in 344 pairs of matching identifiers in the record proves convincingly that when a bar code and a serial number match they refer to the same transformer, thereby directly linking a laboratory PCB concentration to a burned transformer.

Because of the large volume of information available in the exhibits that demonstrate the pattern connecting the data in REX 571, Ex. G to CX 44 (CBI), as Mr. Rice testified, Appellee has prepared fully referenced CBI Tables that link every data item to its source in the evidentiary record. Although there is a substantial amount of information presented in this manner, the significance of the patterns demonstrated by this data will fully justify the expenditure of the court’s time spent evaluating and scrutinizing the information presented in this manner. The CBI Tables, which

information, are a part of the argument presented in this response

in those CBI Tables is referenced to a source in the record of

every bar code reported in REX 571, Ex. G was compared to the

in C. Ex. 44. Each bar code that matches a Serial Number is

the date and time heading that corresponds to the burn date and time

in Ex. G on which the bar code appears. On the same row of the

table, Appellee has listed the corresponding PCB concentrations as reported

by Appellant in REX 571, Ex. G and by ACTI in C. Ex. 44 (CBI), respectively. On the same row as

²⁷ In contrast, Appellant presented few, if any, concrete examples to show that the identifiers are not related. Appellant references a letter from ACTI which does not refer to or mention whether ACTI received five or six digit numbers from Appellant.

the 6-digit identifier and the PCB concentrations, the page number of the source exhibit is listed to provide a link to the evidence in the record. In addition, the date when the laboratory received the sample is shown on the same row. To illustrate the linkage to the record, the first row of information (identifiers, PCB concentrations, and lab date) for matching bar code and Serial Number 286168 on the CBI Table “October 1, 1999 5:12 PM” was obtained from C. Ex. 44 at 240 and from REX 571, Ex. G²⁸ at R004657.

As Rice explained at the hearing, a careful review of the data reveals that there is a relationship, indeed identity, between matching pairs of bar codes and Serial Numbers. The patterns of information exhibited in the CBI Table compellingly refute Appellant’s claim that Serial Numbers are “simply an extraneous data column”²⁹ in CBI Ex. 44. In addition, the pattern found in the evidence leads to several conclusions about Appellant’s reporting of information and the reliability of using the ACTI data as evidence of the PCB concentration of items burned by Appellant. These patterns identified by Appellee which are evident from the CBI Tables at Table 1 (CBI) are enumerated below.

7. The CBI Tables show that there are 344 instances in which a bar code from RX 571, Ex. G matches a “Serial Number” in C. Ex. 44 (CBI).

For every instance of those matching pairs where the PCB concentration reported in CBI C. Ex. 44 is less than 50 ppm, *i.e.*, levels for unregulated transformers, the concentrations reported by Appellant and ACTI match exactly. For example, on CBI Table “October 1, 1999 5:12 PM”, the

²⁸The pages entered as REX 571, Ex. G are also entered into the record at C. Ex. 55. The cross-reference between these two exhibits is indicated at the bottom of each CBI Table.

²⁹ Appellant’s self-serving claim that the six-digit numbers on the ACTI lab data labeled as Serial Numbers is simply an “extraneous” data column, when they identically match Appellant’s six-digit numbers on its Transformer Data Sheets in 344 instances is contrary to common sense. If Appellant did not provide those unique six-digit numbers to ACTI, how did ACTI obtain them, and why would ACTI record them with the results of PCB analyses?

PCB concentrations reported in the two exhibits match identically for matching pairs of identifiers when the PCB concentrations are 1, 3, 2.2, 16, 46, 37, 45, and 28. This exact correlation is evident on every page of the CBI tables. This exact matching of reported PCB concentrations occurs in all of such instances of matching Bar Codes/Serial Numbers when the PCB concentrations reported by ACTI are less than 50 ppm PCB. This 100 percent correspondence between the two six-digit numbers is clear and compelling proof that the ACTI Serial Number is not some “extraneous” data column, unrelated “in any way” to Appellant’s bar codes as Appellant’s president claimed in his testimony and as argued by Appellant at Brief of Appellant at 54.

1. Of the 344 matching pairs, there are 316 instances where the PCB concentration reported in CBI C. Ex. 44 is the same as the PCB concentration reported by Appellant and ACTI match exactly. Further, the dates when the samples were received at the laboratory correspond very well with the dates of the burn cycles to which they apparently relate. Common experience is sufficient to justify the conclusion that these correlations are not mere coincidence. Such a high degree of correlation proves that the ACTI lab data is linked by six-digit serial numbers to the six-digit barcodes on Appellant’s Transformer Burn Data Sheets, from which Appellant created REX 571, Ex. G.
2. However, the only times the PCB concentrations for matching pairs of 6-digit numbers did not match was when Appellant reported a concentration of less than 50 ppm. There are 28 instances in which the PCB concentrations corresponding to matching pairs of identifiers are not exactly the same. In each of those instances, Appellant reported to EPA that the PCB concentration of a transformer was less than

50 ppm. In those instances, the paired PCB concentration reported by ACTI in CBI C. Ex. 44 exceeded 50 ppm, indicating that the transformer represented by the barcode from which the oil sample was taken was regulated for disposal. Appellee contends that this correlation is a random occurrence. Rather, it appears that Appellant selectively excluded data or substituted the data reported by ACTI for those 28 transformers to make it appear as though they were unregulated.

8. Circumstantial evidence in the record proves that Appellant was burning PCB-contaminated transformers in its SRO during times when the primary chamber of the SRO was not operated in compliance with the time and temperature standard of 40 C.F.R. § 761.72(a)(3), as alleged in Count III of the Second Amended Complaint.

At page 57 of Brief of Appellant, Appellant argues that “EPA can no longer rely on the ‘assumption rule’ to meet its burden of proof.” First, Appellant’s arguments imply that Appellant believes that it need not know the concentration of the items it burned and that the regulations do not require a person who disposes of transformers by burning them to know their PCB concentrations. The following analysis reveals that Appellant is incorrect. Indeed, the preamble to the “megarule” confirms Appellant’s misinterpretation of the regulation:

The assumption policies in § 761.2 do not apply when electrical equipment is being disposed of. *At that time, the owner or operator of PCB equipment must know its actual PCB concentration and use the proper disposal method.*

63 Fed. Reg. 35384, 35389 (June 29, 1998) (emphasis added).

Without conceding the merits of Appellant’s premise, Appellee emphasizes that its case does not rely on the assumption rule to meet its burden of proof. Rather, Appellee argues that the circumstantial evidence in this case is entirely consistent with the hard data that directly proves the conclusion that Appellant was burning PCB-contaminated transformers in its scrap metal recovery

oven during times when the primary chamber of the scrap metal recovery oven was not operated in compliance with the time and temperature standard of 40 C.F.R. § 761.72.72(a)(3), as alleged in Count III of the Second Amended Complaint. The significance of the circumstantial evidence is explained below. As a person who owns and operates a scrap metal recovery oven which is regulated explicitly by 40 C.F.R. § 761.72(a), Appellant has been under a duty to operate the oven in accordance with that provision, which applies to Appellant whenever it is burning PCB-contaminated equipment, whether or not Appellant knows the actual PCB concentration of that equipment. Logically, Appellant could not fulfill that duty unless it either: 1) always operated the oven in accordance with the standard set forth at 40 C.F.R. § 761.72(a)(3), or 2) measured, recorded, and tracked the actual PCB concentration of each transformer before it was burned in a particular burn cycle, so Appellant would know if it were required to comply with that provision during that burn cycle. The EPS Furnace Measurement Operating Levels included in CX. 16A, B, and C show that Appellant did not always operate the oven in accordance with the standard set forth at 40 C.F.R. § 761.72(a)(3). In fact, Appellant complied with that standard only one-third of the burn cycles recorded during the three one-week periods reviewed by EPA in 1999.³⁰ CX 11 at 5; Tr. 111 (Vol. II). In addition, Appellant's scrap metal recovery oven operator testified that he did not know the PCB concentration of the transformers that he was burning in the scrap metal recovery oven because the PCB concentrations were not indicated in any way on the transformers he burned. Thus, he had no way of determining whether or not the temperature of the primary chamber of the scrap metal recovery oven needed to be above 999 °F for a period of 2 and ½ hours during any

³⁰Appellant failed to operate its scrap metal recovery oven in accordance with 40 C.F.R. § 761.72(a)(3) in 51 of 76 (two-thirds) of the burn cycles examined at random by EPA during 1999. C. Ex. 11 at 4-5; Tr. 111 (Vol. II).

particular burn cycle. Consequently, the evidence shows that Appellant was not implementing the measures necessary to enable it to comply with the scrap metal recovery oven operating standards. This fact combined with evidence that 10-15 percent of the transformers handled at Appellant's facility contained PCB concentrations above 50 ppm constituted circumstances in which violations of the scrap metal recovery oven operating standards would be inevitable and routine. These circumstances and the evidence of PCBs at concentrations described on pages 48-58 (CBI) of Appellee's Post-Hearing Brief are entirely consistent with the violations alleged in the Second Amended Complaint.

In fact, Appellant admits that "all but a handful of the units were non-PCB." Brief of Appellant at 52.

9. Appellant's admissions show that a reasonable inference can be drawn that Appellant was burning regulated material on the dates at issue.

Appellant's president testified that 10 to 15 percent of the equipment burned by Appellant is PCB-contaminated.³¹ Tr. 135 (Vol. X). In addition to Appellant's president's testimony, Appellant's vice president testified that 90 percent of equipment that EPS burns is non PCB. Tr. Aug. 18 at 48. Consequently, the vice president, Scott Reed, admitted that 10 percent of what was burned at EPS was PCB-contaminated. On this evidentiary record, it is more likely than not, that 10 to 15 percent of the material burned in Appellant's scrap metal recovery oven during the 3 random weeks in 1999 when Appellant failed to operate in accordance with the time and temperature requirements of Section 761.72(a)(3) was regulated material, that is, electrical equipment with PCB concentrations from 50 to 499 ppm. The above admissions contradict the claim by Appellant's

³¹Appellant's president testified that 85 percent of the equipment in the field is non-PCB. Tr. Aug. 19 at 12:7; Tr. Aug. 19 at 302:23. Consequently, 15 percent of the equipment is PCB-contaminated or PCB.

president in his April 30, 2003 Affidavit at Para. 77 that “only 11 of the 1287 units are PCB-contaminated and the eleven transformers were on two burns only”. RX 571 at R004586. In addition, the PCB concentration data provided by the ACTI laboratory for items burned by Appellant on the dates and times at issue contradict Appellant’s claim.

10. The minimum temperature requirement of 40 C.F.R. § 761.72(a)(3) must be met continuously.

Although Appellant argues that the absence of the word “continuous” in 40 C.F.R. §761.72(a)(3) allows a company who disposes of PCB-contaminated items to burn the material in the primary combustion chamber of a PCB scrap metal recovery oven for a total of two and one-half hours as opposed to a requirement that the two and one-half hour burn must be continuous. Appellant’s argument lacks merit.

The preamble to the TSCA, 63 Fed.Reg. 35402(3), states that PCB-contaminated articles may be burned in a scrap metal recovery oven. The scrap metal oven has a primary combustion chamber and a secondary combustion chamber. *Id.* The articles are heated in the primary combustion chamber to a temperature below the melting point of aluminum and “kept at that temperature for a number of hours, much longer than the time waste is in the primary chamber of a PCB incinerator.” 40 C.F.R. § 761.72(a)(3) states more specifically “[t]he primary chamber shall operate at a temperature between 537 °C and 650 °C for a minimum of 2.5 hours and reach a minimum temperature of 650 °C (1202 °F) once during each heating cycle or batch treatment of unheated, liquid-free equipment.” The purpose of burning the PCB-contaminated items in the primary combustion chamber is to vaporize and destroy the PCBs, or at the very least, prepare them for destruction when the gases are incinerated in the secondary combustion chamber. See 63 Fed.

Reg. 35402(3).

In the current case, the Appellant argues that two and one-half hours total burning time (regardless of continuity) is all that is required to meet EPA's standards. However, continuity is a factor because the heating time in the primary chamber may be inadequate for vaporizing the PCBs for subsequent incineration in the secondary chamber. The standard specifically requires that the primary chamber operate at a temperature between 537 C and 650 C for a minimum of 2 ½ hours. Furthermore, the preamble states "the articles are ... kept at that temperature," which can only have one meaning—that the materials in the primary chamber must have a continuous two and one-half hour period of temperature higher than 537 °C. The American Heritage Dictionary (4th Ed., 2000.) defines "keep" as "to cause to continue in state, condition, or course of action." Therefore, continuity is implied in regards to 40 C.F.R. §761.72(a)(3). Similarly, continuity is implied in the use of the term "each heating cycle" in § 761.72(a)(3). The word "cycle" is defined as "an interval of time during which one sequence of a regularly recurring succession of events or phenomena is completed and further as " a period of time during which something becomes established, reaches a peak and declines." *Webster's Third New International Dictionary* (1976). Appellant also states that the word "continuous" is not found in the regulation (40 C.F.R. §761.72(a)(3)). Following Appellant's logic, Appellant could reach the proper temperature, but does not need to maintain the proper temperature, so long as the combined times within the proper temperature range exceeds two and one-half hours. If Appellant were correct, wild fluctuations of temperature over very long periods of time would be acceptable, which is contrary the operating "cycle" concept stated in the regulation.

The agency's interpretation of the regulation 40 C.F.R. §761.72(a)(3) is within a reasonable

person's comprehension of what the regulation requires. A lack of continuity in burning the PCB-contaminated Items would frustrate the purpose of the regulation, which purpose is to vaporize and destroy PCBs. Not burning continuously may not properly vaporize the PCBs for incineration in the secondary chamber. Non-vaporizing of PCBs would result in PCBs remaining in the scrap metal which is redistributed into commerce. If the EAB would find the regulation ambiguous because of the term "continuous" (or another word synonymous with continuous) lacking from the regulation, Appellant's interpretation would produce an "absurd result." "The absurd result doctrine applies where a court must pass upon an ambiguous statute. The doctrine has no application where a statute is clear." *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996). If Appellant's view of the regulation that the two and a half hour time is not required to be continuous is correct, one could turn the oven on and off every three or four minutes (assuming one could achieve the required temperature) for an extended period of time as long as the total time resulted in two and one-half hours. This reading of the regulation would defeat its very purpose of assuring that PCBs which are absorbed in paper, wood and wire windings in the PCB contaminated transformers would be sufficiently vaporized/decontaminated. Tr. 160-62 Vol. II). The purpose of maintaining the temperature continuously is to ensure that the interior of the oven contents reaches a temperature which results in the PCBs being fully volatilized. It is important to maintain the temperature continuously for the minimum amount of time because as Appellant's president stated: "Each burn is a unique burn." Tr. 145 (Vol. X). To assure adequate penetration of heat into the many types of equipment requires some degree of continuity and consistency in oven operation, particularly for large items. The oven operator testified that he burned items such as bushings and transformer "cans" that were as large as ten feet across. Tr. 214-15 (Vol. I). Appellant's argument seems comparable to suggesting that a baking recipe which requires baking a cake for thirty minutes at 350 degrees F for thirty minutes would provide the same result as baking the cake for five minutes each hour during a six-hour period.

Finally, EPA's interpretation is entitled to substantial deference compelling a result in EPA's favor due to the complex nature of environmental regulations and the specialized knowledge necessary to construe them. *See Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 273-74 (3d Cir. 1986); *United States v. Unitank Terminal Service*, 724 F. Supp. 1158, 1164 (E.D. Pa. 1989). Deference "... extends to an agency's interpretation of its own regulation unless that construction 'is plainly erroneous or inconsistent with the regulation.'" *Modine Mfg.*, at 273. [citations omitted]. EPA's interpretation of the regulation is consistent with the purpose of the regulation. Therefore, it is reasonable. EPA's interpretation does not assure that the goals of the regulation would be achieved and therefore should be rejected.

Even if the EAB were to adopt the Appellant's view of the regulation, a scrupulous review of Appellant's time and temperature data for its primary chamber of its PCB scrap metal recovery oven reveals that there is only one burn time on one date for which the total time above 999 degrees F was two and one half hours even though it was not a continuous period of time. The date and time of that burn is Oct. 29, 1999 at 1:38 pm. CX. 16C at Oct. 38-39. All of the other burns in violation totaled less than two and one half hours at above 999 degrees F including non-continuous intervals of temperature above 999 degrees F. CX 16A, B and C, specifically set forth at CPHB at 40-41.

11. Appellant's Fair Warning Argument Regarding 40 C.F.R. § 761.72(a) is not supported by the record.

Appellant was fully aware of EPA's interpretation of 40 C.F.R. § 761.72(a)(3) as a continuous two and one half hour burn requirement as discussed in the Initial Decision at 31. Appellant's "fair warning" argument is rejected by the Presiding Officer at Initial Decision at 38.

Appellant was involved in the rulemaking for such regulation and made recommendations for the two and one half hour burns to Denise M. Keehner, Chief, Chemical Regulation Branch, EPA Headquarters, in a letter dated Feb. 20, 1989, as to the length of time for effective processing of PCB-contaminated electrical equipment. Appellant describes its contact with Headquarters and its recommendation of two and one half hours for burn cycles for PCB-contaminated transformers in a pleading, *Environmental Protection Services, Inc.'s Motion for Request for Production of Documents*, dated May 7, 2002 at 25-26. In its Motion, Appellant states:

Upon reviewing EPA's proposed specifications for processing PCB-contaminated electrical equipment, EPS contacted John Smith (EPA PCB disposal specialist) and Tony Baney (Chief Chemical Regulation Branch for TSCA (PCBs)). In a meeting held at EPA Headquarters, EPS advised EPA that the proposed specifications would not be effective when processing PCB-contaminated electrical equipment. EPS advised that if the object of recycling was to recover the valuable raw material, such as copper, brass and aluminum, the proposed conditions would lead only to a molten mass and mixture of steel, copper and aluminum, with no resale value. Based on EPS's expertise, EPA requested that EPS submit recommendations to help EPA formulate appropriate regulatory specifications. EPS subsequently provided to EPA the basic specifications and features of EPS's own furnace, with typical operating temperature parameters for both the primary and secondary furnaces. Ironically, based on EPS's own experiences, a typical burn time in the primary furnace of two and a half-hours (2 ½) was suggested. EPS's recommendations to EPA are documented in EPS's letter, dated February 20, 1989, to Denise M. Keehner, Chief Chemical Regulation Branch, (8- (3)(10) and page 11(d).

Id.

EPS goes on to state that:

Prior to the adoption of EPA's megarule, the normal time for these units was typically a half-hour burn cycle. As part of EPS's requirements with utility customers and the vendors that purchased raw metals, EPS was required to conduct wipe tests on the metals to ensure such units were PCB free. All tests have shown non-detectable levels at less than 2 PPM PCB's. Once the EPS process is complete, the metals are then shipped to foundries where the raw materials are introduced into hearths that operate at temperatures in accordance with § 761.72(b)(1). Thus the 2 ½ burn time is based on a typical burn cycle for polemounted transformers." *Id.* at 26-27.

Appellant refers to a two and a half hour cycle in its recommendation and its involvement in the formulation of the regulation's two and one half hour burn cycle requirement does not support his latest claim of lack of fair warning. Notably, there is no recommendation from Appellant that the two and one half hour cycle recommendation should not be continuous.

12. The PCB Penalty Policy was Properly Applied to Count III.

Appellant's assertion that "the entire proposed penalty for Count III is based on improper disposal of PCB transformers" is incorrect. Brief of Appellant at 60. A complete discussion of the application of the PCB Penalty Policy to Count III is set forth in CPHB at Section IV. D, pp. 79-94. At footnote 48 of Appellee's Post Hearing Brief, the Region provided its rationale in employing the use of volume as a reasonable measure of "extent" for drained PCB-contaminated transformers:

Although the *Penalty Policy* identifies several potential measures of extent applicable to transformers, *e.g.*, dielectric fluid capacity (gal.) and weight (kg), it suggests that volume is a reasonable measure of extent for drained PCB transformers. CX 24 at 6. The *Penalty Policy* does not suggest a measure for PCB-contaminated transformers because it was written before the promulgation of 40 C.F.R. 761.60(b)(6)(ii), which provides that such transformers must be disposed of in accordance with any of four specifically regulated disposal options. See 63 *Fed. Reg.* at 35403. Now that disposal of PCB-Contaminated transformers is regulated, the use of volume as a measure of extent appears equally reasonable because it indicates the size of the unit that is being disposed of and thus bears a relationship to the quantity of material and the cost of proper disposal.

CPHB at 92, fn 48.

The application of the Policy was upheld by the ALJ in the Initial Decision at 57-59. Given the importance of ensuring compliance with the scrap metal recovery oven operating standards, penalties calculated by using this methodology provide appropriate and reasonable deterrence.

E. Appellee's Response to Appellant's "Claimed Errors" at Appendix B of Brief of Appellant

The majority of Appellant's "claimed errors" at Appendix B are actually further argument

with little or no citation to the record. Appellee responds to the “claimed errors” at Attachment 1 to this Response Brief.

F. Appellant’s Affirmative Defense of Selective Enforcement

1. The Presiding Officer’s Rejection of Appellant’s Affirmative Defense of Selective Enforcement Should be Upheld.

Appellant’s central affirmative defense has been that EPA has singled it out for an enforcement action, while at the same time overlooking comparable alleged violations occurring at the facility of an alleged competitor³², G & S Technologies, Inc. (“G & S”) located in Kearny, New Jersey. Appellant further alleges that the action against it was brought in retaliation for EPS’s efforts to inform EPA of these alleged violations occurring at the G & S facility. In *Brief of Appellant* at 73 - 74, Appellant sets forth its affirmative defense of selective enforcement as follows:

Despite EPS’s concerted efforts to exercise its constitutionally protected rights over ten years to bring 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 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 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

³² Appellee is not in a position to determine whether G & S is truly a competitor of EPS. While they operate in the same general area, their specific operations are quite distinct.

unsupported June 2001 Administrative Complaint.

Having failed to substantiate its allegations with credible evidence, Appellant has not met the requisite burden of demonstrating selective enforcement. Appellant's accompanying argument that EPA has deprived it of constitutional rights is devoid of merit and without any legal foundation. Appellant is unable to demonstrate that EPA has engaged in selective enforcement or that any EPA actions against it were motivated by an invidious purpose or an impermissible (*i.e.* unconstitutional) consideration. Appellant has admitted that it bears the burden of demonstrating selective enforcement: "[S]uccess 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.'"³³ Brief of Appellant at 75 (internal citation omitted). Appellant has failed to meet this burden, *i.e.* it has failed to establish several critical elements – that it was intentionally treated differently from others similarly situated, that indeed it was similarly situated with G&S, that there was no rational basis for EPA's actions toward it, and that EPA selected Appellant for enforcement in bad faith. Because Appellant is unable to establish through evidence in the record these elements of selective prosecution, the ALJ correctly held that Appellant's defense must be rejected in its entirety:

In sum, EPS made an enormous effort in this case to show that it was the victim of selective prosecution. It had a very high burden to meet and it failed to do so by a wide margin. The facts of this case simply do not support the conclusion of selective prosecution which Appellant finds so obvious. In order to reach the result sought by EPS here—*i.e.* that the

³³ Appellant, here, omits the second necessary requirement to establish its affirmative defense of selective enforcement which is the requirement that the government's selection was made in bad faith. *U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 984-85 (E.D. Va. 1997), cited approvingly by the EAB in *In re: B&R Oil Company*, 8 E.A.D. 39, 51 (EAB 1998).

government unlawfully singled out appellant for enforcement, this tribunal would have to draw adverse inferences from many sets of competing facts, seeing only the worst in the government's actions, despite the existence of more persuasive, alternative explanations showing that those actions were lawfully motivated. This tribunal declines such an invitation.

Initial Decision at 55.

Throughout its brief and most particularly in its argument on its affirmative defense of selective enforcement, Appellant is seeking to have this Board review and adjudge the evidentiary record based on its selective and often misleading recitation of incomplete or isolated portions of it. EPS's efforts should not be permitted to prevail because, simply put, the entirety of the evidentiary record does not support or provide any reasoned or principled basis for its attempt to provide a misleading, and ultimately less than truthful, interpretation of the record. Appellant's factual arguments concerning EPA's treatment of G & S and the alleged disparity between EPA's actions affecting EPS and EPA's actions affecting G & S do not reflect, and in fact distort, what actually occurred. Taken as a whole, the evidentiary record refutes and disproves any notion that EPA engaged in selective enforcement of EPS. The record attests that EPA's actions were grounded upon a rational basis and that there was no intent on EPA's part to hold EPS to a different standard than the Agency held G & S with regard to compliance with the PCB regulations.

2. Legal Standard for Selective Prosecution

The standard applicable to Appellant's defense is well-established: In order to make a prima facie selective enforcement defense in an environmental case, 'defendants bear a heavy burden of establishing that (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for prosecution invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights.' [internal quotation marks omitted]

United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 985 (E.D. Va 1997), citing *United States*

v. Production Plated Plastics, Inc., 742 F. Supp. 956, 962 (W.D. Mich.), *opinion adopted*, 955 F.2d 45 (6th Cir. 1990), *cert. denied*, 506 U.S. 820 (1992) (citing *United States v. Bustamante*, 805 F. 2d 201, 202 (6th Cir. 1986) and *United States v. Hazel*, 696 F.2d 473, 474 (6th Cir. 1986). See also *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir. 1988); *Schehl v. Commissioner*, 855 F.2d 364, 367 (6th Cir. 1988).

The Environmental Appeals Board stated that a respondent faces a daunting burden in establishing that the Agency engaged in illegal selective enforcement, recognizing that courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement. *In Re B & R Oil Company*, 8 E.A.D. 39, 51 (EAB Nov. 18, 1998). As noted by the Court of Appeals: "There is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is so enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere; and prosecutors have broad discretion in deciding whom to prosecute." *Futernick v. Sumpter Tp.*, 78 F.3d 1051, 1056 (6th Cir. 1996), *citing Wayte v. United States*, 470 U.S. 598, 607 (1985). In *In the Matter of U.S. Dept. of Navy, Naval Air Station Oceana*, RCRA III-9006-062, 2000 EPA ALJ LEXIS 76, *48 (Nov. 15, 2000), the Presiding Officer stated that "[a] challenge to the government's decision to prosecute is a 'demanding' burden, and courts presume that prosecuting officials have properly discharged their duties."

3. Region III followed its routine deliberative process in its decisions to inspect EPS and to bring an enforcement action.

As evidenced by the record in this matter, Appellant was not singled out from similarly

situated violators in bad faith to deprive Appellant of its constitutional rights to due process and/or equal protection. EPA Region III followed an orderly, rational process in its decisionmaking regarding the inspections of EPS and the subsequent enforcement action.

In sum, just like the Agency's decision to investigate respondent, the record shows that in reviewing the results of that investigation EPA Region III followed its normal course of business in deciding whether to file a complaint in this case. Indeed, the fact that the decision here upholds all three charges set forth in the Second Amended Complaint shows that Region III had cause to proceed against EPS, thereby lending additional support to the conclusion that the government did not engage in selective prosecution.

Initial Decision at 46.

The issuance of the Complaint against EPS was based solely on the evidence of violations, which were deemed to be "significant" by the Associate Director for Waste and Chemicals Management Division, James Webb, who supervises the Toxic Substances Branch. Tr. 93 (Vol. I). As discussed *supra*, the reasons for the 1999 inspections of EPS are documented in the contemporaneous memoranda of Bobbie Wright and Charlene Creamer who were the regional TSCA program employees assigned to the matter in 1999. CX 7, Att. 1, CX 60. The initial inspection was scheduled due to EPS's attempt to release its funds from its financial assurance account. CX 7, Att. 1. PCB storage violations were discovered in 1999. CX 7. A second followup inspection was scheduled when EPS attempted to modify its permit at least twice, and when public inquiries to Region III regarding EPS's decontamination and burning procedures occurred. CX 60. Following the inspections in which violations were discovered, EPA Region III followed its routine deliberative process for bringing enforcement actions as described by Aquanetta Dickens, Chief of the Toxic Programs and Enforcement Branch in Region III, and supervisor of Wright and Creamer. Tr. 109 (Vol. XII). The decision to initiate an enforcement action against EPS was a collaborative

effort which was made by the staff of the Region III Waste and Chemicals Management Branch, the Office of Regional Counsel, and the Office of Enforcement and Compliance Assistance. Tr. 109 (Vol. XII). Webb, the Associate Director for Enforcement of the Waste and Chemicals Management Division, reviewed the Complaint and approved its issuance. Tr. 93 (Vol. I).

The decision to bring the enforcement action was not made in bad faith or in retaliation to EPS's complaints regarding its alleged competitor in Region II as evidenced by the testimony of the TSCA management and staff of Regions II and III. Webb was asked by Region II to attend a meeting regarding EPS's allegations about its alleged competitor in September of 2000. Tr. 196 (Vol. I). Both inspections of EPS had previously taken place and until that meeting, Webb had no knowledge of EPS's alleged competitor in Region II. Tr. 196 (Vol. I). Webb testified that Region II does not tell Region III whom to inspect or enforce against and that he did not discuss Region III's investigation of EPS with the managers or staff of Region II. Tr. 193-96 (Vol. I). His discussion of EPS with Region II was limited to the Region II Inspector General investigation regarding G & S Technologies, and possibly a Region V inspection of G & S Technologies. Tr. 194 (Vol. I). Ms. Dickens, testified that she was not encouraged by anyone in Region II to bring an enforcement action against EPS. Tr. 110 (Vol. XII). Ms. Creamer, PCB Coordinator, Region III, testified that she was not encouraged to inspect or bring an enforcement action against EPS. Tr. 40 (Vol. XII). She testified that, as PCB Coordinator, she proposed that inspections of EPS take place, reviewed the results of the EPS inspections within the TSCA Programs and Enforcement Branch and met with the Office of Regional Counsel and her supervisor on the matter. Tr. 39-40 (Vol. XII).

The Region II TSCA enforcement employees, Ms. Finnegan and Mr. Kraft, testified that they did not ask, urge or encourage anyone in Region III to inspect, or take an enforcement action

against EPS and that Region III did not seek their advice or opinion regarding Region III's decision to take an enforcement action. Tr. 205 (Vol. XII); Tr. 299-300 (Vol. XIII). While Mr. Kraft testified that he sent an email to Scott Rice asking about the progress of the Region III complaint (Tr. 358-59 (Vol. XIII), RX 449), this one isolated email does not remotely support or even plausibly suggest a finding that the Regions joined forces in some manner to come to a decision to bring an enforcement action against EPS and not to bring an enforcement action against G & S. The email was sent approximately three days prior to the issuance of Region III's Complaint. The timing of the email shows that it could not have been a factor in the decision to bring the case since that decision had been made after the inspections revealed violations in 1999. Tr. 93-94 (Vol. XIII); Tr. 39-40 (Vol. XII). There is no evidence in the evidentiary record demonstrating, or even suggesting, that a causal connection existed between EPS complaining to EPA Region II about its allegations against G&S and EPA Region III's issuance of an administrative Complaint against EPS, or that EPA was motivated by an invidious purpose in issuing such Complaint. The record proves unequivocally otherwise. Tr. 202-205 (Vol. XII); Tr. 291-296 (Vol. XIII).

Appellant mischaracterizes and grossly distorts the "curiosity" of the EPA Region II official, Daniel Kraft. Any "curiosity" referred to by EPS does not equate to an invidious purpose on the part of EPA or establish any causal connection or conspiracy between the activities of EPA Region II and EPA Region III. Kraft's curiosity is simply a human response to the false accusations leveled against him by EPS.³⁴ Tr. 303 (Vol. XIII). One or two inquiries does not establish any factual

³⁴ Keith Reed, EPS President, made allegations in a letter to Region II officials that Kraft and David Greenlaw, TSCA officials of Region II, were "accepting favors" from G & S. Tr. 125-32 (Vol. X). In fact, Mr. Kraft, as well as Ms. Finnegan, two of the Region II employees who testified at the hearing, emphatically denied ever accepting anything, favors or otherwise, for or on behalf of G & S. Initial Decision at 50-52. Mr. Greenlaw died before the hearing was held.

pattern sufficient to meet the daunting burden of proving selective prosecution.

Similarly, the presence of James Webb, EPA Region III Associate Director of Enforcement, Waste and Chemicals Management Division, at a meeting at EPA Region II in September of 2000 during which Appellant's president presented allegations of violations by G & S, and allegations of wrongdoing by Region II officials which were unfounded does not support any causal connection between EPA Region II and EPA Region III regarding the issuance of an administrative complaint for violations discovered during two inspections of Appellant's facility in 1999. Webb testified that while he was present at the September 2000 meeting, he did not discuss Region III's investigation of EPS with Dan Kraft or any individuals or counterparts in Region II. Tr. 133, 193-94, 196 (Vol. D).

4. Region II made substantial efforts to investigate EPS's claim and G & S was not "left untouched".

The record also shows that Region II made good faith efforts to investigate Appellant's allegations by conducting numerous investigations and inspections of Appellant's alleged competitor and made its own decisions on the application of the TSCA regulations to the evidence it collected. *See generally* testimony of Anne Finnegan and Daniel Kraft, Tr. Vol XII-XIII. The Presiding Officer found that: "Finnegan and Kraft are found to be credible witnesses and their testimony is accorded substantial weight." Initial Decision at 49. As previously noted, the EAB accords deference to credibility determinations of the Presiding Officer who had an opportunity to personally observe a witness during his or her testimony. The Criminal Investigation Division conducted an investigation of G & S and was unable to confirm Appellant's allegations. Tr. Jun. 29, 2004 at 81 (D. Dillon), and *see generally*, testimony of Dave Dillon, Tr. Jun.29-30, 2004. The

alleged competitor, G & S Technologies, was not present at the hearing, and therefore, was unable to present its view of Appellant's allegations. Consequently, these proceedings are not an appropriate forum for assessing the merits of EPS's allegations against its alleged competitor. In the absence of a complete record from which to adjudicate G & S's compliance with the PCB regulations, it would be impossible for a court to conclude that Region II should have initiated an enforcement action as Respondent suggests.

From 1998 to June 2001 (the time of the issuance of the EPS complaint), G & S was inspected by EPA Region II civil enforcement personnel four times. Tr. 151 (Vol. XII). In addition to the civil inspections, G & S was a subject of an EPA criminal investigation which was initiated by EPA in response to allegations offered by EPS. Tr. Jun. 29-30, 2004; RX 610. In late 2000, G & S entered into a Consent Agreement/Final Order with EPA Region II for TSCA violations and paid a civil penalty of \$19,000.00. Tr. 153 (Vol. XII); *Order Denying Complainant's Motion to Strike Defense of Selective Prosecution*, Feb. 28, 2003 at 2, referencing *Complainant's Reply to Appellant's Opposition to Motion to Strike*, Attach. 1: *Executed Consent Agreement/Final Order (CA/FO) against G & S Motor Equipment Company, Inc.*). The allegations against EPA Region II officials of wrongdoing vis-a-vis G & S were investigated by the EPA Inspector General's Office. Tr. 293 (Vol XIII); RX 432. EPA Headquarters reviewed and commented on EPA Region II's inspection results regarding G & S, Tr. 161 (Vol. XII), and also reviewed the results of the EPA criminal investigation as presented to them by the case agent. Tr. Jun. 29-30, 2004 at 296-97. Thus, the record does not show that G & S was left untouched by EPA, and in fact was subject to a great level of scrutiny by EPA officials.

5. The evidentiary record demonstrates that EPS and G & S are not “similarly situated”.

The business activities of G & S and EPS differ, and therefore, the two companies cannot be considered to be similarly situated. The evidence shows that G & S purchases surplus electrical equipment for testing and evaluation, repair, rebuilding and/or resale. Tr. 154-167 (Vol. XII), generally. EPA Region II’s investigation of G & S’s activities revealed that G & S was receiving transformers that were still in service (*i.e.* not designated or deemed waste under the PCB regulations). Tr. 163 (Vol. XII). EPA Region II consulted with Headquarters regarding the purchase and resale of surplus transformers and their designation in regard to the PCB commercial storage regulations. Tr. 161-62; 176-84 (Vol. XII). The documents referenced by Appellant (RX 411, 413, 415, 420, 433, 470-73, 475-77, 482-84), consisting of shipping papers, bills of lading, unsigned contracts, and handwritten notes of Ann Finnegan, do not support Appellant’s view that G & S was accepting unmanifested PCB waste for commercial storage. Tr. 172 *et seq.* (Vol. XIII). EPA Region II’s review of G & S documents and activities reveals that the customers of G & S were selling surplus electrical equipment to G & S. Tr. 154-67 (Vol. XII). Although the word “resale” may not be used on above-referenced exhibits, the following words indicate that the items were not designated as waste and therefore, not requiring a waste manifest:

RX 411 at R005238 - “surplus for evaluation”

at R005227 - “surplus”

RX 413 Ann Finnegan notes re conversation with Duquesne Lighting who claimed “wrote

bill of lading wrong should have said “surplus”

RX 415 at R003464 “surplus for evaluation”

at R003465 - “surplus evaluation”

RX 420 at R003336 - "for evaluation"

RX 4-- at R003515 - "surplus for evaluation"

RX 472 at R003145 "surplus evaluation loads"

RX 482 at R003395 -"oil-filled for PCB testing and advisement",
at R003397 - "71 units for evaluation"

Pursuant to 40 C.F.R. § 761.207(a), PCB manifests are required only for PCB waste. Tr. 147-49 (Vol. XII). In addition, the Dec. 21, 1989 preamble to *EPA's Final Rule: Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities* states in pertinent part 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). Tr. Sept. 10 at 177-78. Appellant is completely in accord with this statement, as noted *supra*, stating: "EPS does not dispute the fact that equipment purchased for **resale** would not be considered commercially stored if later disposed" (emphasis in original). Brief of Appellant at 128. Thus, when a buyer decides to dispose of the PCBs or PCB equipment, the buyer then becomes the generator.

The EPA criminal case agent, Dave Dillon, testified that he conferred with EPA Region II and EPA Headquarters as to the investigation he conducted regarding shipments of equipment to G & S, described by Appellant at Brief of Appellant, pp. 91-102 and RX 610, and found no actionable violations which rose to the level of federal criminal conduct. Tr. Jun. 29-30, 2004 at 207.

In contrast to G & S, EPS is in the business of electrical equipment storage and disposal including storage and disposal of waste PCB electrical equipment. Tr. 11 (Vol VI), 67 (Vol. X). An examination of the record reveals that EPS does not rebuild or resell transformers. Because of

this fundamental difference in the business models of G & S and EPS, EPS intends and chooses to commercially store large quantities of PCB waste. CX 1 and 2. For example, EPS's TSCA Commercial Storage Approval has an MSC for PCB liquid from contaminated and non-PCB electrical equipment of 18,000 gallons, and an MSC for PCB solids of 40,000 pounds in addition to MSCs for PCB transformers and PCB waste capacitors. CX 2 at 5. G & S intends and chooses to handle and store quantities of commercial waste PCB in amounts less than the threshold (500 gallons PCB) which would necessitate a commercial storage approval (permit). Tr. 165-67 (Vol. XII). Therefore, G & S is limited to a commercial storage capacity of 500 gallons of waste PCB at any given time. *See* 40 C.F.R. § 761.3, Definition of "Commercial Storer of PCB Waste" which states in pertinent part: "If a facility's storage of PCB waste generated by others at no time exceeds a total of 500 gallons of liquid and/or non-liquid material containing PCBs at regulated levels, the owner or operator is a commercial storer but is not required to seek an EPA approval as a commercial storer of PCB waste." Tr. 165-67 (Vol. XII). As the evidence demonstrates, EPS chooses to commercially store amounts of PCB waste which are significantly higher than the threshold amount of 500 gallons PCB at any given time, and therefore, requires a commercial storage approval. CX 2. The record shows that EPS and G & S are not similarly situated in their business operations and thus are not similarly situated for the purpose of the selective enforcement analysis. Because Appellant concedes the correctness of EPA's interpretation of the relevant provisions of the PCB regulation at issue, in order to rule on Appellant's selective enforcement defenses, this Court need not adjudicate the validity of EPA's interpretation. On page 128 of Brief of Appellant, Appellant has stated, "EPS does not dispute the fact that equipment purchased for

resale would not be considered commercially stored if later disposed” (emphasis in original).³⁵

From this admission, at least two salient considerations unequivocally emerge: Appellant does not dispute or disagree with EPA’s interpretation of the relevant and applicable regulations, and resolution of this proceeding in Appellant’s favor accordingly is premised upon Appellant demonstrating through competent evidence placed in the record at the hearing that the predicate facts necessary to support its selective enforcement argument exist. These predicate facts do not, however, exist, and thus the selective enforcement argument necessarily fails.

EPA Region II is entitled to discretion in interpreting TSCA regulations such as the Mega-Rule. “Recognizing that government officials often operate under limited budgets and must inevitably exercise their discretion in selecting which cases to pursue, courts have traditionally allowed regulators considerable leeway in initiating enforcement actions.” *In Re B & R Oil, Inc.*, 8 E.A.D. 52, 53. Further the Board noted 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. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited,” *citing Futernick*, 78 F.3d at 1058. In a recent decision granting EPA’s Motion to Dismiss EPS’s mandamus action seeking a declaratory judgment that EPA failed to perform a nondiscretionary duty in requiring G & S to obtain a TSCA commercial storage approval, the federal district court noted that “TSCA was enacted with the Congressional intent that the EPA be permitted to ‘carry out this chapter in a reasonable and prudent manner and . . . consider the environmental, economic, and social impact of any action’ that it takes.” *Environmental*

³⁵ While Appellant has stated this principle in terms of “for resale,” a more accurate term would be “for evaluation.” Resale represents one option subsequent to receiving such equipment for evaluation. Ms. Finnegan set forth this interpretation in her direct testimony. Tr. 154, 163 (Vo. XII).

Protection Services, Inc. v. Michael O. Leavitt, Civ. Action No. 5:03CV162, Slip Op. at 4, (N.D.W.Va. Aug. 24, 2004). Among the many factors EPA must weigh in exercising its enforcement discretion are Agency priorities, resource limitations, the importance of establishing favorable legal precedent, the strength and quality of the evidence collected, enforcement response policies and its analysis of applicable law and regulations. See Tr. 90-91 (Vol. I). To the extent that EPA Region II may interpret the PCB regulations somewhat differently than another EPA region, that is akin to two circuit courts differing in their interpretations of a point of complex law; such differences do not per se translate into or otherwise rise to the level of violations of constitutional (or statutory) rights.

Appellant's claims of illegal importing and exporting by G & S are likewise unsupported. The allegations are not proven in the record, and in addition, Puerto Rico is a part of the customs territory of the United States, and a shipment between one part of the customs territory to another is not considered to be an act of importing. 40 C.F.R. §§ 761.93, 761.3 for definition of "importer" which cross references 40 C.F.R. § 720.3(1). EPA Region II investigated the export allegations and tracked transformer identification numbers of equipment allegedly illegally exported and found that the lab analyses of those units revealed that the equipment at issue was less than 50 ppm and therefore, not regulated. 40 C.F.R. § 761.97(a)(1). RX 412.

In addition, the record in this case reveals that G & S was not a participant in these proceedings and therefore, anything in the record is not dispositive of any violations alleged against them by EPS. G & S simply was not present to rebut any allegations of PCB violations. Appellant is not foreclosed from pursuing its allegations against G & S directly by initiating a citizens suit, 15

U.S.C. § 2619, or filing other claims.³⁶

6. Appellant's constitutional deprivation claims are without merit.

Appellant advances the following claim:

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's 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.

Brief of Appellant at 79.

While the government's enforcement discretion is subject to constitutional restrictions such as discrimination based on race, religion or other arbitrary classifications, *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996), the record in the instant case does not support a finding that EPA "selected" Appellant in bad faith to deprive Appellant of its constitutional rights to due process or equal protection as claimed in Appellant's argument.³⁷ The mere bald assertions or vague claims by Appellant of an arrangement or conspiracy between Region II and Region III to deprive Appellant of its constitutional rights to due process and equal process are insufficient to support its claim. *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2nd Cir. 1977). Appellant can point to nothing in the record – other than its own unsupported self-serving assertions to the contrary – that would even imply the existence of any such conspiracy, let alone demonstrate the actual existence

³⁶ See *Environmental Protection Services, Inc. v. G & S Technologies*, Civ. Action No. 03-C-561, Cir. Ct. Ohio County, WV (Nov. 5, 2003), a suit for tortious interference with contracts.

³⁷ Appellant's distortions, misrepresentations and overall carelessness in its citation to and reliance upon the factual record parallels its sloppiness in its legal recitation of case law purportedly favoring its position. For example, appellant explicitly anchors its selective prosecution - equal protection argument in the Fourteenth Amendment when that provision by its terms applies only to state governments and their subdivisions. Its apparent indifference to factual veracity and legal accuracy betrays the underlying weaknesses in its position. See Attachment 2 for a detailed listing of Appellant's mischaracterizations.

of one.

Due process has been fully afforded by the EPA's adherence to the administrative process of 40 C.F.R. Part 22. EPA's complaint against EPS put EPS on notice that violations regarding the storage of PCB waste and the operation of the scrap metal oven were at issue. An examination of the proceedings in this case subsequent to the issuance of the Complaint demonstrate that all facts relevant to the violations and to Appellant's affirmative defenses were fully litigated. "Under the Administrative Procedures Act, § 5(b), 5 U.S.C. § 554(b), persons entitled to notice of an administrative hearing must be informed of 'the matters of fact and law asserted.' However, the purpose of the Act is satisfied, and there is no due process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify its conduct." *Golden Grain Macaroni Co. v. F.T.C.*, 472 F. 2d 882, 885 (9th Cir. 1972), citing *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 350 (1938).

In regard to Appellant's claim that it has and will be deprived of its right to equal protection, the Supreme Court recognized that the concept of due process has an equal protection component in *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), stating that "the concepts of equal protection and due process, both stemming from the American ideal of fairness, are not mutually exclusive." Appellant attempts to satisfy the second element of the selective prosecution standard by broadly asserting that the government is interfering with Appellant's constitutional rights by failing to require G & S to have a commercial storage approval, and by inspecting and filing an enforcement action against EPS. However, there simply is no evidence in the record to show that Appellant's right to equal protection was infringed upon by EPA's decisions. "Constitutional equal protection does not require the polarized conclusion that either all of those who arguably committed

a crime must be prosecuted or else all must go free. Such a holding would result in the destruction of the principles of prosecutorial discretion which are so firmly established in our system of justice.” *United States v. Brown Transport Corp.*, 448 F. Supp. 773, 775 (N.D. Ga 1978).

There nothing in the record to demonstrate ill will in EPA’s examination of the EPS facility and subsequent dealings. EPA has sufficient prosecutorial discretion to consider such factors as cost, levels of evidence, amount of culpability and the facts that the agency has concerning any potential violations when deciding whether to pursue an enforcement action. As discussed *supra*, the Agency had a rational basis for proceeding with this case. The steps the agency took were all reasonable and were not motivated by animus towards the appellant. The Agency has a duty to seek out environmental violations and to assess penalties to deter violations of the Agency’s standards. Further, any allegations that selective enforcement continued beyond the issuance date of the June 29, 2001 administrative Complaint are irrelevant and beyond the scope of this proceeding.

7. Appellant presented no evidence of wrongdoing (i.e. bribery, conspiracy to commit perjury).

Appellant’s allegations of wrongdoing by Region II officials are based exclusively on the conclusory accusations of Appellant’s president without any foundation, supporting documentation or other independently verifiable evidence in the record.³⁸ See Tr. 125-32 (Vol. X). In response to questions on Appellant’s accusations of bribery, Appellant’s president equivocated. *Id.* As set forth *supra*, the Region II witnesses did not corroborate the inference that Appellant would like to draw regarding the activities of G & S. Tr. 163-66 (Vol. XII). Initial

³⁸Reed’s testimony spreads credulity thin, Without impugning his integrity, Appellant’s president has every reason to offer distorted and mendacious testimony.

Decision at 49 citing to Tr. 163 (Vol. XII).

Appellant now goes further in Brief of Appellant at 145 to allege:

On September 10-11, 2003, Complainant's counsel (Lee Spielman, Cheryl Jamieson) and EPA TSCA officials (Kraft and Finnegan) with full knowledge of the contents of Dillon's Criminal Activity Reports (RX610), containing Dillon's notes and interviews with four separate utility companies, at the hearing, came forth in a concerted effort to perpetuate inaccurate testimony in this proceeding.³⁹

Appellant is apparently making this false and irresponsible accusation because the EPA witnesses did not agree with Appellant's view. The CID reports (RX 610) do not confirm that waste was sent to G & S solely for disposal as previously set forth *supra*. Appellant's serious unsupported charges and accusations of criminal wrongdoing by Region II officials and of conspiracy by Region II and III attorneys is a telling example of Appellant's president's lack of credibility as a witness.

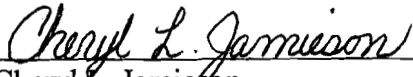
At the conclusion of Finnegan and Kraft's testimonies, each categorically denied doing anything improper *vis-a-vis* G & S and such testimony directly refuted Appellant's president's unsupported allegations of improper, unethical, or illegal conduct. Tellingly, when Appellant had the opportunity to cross examine Kraft and Finnegan, Appellant never attempted to impeach their testimony in this area and their overall credibility. Tr. 202-03 (Vol. XIII), Tr. 294-96 (Vol. XII).


IV. Conclusion

For all of the reasons set forth above, Appellee requests that the EAB affirm the Initial Decision in its entirety.

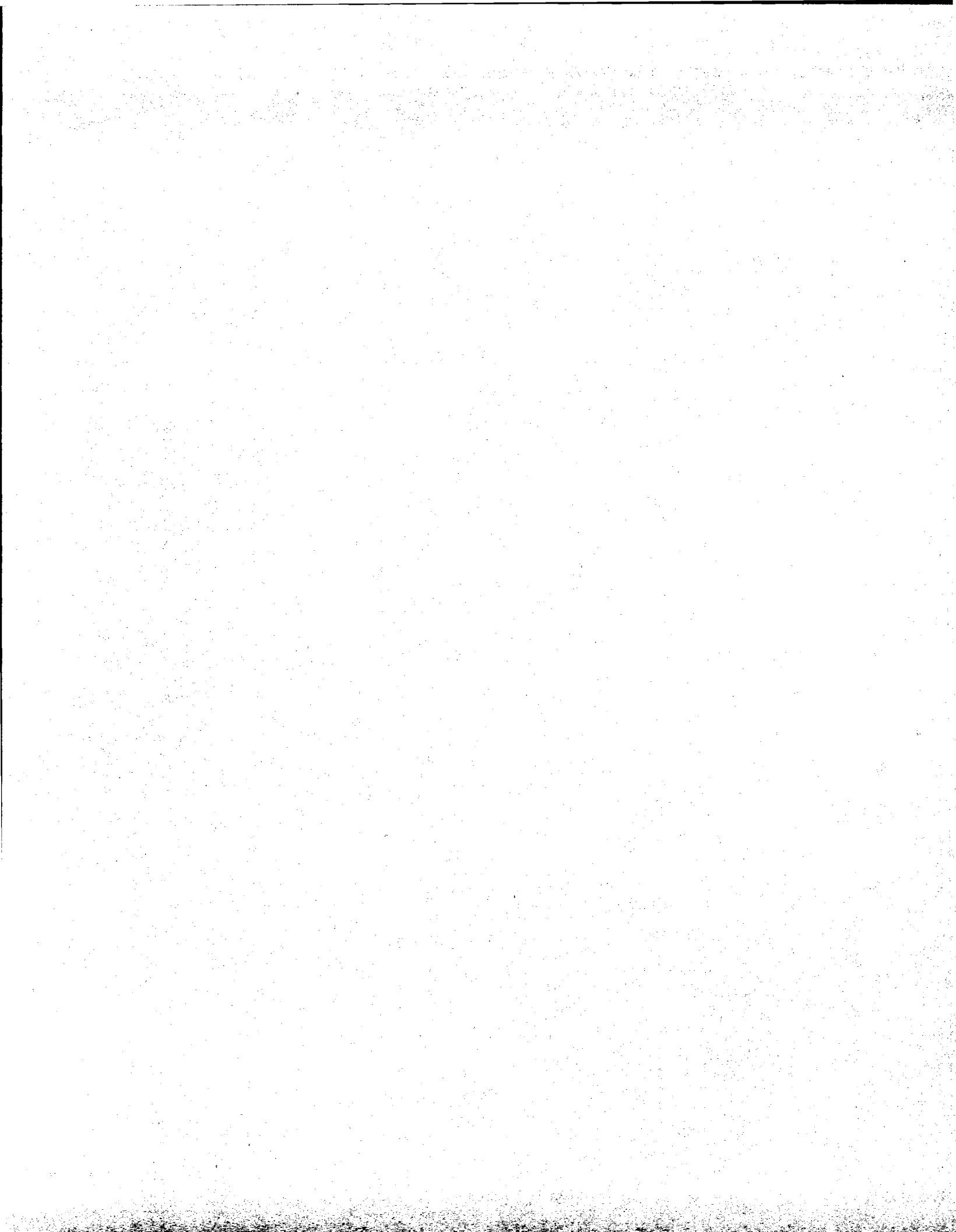
³⁹EPA categorically denies such unfounded and baseless accusations.

Respectfully submitted,


Cheryl L. Jamieson


John J. Ruggero

Of Counsel:
Lee A. Spielmann



**APPELLEE'S RESPONSE TO
APPELLANT'S "CLAIMED ERRORS" at Appendix B**

No.	APPELLEE'S SUPPORT OF JUDICIAL DECISION
1.	Appellant's "claimed error" applies to the evidence regarding Count III. Appellee's fully addresses the evidence for Count III at Appellee's Response Brief, Section III.D.
2.	Appellant's "claimed error" No. 2 appears to state that it did not need a commercial storage permit after the PCB Mega-rule became effective because Appellant was availing itself of exemptions at 40 C.F.R. § 761.20(c)(2)(i) and/or (ii). The processing exemption from acquiring a storage permit did not apply to Appellant's activities. See Appellee's Response Brief, Section III.B.7 and C.3. The distinction between the operations of G&S and EPS is fully set forth in Appellee's Response Brief, Section III.F.
3.	Previously raised. See Response 2, above.
4.	Error appears to apply to weight given to the testimony of Keith Reed, President of EPS, and John Smith, EPA's expert witness at the hearing. Court can make determinations regarding the weight to be given to witness testimony. John Smith testimony regarding "uncontrolled burning" refers to burning in violation of the time and temperature of the requirements of 40 C.F.R. § 761.72 (a), which is at issue in this case.
5.	"Claimed error" cites no support in the record. Ms. Creamer's testimony regarding 40 C.F.R. § 761.79 was in response to hypotheticals posed by opposing counsel, and not to the facts of this case.
6.	40 C.F.R. § 761.20 (c)(2)(i) does not apply to the Appellant's storage activities. See Response 2, above.
7.	Appellant received the items at issue on manifests as waste. Appellant's "claimed" ultimate disposition of the PCB waste transformers is not a defense to the commercial storage violations. See Appellee's Response Brief, Section III. B.7.
8.	Previously raised. See Response 2, above.
9.	Previously raised. See Response 2, above. See also Appellee's Response Brief, Section III.B.7.
10.	Previously raised. See Response 2, above.
11.	Appellant inaccurately claims to be the owner, and therefore, the generator of the PCB waste it receives for disposal. See Appellee's Response Brief, Section III.B.2.

12.	The ALJ misspoke in footnote <u>19</u> of the Initial Decision regarding the deposition transcripts. The deposition transcripts were admitted into the record as noted by Appellant. However, this should be considered harmless error because the deposition transcripts do not support Appellant's claim that the Appellant had the authority to unilaterally modify its permit. See Appellee's Response Brief, Section III.B.6.
13.	See Appellee's Response Brief, Section III.B.
14.	Appellant misinterprets the law on TSCA approval modifications. See Appellee's Response Brief, Section III.B.1, 2, 3, and 6.
15.	See Appellee's Response Brief, Section III.B.1, 2, 3, 6, and 7.
16.	See Appellee's Response Brief, Section III.B.1, 2, 3, and 6.
17.	See Appellee's Response Brief, Section III.B.6 and 9.
18.	See Appellee's Response Brief, Section III.B.1, 2, 3, 6 and 7.
19.	If the ALJ misspoke regarding Rice's experience as a PCB inspector for EPA, it was harmless error. Inspector McPhilliamy was a seasoned inspector. He was accompanied by Inspector Rice, who was on his first PCB inspection for EPA. However, prior to employment by EPA, Rice was employed by an environmental consulting company for 10 years conducting hazardous waste site assessments, interpreting analytical data, arranging for transportation and disposal of hazardous waste from Superfund sites, including PCBs. Tr. 90 (Vol. II).
20.	Previously raised. See Response 2, above.
21.	Appellant claims that the lists EPS provided to EPA, of PCB transformers in storage, do not support the violations of Count I. See Appellee's Response Brief, Section III.B.4 and 5. Previously raised. See Response 2, above.
22.	See Appellee's Response Brief, Section III.D.5, 6 and CBI Section of Appellee's Post Hearing Brief. The 2 nd part of the "claimed error" is previously addressed at Appellee's Response Brief, Section III.B.
23.	Appellant claims that EPA failed to establish a <i>prima facie</i> case of violation for Count I. See Appellee's Response Brief, Section III.B. Appellant cites to <u>L&C Services</u> , Docket No. VII-93-CAA112, 1997 EPA ALJ LEXIS 113 (Jan. 29, 1997); <u>In Re: Louisiana Pacific Corp.</u> Docket No. CAA 120-V-84-2, 1987 EPA ALJ LEXIS 34 (Mar. 24, 1987) and <u>Rodale Press v. Fed. Trade Comm'n</u> , 407 F. 2d 1252 (D.C. Cir. 1968). Appellant's reliance on <u>Rodale Press</u> is misplaced. In <u>Rodale Press</u> , the court held that parties were improperly deprived of notice and hearing where... "[t]he theory under which

	<p>the complaint was issued and under which the hearing before the examiner was held differed from the theory upon which the complaint was ultimately sustained by the Commission.” <i>Id.</i> at 320, 322. In the instant case, the Region amended its complaint prior to the hearing which corrected minor errors only. The Region’s theory of its case never changed. Counts I and II were not amended. The amendments to Count III were explained at Appellee’s Response Brief, Section III.D.2.</p>
24.	<p>The Court correctly cited to 40 § C.F.R. 761.20(c) (2)(i) with the exception that the uppercase “I” should be a lower case “i”. Appellant’s argument is misplaced if it is relying on 40 C.F.R. 761.20(c) (2)(ii) as an exemption. 40 § C.F.R. 761.20(c)(2)(i) provides for an exemption from TSCA <u>storage</u> or disposal approval. (emphasis added). Since Counts I and II are storage violations, it would seem likely that Appellant is relying on that provision. 40 C.F.R. 761.20(c) (2)(ii) provides for an exemption from <u>disposal</u> approval (emphasis added), which is not applicable to the instant case because Appellant does not possess a disposal permit for this facility.</p> <p>Complainant established a <i>prima facie</i> case as fully set forth in Appellee’s Response Brief, Section III.B.</p> <p>Appellant provided the lists of the PCB transformers in storage at EPS to the Region in 1999. See Appellee’s Response Brief, Section III.B.5, 6. The Complaint was filed in June 2001. Appellant’s reliance on <u>Rodale Press</u> is misplaced as noted above at “claimed error” 23.</p>
25.	<p>Appellant now flip-flops back to 40 C.F.R. § 761.20(c) (2)(i), which it previously cited as “judicial error.” §761.20(c) (2)(i) does not exempt Appellant’s self-implementing decontamination procedures at 40 C.F.R. § 761.79 (c) from its <i>TSCA Commercial Storage Approval</i> MSCs. See Complaint’s Response Brief, Section III.B.</p> <p>As noted above, 40 C.F.R. § 761.20(c) (2)(ii) exempts 40 C.F.R. § 761.79 (c) self-decontamination activities from TSCA PCB <u>disposal</u> approval. (emphasis added). The method that EPS employs regarding the decontamination procedures of 40 C.F.R. § 761.79 (c) is not at issue in the instant case.</p>
26.	<p>Previously raised. See Appellee’s Response Brief, Section III. B.5, 6, and 7.</p>
27.	<p>The self-implementing decontamination procedures employed by Appellant do not serve as an exemption to Appellant’s MSCs in its <i>TSCA Commercial Storage Approval</i>. See Appellee’s Response Brief, Section III.B.7.</p> <p>Appellant’s argument at 27 is a further admission that Appellant <u>stores</u> equipment prior to processing it. Such storage of waste generated by others is “commercial storage”, which is regulated by Appellant’s <i>TSCA Commercial Storage Approval</i>.</p>
28.	<p>See Response to “claimed error” at 27.</p>

29.	Previously raised. See Response 2, above, and Appellee's Response Brief, Section III.B.
30.	See Appellee's Response Brief, Section III.B.
31.	See Appellee's Response Brief, Section III.B.10 and Section III.E.
32.	Appellant is a disposer, who receives PCB waste generated by others. Appellant was commercially storing the waste it received from the generators of such waste. See Appellee's Response Brief, Section III.B.
33.	See Response to 32, above, and Appellee's Response Brief at Section III.B.
34.	Appellant is mistaken. CX64 (or C. EX. 64) (CBI) is not ACTI laboratory data. C. EX 44 (CBI) is the laboratory data. CX 64 was Appellant's manifests provided to Complainant, as a part of court-ordered discovery, on the first day of the hearing. The remainder of the Appellant's "claimed error" (Appellant's argument that it is a "generator" of the PCB waste it receives) is fully addressed at Appellee's Response Brief, Section III.B.2.
35.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
36.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
37.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
38.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
39.	See Appellee's Response Brief, Section III.C.1, 2, and 3. The manifest in evidence, RX 515, establishes that American Electric Power (Line 3, Generator's Name) was the generator of the PCB waste capacitors at issue. American Electric Power sent PCB waste capacitors to the disposer, EPS (Line 9, Designated Facility). CX. 7 is the Region III inspection report dated July 15, 1999 documenting that 26,367 lbs. of PCB waste capacitors were stored at EPS and subsequently shipped off-site. CX 7 at 2. CX 10 is the manifest used by EPS to send the PCB waste capacitors to Safety-Kleen after EPS "discovered" that they were pure askarel (500,000 ppm PCB) and could not be burned by Appellant in its scrap metal oven. The ALJ correctly relied on the three exhibits cited the Initial Decision, and the testimony of Inspector McPhilliamy and Keith Reed, to find that Region III established sufficient proof of the violation.
40.	See Appellee's Response Brief, Section III.C.1, 2, and 3.

41.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
42.	See Appellee's Response Brief, Section III.C.1, 2, and 3.
43. and 44.	<p>RX 515 clearly establishes that AEP was the generator of the PCB waste capacitors at issue in Count III. Appellant's argument supports the violation: "At the time the original manifest was prepared, the capacitors were destined for processing and disposal at EPS, so AEP was the generator". It also supports the finding that EPS was not operating a "transfer facility" in regard to PCB waste capacitors. EPS was operating as a commercial storer and as a disposer. Although EPS eventually manifested such PCB waste capacitors, prior to such occurrence, EPS was commercially storing 26,367 lbs. of PCB waste capacitors at its facility in violation of its 1,000 lb. MSC in the <i>TSCA Commercial Storage Approval</i>. The PCB regulations are clear that EPS's status as a commercial storer does not change even though it must comply with the manifesting requirements: 40 C.F.R. § 761.208(c)(3) states:</p> <p style="padding-left: 40px;">whenever an off-site shipment of PCB waste is initiated from a commercial storage or disposal facility, the owner or operator of the commercial storage or disposal facility shall comply with the manifest requirements that apply to generators of PCB waste.</p>
45.	See Appellee's Response Brief, Section III.C.2.
46.	See Appellee's Response Brief, Section III.D. and CBI Section of Appellee's Post-Hearing Brief.
47. and 48.	See Appellee's Response Brief at Section III.D.
49.	No argument is provided by Appellant and no citation to the record.
50.	<p>See Appellee's Response Brief, Section III.D. and CBI Section of Appellee's Post-Hearing Brief.</p> <p>Appellant cites to <i>In Re: H.E.L.P.E.R., Inc.</i>, EPCRA Appeal No. 98-3 (EAB Jun. 21, 1999) a case in which the complaint was never formally amended. This can be distinguished from the instant case in which the ALJ granted an unopposed Motion to Amend Region III's Complaint over 2 months prior to the hearing. ALJ Order, dated March 31, 2003. Further the EAB held that the Consolidated Rules have been interpreted to allow amendments of pleadings to conform to evidence. <i>H.E.L.P.E.R.</i> at 449.</p>
51.	See Appellee's Response Brief, Section III.D. and CBI Section of Appellee's Post-Hearing Brief.

52.	See Appellee's Response Brief, Section III.D. and CBI Section of Appellee's Post-Hearing Brief.
53.	See Appellee's Response Brief, Section III. D.1 and 2.
54. and 55.	<p>The ACTI laboratory data (CX 44 (CBI)) is direct evidence that Appellant individually tested PCB-contaminated equipment the was subsequently burned. The violations established, and the resulting penalty, rely solely on PCB equipment with known individual PCB concentrations which were burned at times when scrap metal recovery oven was not in compliance with 40 C.F.R. § 761.72(a)(3).</p> <p>The issue raised here by Appellant relates to ALJ's finding as to whether Appellant was in possession of additional data that EPS was ordered to provide during discovery.</p>
56. and 57.	Witness testimony of McPhilliamy and Smith was highly relevant in relation to the harm of "uncontrolled" burns, that is, burns conducted not in accordance with the time and temperature requirements of 40 C.F.R. § 761.72 (a)(3).
58.	See Appellee's Response Brief, Section III.B and C.
59.	See Appellee's Response Brief, Section III.D.



1. Appellant's Citations to exhibits not admitted:

The consequences of the Respondent citing to exhibits not admitted into the record could be dire. Since the party appealing has the burden of showing error in the ALJ's decision, it cannot deviate from the record to support disputed facts. However the Respondent on numerous occasions tries to avail itself of just such tactics. In the Appellant's brief there are citations to exhibits not admitted into the record by the ALJ. Therefore it would be prudent to ignore all portions and references to exhibits not admitted cited in their brief. Examples of citing exhibits not admitted are as follows:

- P. 20 Respondent cites REX 2 at (C0000559). REX 2 is not admitted and its bates numbers are R005862-5875.
- P. 24 Respondent cites REX 560 should be cited as REX 570, as noted in Aug. 22, 2003 Tr. 42. Therefore, REX 560 as cited is not admitted.
- P. 27 Respondent cites CEX 500. Appellee's exhibits ended at #74, therefore it cannot be CEX 500. However if Appellant's meant to cite as REX 500, this is also inaccurate as REX 500 was not admitted.
- P. 90 REX 480 R-005156A and R-005157A not admitted.
- P. 123 REX 480, cites specifically pages R005154A, R005154-R0054155A; only R005154A is admitted Therefore the cited pages are not admitted.
- P. 128 REX 473 not admitted
- P. 147 Respondent cites CEX 30 at C001019. CEX 30 is not admitted. EPA did not number its exhibit pages.

Attachment C to Appellant's brief cites CEX 30 at C001019. See above.

2. Appellant's Citations to exhibits admitted in part without references to specific pages:

The Respondent seeks bolster its position by citing to exhibits in their entirety when in fact several exhibits were admitted in part by the ALJ. Without citing specific pages, the Respondent appears unable to support or establish the elements of the arguments. Therefore the reader is left to their own imagination, rather than the record, to ascertain the Appellant's line of reasoning. Therefore all statements and references which were cited to exhibits admitted in part without citing specific pages should be ignored, as they are not valid. Examples of citing exhibits admitted in part are as follows:

- P. 86 Respondent cites REX 480, only pages 2824, 5158A, 6914-6916 were admitted.
- P. 90 REX 480, R-005156A and R-005157A not admitted
- P. 93 REX 480, see 86 above
- P. 99 REX 419 cited admitted in part
- P. 101 REX 476 admitted in part
- P. 104 REX 479 admitted in part
- P. 117 REX 480, admitted in part
- P. 121 REX 480, admitted in part
- P. 128 REX 476

3. Appellant's Citations that are inaccurate and/or misleading:

Accurate record citations are essential to establish the supporting documentation for arguments. However many of the Appellant's citations to the record in support of the statements are inaccurate and/or misleading. Verifying numerous citations to the record

proved challenging and led to confusion rather than clarification. For example on page 60 the first line states “[the entire proposed penalty for Count III is based on improper disposal of PCB transformers. June 20, 2003 Tr. at 77-78.” However the pages cited are the testimony of Victor Holds, a private investigator, discussing his investigation of G&S Technologies. The citation is not even close to being on point, let alone does it support the statement made by the Respondent. Another example is on page 52. The last line of the 3rd paragraph states, “Finally Mr. McPhilliamy also testified that he had no information regarding PCB concentrations of any transformers that were the subject of the Complaint. Aug. 18, 2003 Tr. 20:16-20.” Referring to that citation we find the Court discussing the Federal District Court FOIA action. A reasonable person would fail to see the citation in support for the Appellant’s statement. On pages 13 and 40 the identical statement is made: “McPhilliamy prepared an inspection report describing his and Rice’s activities during the inspection”. June 17, 2003...and June 18, 2003 Tr. 201-203". (Page 40 continues with “that took place on July 15, 1999".) The citation is to a discussion regarding CEX 2 (EPA Renewal of EPS Approval to Commercially Store Polychlorinated Biphenyl Waste, September 1998). There is no connection with the inspection and even repeating the same statement twice does not make it accurate.

On page 61 of Appellant’s brief it states, “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. 247-251". There is no mention of the PCB regulations on this page. Mr. Rice is testifying regarding the PCB containers in storage at EPS on July 15th.

Additionally, on page 19 of Appellant’s brief, it states, “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 the MSCs during the inspections or subsequently. June 18, 2003 Tr. 35; May 20, 2003 Depo. Of Scott Rice 139-143. It is ironic that Respondent used the word “subsequently” as that is the exact word Mr. McPhilliamy uses on line 16 on page 35. He states, “Somewhere within EPA files subsequent to my August visit I believe I have seen the letter that’s dated July 19th” (emphasis added). Scott Rice in his deposition (in the cited pages) testifies that he did not see the letter and that he had “very limited experience” and at that time it was not part of his responsibilities. It is misleading to state as a “fact” that the inspectors “were not even aware” of a letter even subsequent to the inspections. The record does not support the Appellant’s interpretation of the record. Additional similar examples can be found at:

- P. 13, June 17, 2003 Tr. 88-90
- P. 14, June 18, 2003 Tr. 201-03
- P. 52, Aug 18, 2003 Tr. 20:16-20
- P. 59, June 20, 2003 Tr. 17-42
- P. 61, June 17, 2003 Tr. 247-51
- P. 85-86 June 29-30, 2004 Tr. 277-82
- P. 86, June 29-30, 2004 Tr. 74:16-75:14
- P. 88, June 29-30, 2004 Tr. 241:25-244:23;
- P. 88, June 29-30, 2004 Tr. 101:2-15;
- P. 109, Sept. 11, 2003 Tr. 393:14-397:23

P. 132, Aug. 20, 2003 Tr. 227:2-227:17, 354:22-356:6
P. 132, Aug. 20, 2003 Tr. 227, 275
P. 133, Sept. 11, 2003 Tr. 229-30
P. 142, Sept. 11, 2003 Tr. 357
P. 143, Sept. 11, 2003 Tr. 357

4. Appellant's Citations that are over broad:

The Appellant fails to cite portions of the record in even *close proximity* to the statements of factual disputes. One specific example is on page 118 with the phrase "admitted and discussed at August 19, 2003 Tr. 320-364". It is impossible to glean adequate support for a factual assertion when the Appellant cites to 46 pages of testimony with the statement "admitted and discussed". Another example is on page 81 it states [to assist the EAB in its evaluation of the regulations, Attachment A...] and refers to footnote which cites numerous pages one of which is Tom Simmons, June 19, 2003 Tr. 74-125. Additional similar examples can be found at:

P. 14, June 17, 2003 Tr. 238-67;
P. 19, June 18, 2003 Tr. 184-98;
P. 28, Aug. 22, 2003 Tr. 7-22;
P. 32, Aug. 18, 2003 Tr. 38-46;
P. 37, Aug. 22, 2003 Tr. 7-22 (twice);
P. 92, June 29, 2004 Tr. 75-151;
P. 93, June 30, 2004 Tr. 326:4-332:25
P. 105, Aug. 19, 2003 Tr. 295:3-320:8
P. 105, Aug. 19, 2003 Tr. 156:8-170:3
P. 114, Sept. 11, 2003 Tr. 258:20-263:23

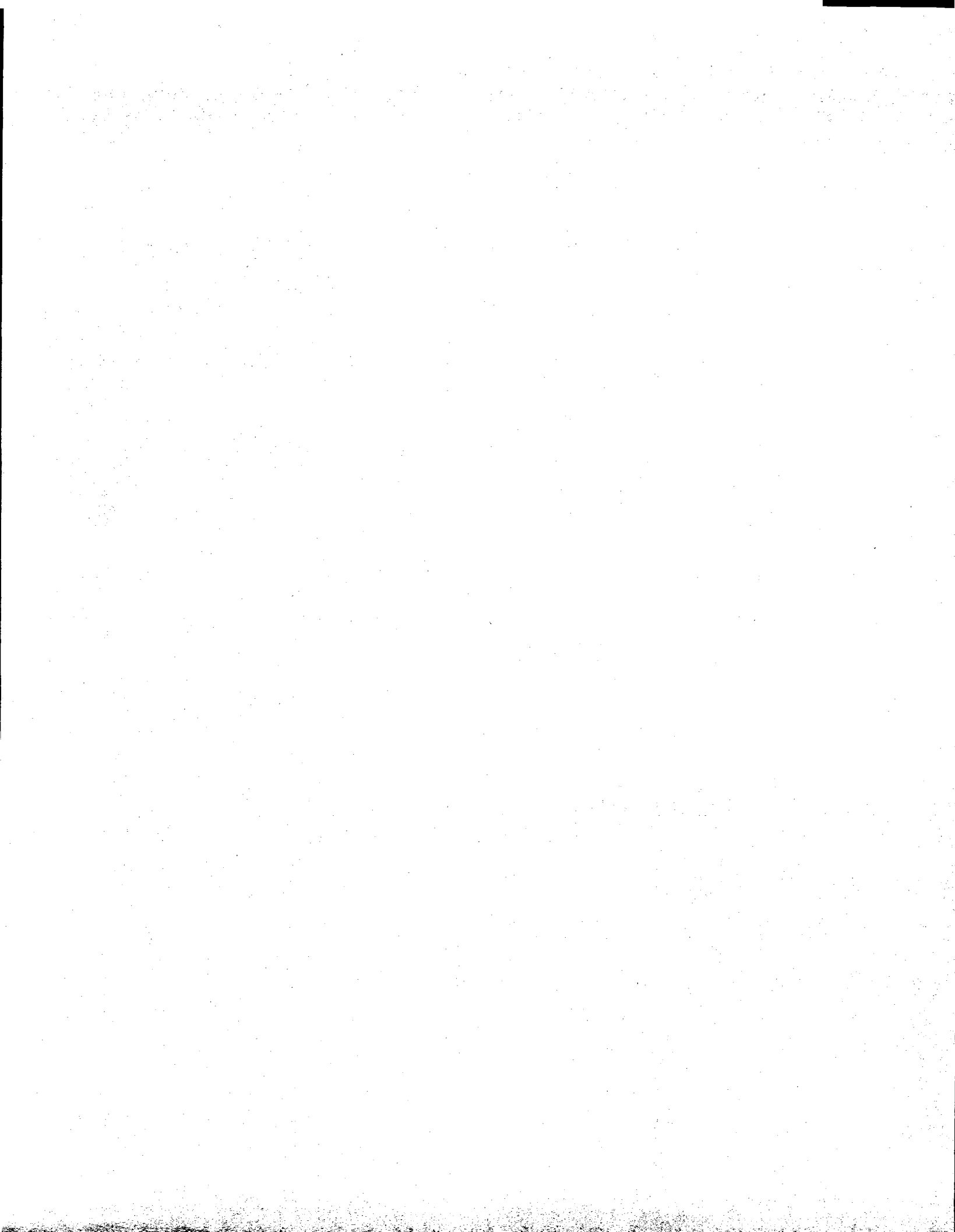
Appellant's citations to documents not relevant to the issues further undermines their arguments. For example, Appellant's citation to a statement by G&S in the letter of July 11, 2002 withdrawing the G7S application for commercial storage approval (p. 105) to suggest that G&S exceeded the 500 gallon limit is only evidence that G&S is also confused on the application of the PCB regulations. The cited G&S statement, "[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" misapplies the regulation. Oil removed from "in-service" electrical equipment, owned by G&S, and taken out of service at the G&S facility would not constitute PCB commercial waste. It would be PCB waste generated by G&S and not be subject to any commercial storage limit.

Likewise, Appellant's attempt to use the G&S 2001 Annual Report as proof that G&S was exceeding the 500 gallon commercial storage limit (p. 106, 6) and (107, 7) fails utterly. The Annual Report does not specify which PCB waste data listed on the report was commercial PCB waste and what was not. For example, the Annual Report does not indicate what portion of the 1333 kg (approximately 390 gallons) of PCB contaminated oil stored at the beginning of the year was commercial waste and what portion was waste generated by G&S. The Annual Report does indicate that there was 4759 kg (approximately 1396 gallons) of PCB-contaminated oil received by the facility during 2001. This material would be commercial PCB waste, but the report only indicates that this 1400 gallon quantity was received throughout the entire year. This statistic

provides no indication whether more than 500 gallons were being stored during the year as waste "generated at the facility". Waste generated at the facility is not commercial PCB waste.

In 6, Appellant simply omits this critical distinction when it states that "A review of this document (REX 486 (R005529)) 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," and ..."40 C.F.R. Part 761, which requires that any commercial storage facility storing 500 or more gallons of PCB... is subject to the commercial storage approval requirements". As specified in the definition of the Commercial storer of PCB waste at 40 C.F.R. § 761.3, "If a facility's storage of PCB waste **generated by others** at no time exceeds 500 gallons of liquid and/or non liquid material containing PCBs at regulated levels, the owner or operator is a commercial storer but is not required to seek EPA approval as a commercial of PCB waste." (emphasis added).

Similarly in 7, Appellant cites the data in the G&S Annual Report for 2001 storage of PCB equipment as proof of the need for a commercial storage approval and baldly asserts that on every day of operation, G&S was storing in excess of 70 cubic yards (equivalent of the 500 gallon limit) of **solid waste** without a PCB commercial Storage Permit (emphasis added). As indicated above, the Annual Report does not distinguish between commercial and site generated waste stored at the beginning of the year. The report does indicate that no PCB waste equipment was generated at the facility, i.e. was not commercial PCB waste. Again, the Annual Report provides no basis to determine whether G&S stored more than 500 gallons of commercial PCB waste at any time during the year. Appellant now uses the term "solid waste" which has no bearing on whether such waste was site generated or was generated by others.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re:

Environmental Protection Services, Inc. : Docket No.: TSCA Appeal No. 06-(01)
4 Industrial Park Drive :
Wheeling, WV 26003-0091, :
Appellant. :

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the date provided below, I served the *U.S. Environmental Protection Agency, Region III's Response Brief* in the above-captioned matter on the following persons in the manner set forth below:

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