



RECEIVED
U.S. E.P.A.

1600 LAIDLEY TOWER • P.O. BOX 553 • CHARLESTON, WEST VIRGINIA 25322 • TELEPHONE: 304-340-1199 • TELECOPIER: 304-340-1130

www.jacksonkelly.com

304-340-1199

skropp@jacksonkelly.com

2007 JAN 12 AM 10:17
ENVIR. APPEALS BOARD

January 11, 2006

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

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

Dear Clerk:

Please find enclosed for filing an original and five copies of Appellant Environmental Protection Services, Inc.'s Reply to U.S. EPA, Region III's Response to EAB Request During Oral Argument.

Thank you for your courtesy in this matter.

Very truly yours,

Edward L. Kropp

ELK:kd1
Enclosures

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

RECEIVED
U.S. E.P.A.

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

2007 JAN 12 AM 10:17
ENVIR. APPEALS BOARD

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

**Appellant-Respondent's Environmental Protection Service, Inc.'s
Reply to Appellee-Complainant U.S. EPA, Region III's
Response to EAB Request Made During Oral Argument**

On December 13, 2006, the Environmental Appeals Board ("EAB") a) requested the U.S. Environmental Protection Agency, Region III, ("Appellee" or "EPA") to research and provide additional guidance and policy statements by the Agency regarding the definition of "owner" of PCB equipment as the term "owner" is used in the definition section of the PCB rules at 40 C.F.R. Part 761.3, and b) authorized the Appellant-Respondent, Environmental Protection Services, Inc ("EPS") to file on or before January 12, 2007, a reply if one is warranted. EPS believes that a reply is not only warranted but necessary to clarify the record in this instance.

Specifically, the EAB request was:

JUDGE STEIN: It is a little odd that you're relying on the generator definition to prove a regulatory term that says "ownership." One would think that -- I'm not saying that you can't make the connections that you're making, but if it's such a fundamental term in the regulations, one would think that there might be a definition somewhere, some kind of statement by the Agency, and guidance as to what that term means.

MS. JAMIESON: I'm not aware of that, Your Honor, that there is a guidance.

JUDGE STEIN: Well, following the argument, I would appreciate it if the Agency could look at that issue, and if they find anything on point, to please tell us about it.

TSCA Appeal 06-01 Hearing TR at 74.

EPA Region III filed a Response on January 5, 2007 (“Response”), noting that, “in consultation with EPA Headquarters, it [EPA] is unaware of any policy document or guidance containing a definition of the term “owner” under the PCB rule.” Response at 1. Notwithstanding the fact that EPA had already acknowledged in 2000 that there is neither PCB statutory nor PCB regulatory guidance defining the term “owner,” EPA submitted the two following documents, in which documents it stated that the terms “owner” and “generator” of PCB waste are explained:

(1) a page from the Preamble to the *Proposed Rule: Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities*, 53 Fed. Reg. 37436 at 37438 (Sept. 26, 1988),...
and (2) two pages from the Preamble to the *Final Rule: Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities*, 54 Fed. Reg. 52716 at 52717-52718 (Dec. 21, 1989),....

Response at 1.

EPS notes that these preambles are nearly two decades old, are not law, and do not provide guidance regarding the issue of ownership and its impact on interpreting the PCB regulations. EPS submits that EPA’s analysis is incorrect, grossly oversimplified and incomplete. Moreover, EPA mischaracterizes the EAB request, focusing only on the relationship of the words “owner” and “generator” to PCB wastes, which is not relevant to the facts presented involving either the G&S or EPS contracts that were discussed during the oral argument. The vast majority of equipment involved in those contracts has not been tested, has not been removed from service as that term is defined under the rules, and is not yet determined to be a PCB waste. See EPS and G&S brochures, CEX 56 and REX 401, respectively (REX 401 attached as Exhibit 1). See also Appellant-Respondent EPS’ Appeal Brief, Attachment B, Errors 32-34.

The EPA Response fails to address and acknowledge: a) differences in interpretation of the PCB commercial storage approval and other more basic rules among EPA Headquarters, EPA Region II, EPA Region III, and EPA Region V, and b) the failure by the agency to develop

consistent, national guidance regarding a reasonable interpretation of these rules. The entire PCB program is one that demands national consistency.¹ Yet, in this case, there is an identified difference in regulatory interpretation of the rules among units of EPA and EPA has time and again in this proceeding hidden behind the excuse that each Region is a separate entity and entitled to a difference of opinion instead of working to eliminate the differences and develop uniform guidance and interpretations.

In its Response filing,² EPA ignores the guidance issued by Region II and is only able to refer the EAB to Federal Register preamble language that is nearly two decades old, the final rule preamble, and two 1990 letters which reference the same preambles. EPA's Response does not mention the 2000 guidance document addressed specifically to EPS and authored by EPA Region II, with the acknowledged concurrence of both EPA Region III and EPA Headquarters, and which is prominently cited by EPS in the record of the hearing below in this appeal. Remarkably, EPA relies on 1988, 1989, and 1990 documents regarding the issue of impact of ownership of PCB waste (which EPS submits was not the question presented by the Board) on the issue of generator status but fails to cite its very own contradictory 2000 guidance document directed specifically to EPS in its Response.

As both Region III and EPA Headquarters are well aware, in September of 2000, well before EPA filed its Complaint in this case and in response to an inquiry from EPS, EPA Region II addressed guidance to EPS stating that the owner of equipment is the generator of PCB waste resulting from that equipment. REX 312 (attached as Exhibit 2). Importantly, the

¹ The fact that EPA under TSCA can not even delegate responsibility of the program to the states confirms the confusion and lack of clear guidance on this area. See 15 U.S.C.A §2605(e) and implementing regulations.

² It is noteworthy that the EPA Response only states that “[t]he Region [referring to Region III] in consultation with EPA Headquarters, is unaware...”, suggesting to EPS that EPA did not consult with either Region II or Region V, even though Region III and EPA Headquarters know that Regions II and V have expressed contradictory opinions regarding the issue of what party is the generator of PCB waste. See REX 312 and REX 458 (REX 458, Region V G&S Inspection report, attached as Exhibit 3)

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

In that letter EPA Region II writes the following in response to the EPS question “[p]er 40CFR761 regulations who is the ‘owner’ of the regulated waste:”

The term “owner” is not specifically defined in the Toxic Substances Control Act (TSCA) nor in 40 C.F.R. Part 761. Therefore owner takes its common meaning. The owner of the materials shipped by the utility would be the utility (assuming they own them at that time) and their ownership continues through the disposal process. The disposal facility would be the owner of any materials they owned which became PCB waste during the processing of the Utility’s PCB waste.

REX 312, pages R-000122 and R-000123.

EPS submits that this Region II guidance which is a) precisely responsive to Justice Stein's question, b) close to 18 years more recent than the preambles referenced by EPA Region III and c) more importantly, was well known by EPA when it filed its Response, should be controlling. EPA should not be allowed to pretend that this and other documents expressing interpretations contradictory to the Region III position do not exist.


Under its contracts with all of its clients, EPS becomes the owner of all equipment that it transports to its Wheeling facility at the time the equipment is picked up for transportation at the client's site. Aug. 22, 2003 Tr. 10-16. EPS is therefore the owner of all PCB equipment that passes through the doors of its facility. In addition, EPS performs the only PCB concentration testing on more than 99% of the transformers that arrive at its facility under its contract with its clients. August 18, 2003 Tr. 54. Thus, under the plain language of the September 2000 EPA

guidance, EPS is both the owner of the units and the entity that makes the determination that the equipment is waste. REX 312; Aug. 22, 2003 Tr. 24-29. Accordingly, EPS is the generator of all such PCB wastes and the storage of that waste does not require a PCB commercial storage approval. EPA Region III cannot, after the fact, now say that it disagrees with the clear guidance provided to EPS by Region II prior to EPA filing its Complaint in this matter, and in which Region III and headquarters concurred. At the very least, it cannot do so for the purpose of taking enforcement action against EPS for past activities that it expressly authorized.³

For these and all of the reasons set forth by EPS in the record, hearing, and argument in this matter, EPS respectfully requests that the EAB (1) reverse the holdings in the Initial Decision below, (2) find in favor of the Appellant on Counts I, II, and III and on Appellant's defense of selective enforcement, and (3) dismiss EPA's claims against EPS entirely.

Respectfully submitted,

Environmental Protection Services, Inc.
By Counsel

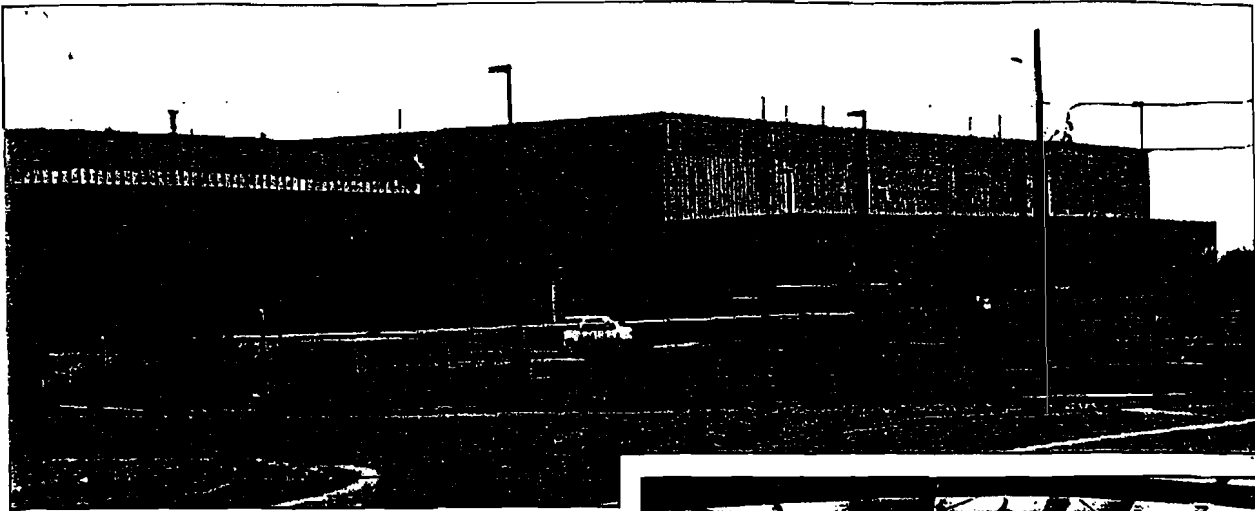

Edward L. Kropp (WV B 5397)
Jackson Kelly PLLC
PO Box 553
Charleston, WV 25322

³ EPA Region III could better argue that its isolated position could form the basis for orders directed at future behavior, but it cannot reasonably expect that EPS or others should be punished for past action that EPA has expressly and implicitly encouraged.

Marian C. Hwang per telecon by EKH

Marian C. Hwang
Miles & Stockbridge
10 Light Street
Baltimore, Maryland 21202

Counsel for Appellant,
Environmental Protection Services, Inc.

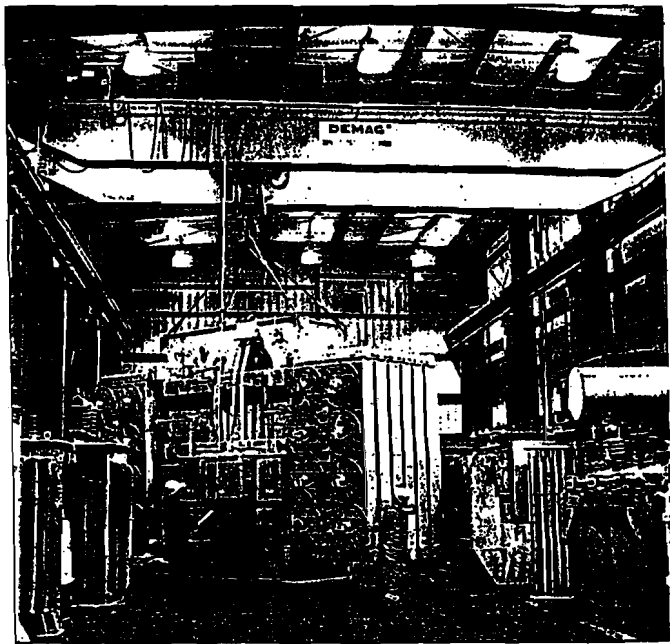


STATE-OF-THE-ART FACILITY

After more than 30 years in business, G&S Technologies has grown into the largest oil-filled electrical equipment disposal facility on the East Coast.

Our new state-of-the-art facility, complete with its own full service PCB testing laboratory, is a testament to our unprecedented growth, as well as our unwavering commitment to excellence.

At G&S, we believe that there is no job too big or too small for our specially trained engineers. Currently, G&S serves the Industrial and Utility industries throughout the entire U.S. and Canada. We offer our clients a wide array of services



including: PCB Sampling & Testing, On-Site Dielectric Fluid Disposal (all PCB levels), Electrical Equipment Disposal and On-Site, Field Dismantling for larger power transformers. G&S also offers Replacement and Rebuilding services to meet our customers specific needs.

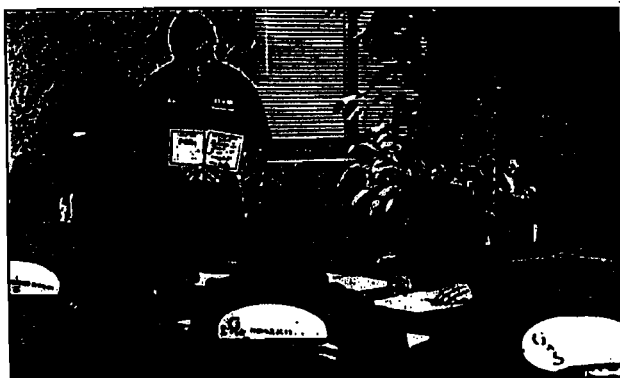
In today's economic environment it has become increasingly difficult for utility companies nationwide to protect their bottom lines. That is why G&S offers its utility customers a comprehensive "Investment Recovery" program that provides utilities with a new and very welcomed source of revenue. This revenue can be very helpful, especially in these trying economic times.

1-201-998-9744

R-003047

WE PICK-UP YOUR OLD OIL-FILLED ELECTRICAL EQUIPMENT AND DELIVER YOU PEACE-OF-MIND.

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



This is why G&S has implemented an environmentally conscious program called the "Environment 1st Safety Program".

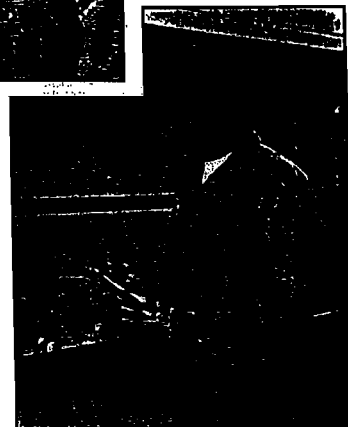
The Environment 1st Safety Program is a comprehensive and company wide employee education program. It was instituted to ensure that all G&S employees achieve the highest level of excellence in plant operations and environmental safety training and to ensure that your equipment is being disposed of in strict accordance with all Federal, State, and Local environmental regulations.

G&S also offers Turnkey services, whereby G&S's trained technicians perform all of the necessary tasks related to the disposal of your electrical equipment. Once a job has been requisitioned, G&S will dispatch one of our specially trained engineers to your site. The engineer will take an oil sample from your equipment and promptly ship it back to our PCB laboratory for testing.

Our laboratory is a "State-of-the-Art" facility equipped with three State Certified (N.Y. & N.J.) gas chromatography instruments. These advanced instruments afford G&S the ability to have PCB test results back to you in less than five business days.

Once test results have determined the PCB concentration of your equipment, the equipment is classified and the appropriate pumping is commenced prior to transport.

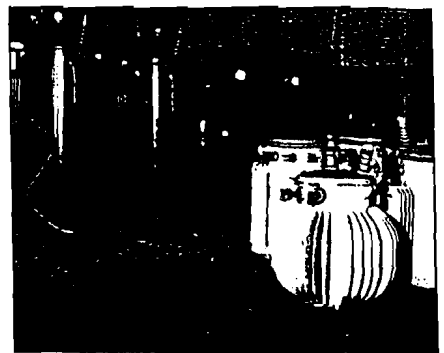
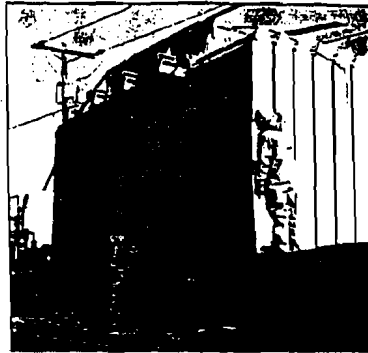
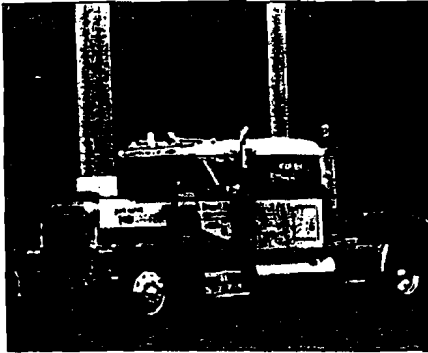
Transportation for your obsolete electrical equipment is provided by trained, licensed and insured transporters who have extensive experience transporting both hazardous & non-hazardous materials.



G&S Technologies... Transforming Risks Into Rewards For Over 30 Years.

R-003048

G&S...WITH YOU EVERY STEP OF THE WAY



Upon arrival at our facility, your obsolete equipment will be "off-loaded" and stored in our 40,000 square foot, indoor warehouse to await processing.

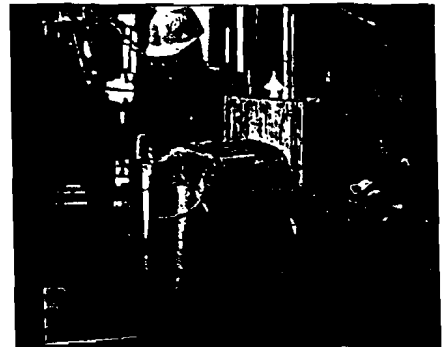
Shortly after the off-loading process has commenced, your electrical equipment is dismantled and prepared for disposal. The transformer shells are thoroughly cleansed, bailed and sent off to a steel mill.

All transformer cores are transferred to our state-of-the-art, New Jersey State permitted, metal reclamation furnace for thermal treatment of PCB & oil impregnated combustibles, such as paper and wood. To ensure that we continue to protect our environment, the incinerator is equipped with a specially designed baghouse filtration system and a continuous emission monitoring system.

Recaptured copper and aluminum are also bailed and sent directly to metal smelting facilities. Any residual dielectric fluid is sent to a USEPA approved detoxification facility, blending facility or burned as fuel at an "Industrial Furnace" (depending on PCB level classification and customer preference).

Once the disposal process has been concluded (approximately 30 days after receipt of your equipment), you will receive a G&S, Environment 1st Certificate of Disposal containing all pertinent data and authenticated by our corporate seal, a document number and the signature of a G&S corporate officer.

So the next time you need to dispose of obsolete electrical equipment, don't take any chances. Call G&S Technologies, because we've been "Transforming Risks Into Rewards" for over 30 years.



R-003049



TECHNOLOGIES

A DIVISION OF G&S MOTOR EQUIPMENT CO., INC.

1-800-5NON-PCB





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

SEP 12 2000

Mr. Keith R. Reed, President & CEO
Environmental Protection Services
4 Industrial Park Drive
P.O. Box 710
Wheeling, WV 26003-009

Dear Mr. Reed,

This is in response to your June 23, 2000 letter to me as the Director, Division of Enforcement and Compliance Assistance in Region 2 of the United States Environmental Protection Agency (EPA). Your current questions and EPA's responses (in bold type) are listed below:

Scenario 1

- A. A utility company enters into a contract with a disposal facility in USEPA Region II with the following stipulation; all articles must be disposed of in accordance with applicable federal, state, and local regulations.
- B. At the time of shipment a quantity of oil filled articles physically contain levels of PCB's greater than 50 ppm, whether tested, untested, known or unknown.
- C. During the disposal process, regulated TSCA wastes are accumulated.

(Note: in all of the following the "contract" is important in relation to enforcement of the PCB regulations (40 C.F.R. Part 761) only in that it indicates when the PCBs and PCB Items are determined to be a waste. Also, although the EPS designation of the facility as a "disposal facility" is used for consistency, any given facility may have multiple roles including owner, generator, transporter, transfer facility, commercial storer, commercial storer with approval, and multiple disposal functions. Finally, the articles addressed are assumed to be articles whose use and distribution in commerce is authorized prior to their designation as waste as any other articles could only be PCB waste.)

R-000121

1. Per 40CFR761 regulations who is the "generator" of the regulated waste.

The "generator of PCB waste," as that term is defined in 40 C.F.R. Part 761, at the time of shipment is the utility as it had possession of the PCBs at the time the decision that they were a waste was made. This term was defined in the December 21, 1989 Notification and Manifesting Final Rule for the purpose of defining the roles and responsibilities regarding manifesting requirements for PCB waste. These requirements apply to PCB waste even if the PCB concentration is unknown at the time (e.g. untested oil). The disposal facility is required to properly dispose of all PCB waste received and to fill out a manifest in the same manner as a generator if waste was to be shipped to another PCB facility. The disposal facility would be a "generator of PCB waste" for any new waste that it generated (i.e. material which became a PCB waste while in its possession) such as decontamination solvents.

2. Per 40CFR761 regulations who is the "owner" of the regulated waste.

The term "owner" is not specifically defined in the Toxic Substances Control Act (TSCA) nor in 40 C.F.R. Part 761. Therefore owner takes its common meaning. The owner of the materials shipped by the utility would be the utility (assuming they own them at that time) and their ownership continues through the disposal process. The disposal facility would be the owner of any materials they owned which became PCB waste during the processing of the Utility's PCB waste.

3. Per 40CFR761 regulations who is liable for proper disposal of the regulated waste.

40 C.F.R. Part 761 requires that PCB waste be properly disposed. Anyone who fails to comply with the applicable requirements may be jointly and severally liable for the improper disposal of PCBs .

Scenario 2

(Change circumstances in paragraph A only and repeat B and C)

- A. A utility company enters into a contract with a disposal facility in USEPA Region II with the following stipulations;
 1. Oil filled articles testing less than 50 ppm PCB's may be resold for reuse or repaired.

2. Oil filled articles tested at the disposal facility site or having known PCB levels greater than 50 ppm PCB's prior to shipment must be disposed in accordance to federal, state, and local regulations.
- B. At the time of shipment a quantity of oil filled articles physically contain levels of PCB's greater than 50 ppm, whether tested, untested, known or unknown.
- C. During the disposal process, regulated TSCA wastes are accumulated.
1. Per 40CFR761 regulations who is the "generator" of the regulated waste.

Under A.1. in Scenario 2 the articles contain less than 50 ppm PCBs and are therefore not subject to requirements for PCB waste even if they were a waste. (note that there are restrictions on the burning of waste oil (oil containing less than 50 ppm PCBs) containing PCBs at concentrations of 2 ppm or greater)

For A.2. in Scenario 2 the "generator of PCB waste," as that term is defined in 40 C.F.R. Part 761, applies to the person who is in possession of the PCBs at the time they are determined to be a waste. For the units which contain PCBs at concentrations of 50 ppm or greater which the utility has identified as waste prior to shipment, the utility is the "generator of PCB waste." For the units which are sent to another facility (the "disposal facility" in this scenario) to determine the PCB concentration and which are found to contain PCBs at concentrations of 50 ppm or greater, the disposal facility is the "generator of PCB waste" as the decision that the PCBs are a waste is made when the PCBs are in the possession of the disposal facility. The subsequent requirements on the disposal facility for PCB waste are the same as in Scenario 1.

2. Per 40CFR761 regulations who is the "owner" of the regulated waste.

The term "owner" is not specifically defined in the Toxic Substances Control Act (TSCA) nor in 40 C.F.R. Part 761. Therefore owner takes its common meaning. The owner of the materials shipped by the utility would be the utility (assuming they own them at that time) and their ownership continues through the disposal process. The disposal facility would be the owner of any materials they owned which became PCB waste during the processing of the Utility's PCB waste.

3. Per 40CFR761 regulations who is liable for proper disposal of the regulated waste.

40 C.F.R. Part 761 requires that PCB waste be properly disposed. Anyone who fails to comply with the applicable requirements may be jointly and severally liable for the improper disposal of PCBs .

Based on the above two scenarios, please provide USEPA Region II response to the following:

After receipt of the oil filled articles containing 50 ppm PCB fluid the articles are resold and the utility receives a "Certificate of Disposal" certifying that all articles were disposed in accordance with 40CFR761 and all applicable federal state and local regulations.

- 1 Is this a violation of 40CFR761 regulations?

40 C.F.R. Part 761 specifies the disposal requirements for PCB waste. 40 C.F.R. § 761.218 contains the requirements and specifications for a certificate of disposal. PCB articles which are PCB waste must be properly disposed of and any other use, or distribution in commerce other than for disposal, would not be in accordance with the PCB regulations. A certificate of disposal must be prepared and sent to the generator of the manifest for any PCB waste received on a PCB manifest and disposed of. If the waste was not disposed of, a false certification would be a violation of TSCA and other federal laws.

2. If so, what regulation?

Disposal of PCBs and PCB Items is specified in Subpart D of 40 C.F.R. Part 761 and depends on the nature of the waste and concentration. Manifesting requirements, including certificates of disposal, are specified in Subpart K of 40 C.F.R. Part 761 with certificate of disposal requirements at 40 C.F.R. § 761.218.

Referring to the enclosed attachment 3 of your (EPA's) March 12, 1999 letter.

- Response 1. Does the receipt of the above articles require G&S to file notification requirements per USEPA form 7710-53.

The response to which you refer, with your original question, was:

EPS concern:
"Section: 761.205

G&S Technologies has been a major commercial storer since 1979 but has never complied [with] the notification requirements."

EPA response:

Commercial storage requirements for PCBs were first effective on February 5, 1990. The only equipment containing PCBs at concentrations of 50 parts per million (ppm) or greater, which G&S receives for disposal, is PCB-Contaminated Electrical Equipment which has been drained prior to shipment. It is therefore exempt from PCB storage requirements (see Attachment 1). Since the waste that G&S handles is not subject to the storage requirements at 40 C.F.R. § 761.65, G&S is not a "Commercial Storer of PCB waste" as that term is defined at 40 C.F.R. § 761.3.

G&S does remove residual liquids from drained PCB-Contaminated Electrical Equipment and ships it for disposal as PCB waste. This residual liquid is not removed during servicing but rather during disposal, making G&S the generator of the liquid; a generator's storage of its own waste is not considered commercial storage.

The two paragraphs above refer to drained PCB-Contaminated Electrical Equipment. Your current examples concern equipment which is full of fluid. 40 C.F.R. § 761.205 requires that all commercial storers notify EPA of their PCB waste handling activities by filing EPA Form 7710-53 with EPA prior to engaging in PCB waste handling activities. Therefore, a person who acts as a commercial storer of PCB waste, as defined in 40 C.F.R. § 761.3 must, among other obligations, notify EPA by filing EPA Form 7710-53 prior to such action.

Response 2 & 5. What is USEPA Region 2 position on the receipt of the above equipment for disposal without a uniform hazardous waste manifest? What is your position on the use of non-hazardous waste haulers?

The responses to which you refer, with your original questions, were:

#2 EPS concern:
"Section: 761.202
G&S Technologies has used transportation firms with no EPA ID numbers to transport regulated PCBs."

EPA response:

Prior to August 28, 1998 the transportation of drained PCB-Contaminated Electrical Equipment was not subject to manifesting requirements and a PCB Transporter was not required. Since August 28, 1998, firms who

transport drained PCB-Contaminated Electrical Equipment to G&S have notified as PCB Transporters. According to G&S's annual records, which were reviewed as part of EPA's October 26, 1998 inspection, shipments of regulated PCB waste from their facility for disposal have been shipped on PCB manifests, have been transported by authorized PCB Transporters, and have been sent to approved PCB commercial storage and disposal facilities.

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

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

On June 24, 1999, EPA published a technical and procedural amendment rule to make corrections to the PCB Disposal Amendments (which had been issued on June 29, 1998 and became effective on August 28, 1998). The above statements were correct at the time they were made. However, the technical corrections changed the requirements for drained PCB-Contaminated Electrical Equipment regarding manifesting (including notification), storage, and record keeping by exempting such items from those requirements, restoring these requirements to the status that existed prior to the PCB Disposal Amendments. Currently a PCB manifest and a PCB Transporter is not required for drained PCB-Contaminated articles, including PCB-Contaminated Electrical Equipment. Since this was a correction to the PCB Disposal Rule this change is retroactive.

For your example of PCB Items full of fluid which have been determined to be a PCB waste, a PCB manifest is required when shipped to another facility not related to the generator. The originator of the manifest (which is initially the generator of PCB waste but may also be a PCB commercial storer or disposer if waste is re-shipped) is required to fill out the manifest in accordance with 40 C.F.R. § 761.207, including designating one commercial storage or disposal facility approved under 40 C.F.R. Part 761 for the commercial storage or disposal of the PCBs and PCB Items described on the manifest.

Your examples also include two examples where a PCB manifest is not required. The first is where a PCB Item, authorized for use, is shipped for use (including resale) and not as a PCB waste. The second is where a PCB Item, authorized for use, has not been determined to be a waste and is sent for repair/service/testing. In this case the PCB Item has not yet been determined to be a waste and a manifest is not required.

(Note that there are certain exceptions to the manifesting requirements such as for research and disposal of certain remediation waste and bulk product waste which are not considered relevant to your subject and are not discussed herein.)

PCB transporters must be used when a PCB manifest is required. Transporters of PCBs at any time must comply with applicable Department of Transportation regulations. A PCB transporter under 40 C.F.R. Part 761 is not required to be a hazardous waste transporter which is a designation under the Resource Conservation and Recovery Act regulations.

Response 7 Does the receipt of oil filled PCB articles and 55 gallon drums of PCB for disposal qualify G&S as a commercial storer and thus mandate them to the PCB storage requirements and notification requirements? What is USEPA Region position on the receipt of the above equipment. Do they have to be above the 100 year flood plain? Do they need records of receipt, records of storage and records of disposal? What are the violations for not having the above.

The response to which you refer, with your original question, is:

EPS concern:

"Section 761.65

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

EPA response:

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

G&S has generally stored PCB liquids in a bulk tank, which is subject to the requirements found at 40 C.F.R. § 761.65(c)(7). A bulk tank is not subject to the requirements found at 40 C.F.R. § 761.65(b)(1), where the 100-year flood plain elevation is a condition. G&S's drum storage, as well as all building floor levels, have been certified by a Professional Engineer to be above the 100-year flood water elevation which complies with this requirement in 40 C.F.R. § 761.65(b)(1).

A commercial storer of PCB waste must notify EPA prior to such storage. PCB waste is subject to the storage requirements of 40 C.F.R. § 761.65. (Note that there is at least one exclusion not listed in 40 C.F.R. § 761.65 and that is for transfer facilities as contained in the definition thereof at 40 C.F.R. § 761.3.) PCB waste "received" at a facility may be accepted and stored and/or disposed and may also be rejected back to the generator (who is required to determine that the receiving facility is authorized to receive the waste) or may be redirected, as authorized by the generator, to another PCB commercial storage or disposal facility. Facilities within a geographical flood plain may be protected or elevated so that it is not subject to the flood plain designation, in which case it is not subject to the flood plain preemption in 40 C.F.R. § 761.65.

40 C.F.R. Part 761 requires that records be generated and maintained for prescribed periods concerning the generation, shipment, receipt, storage, and disposal of PCB waste. Records of the sale of PCB articles are now (since August 28, 1998) also required. Any failure to comply with any requirement of 40 C.F.R. Part 761 may be a violation of that rule and of TSCA.

Regarding the receipt of 55 gallon drums of PCB waste liquids; such containers are subject to the manifesting and storage requirements of 40 C.F.R. Part 761. Any facility which received and stored such waste from an unrelated generator would be a commercial storer of PCB waste and would be required to notify as a commercial storer prior to such receipt. If the quantity of PCB waste commercially stored exceeded 500 gallons at any one time, the facility would be required to obtain a final approval as a commercial storer of PCB waste prior to engaging in the storage of such waste at that quantity. EPA Region 2 has not found that G&S has violated either of these requirements.

Attached is a letter from John W. Melone, Director National Program Chemical Division. Please provide a response to the following:

Question 1. Does USEPA Region 2 agree with the definition of a generator as per Section 761.3. If so, what is USEPA Region 2 position on the ability of the disposal firm to reclassify the equipment for resale or reuse at the time of receipt.

Region 2 affirms the definition of Generator of PCB waste as specified in 40 C.F.R. § 761.3:

Generator of PCB waste means any person whose act or process produces PCBs that are regulated for disposal under subpart D of this part, or whose act first causes PCBs or PCB Items to become subject to the disposal requirements of subpart D of this part, or who has physical control over the PCBs when a decision is made that the use of the PCBs has been terminated and therefore is subject to the disposal requirements of subpart D of this part. Unless another provision of this part specifically requires a site-specific meaning, "generator of PCB waste" includes all of the sites of PCB waste generation owned or operated by the person who generates PCB wastes.

We understand your use of the term reclassification to mean changing the designation of a PCB Item from that of being a PCB waste to one where it can be used, including resale. The generator of PCB waste is responsible for the proper disposal of the PCB waste generated. Another person may not take PCB waste and handle it as anything other than PCB waste in accordance with Subpart D of 40 C.F.R. Part 761.

Question 3 thru 7. What is Region 2 position on these issues?

Question 9. What is USEPA Region 2 position on this issue?

Question 3 was "Does the disposal firm become the generator and/or owner of the waste oil when removing the oil from the units? Or, if the removed generated waste is still owned by the original contractor, does this qualify the disposal facility as a commercial storer?"

If a PCB Item is received full of PCB oil and the PCB Item was shipped as PCB waste then the designated facility receiving the waste, which is subject to the storage requirements of 40 C.F.R. §§ 761.65(b)(1) or (c)(7) or the alternate storage criteria of 40 C.F.R. § 761.65(b)(2), is a commercial storer of PCB waste. As we noted in our previous letter, if the PCB Item received is a drained PCB-Contaminated article, it is not subject to the storage requirements of 40 C.F.R. § 761.65. Residual liquids removed from PCB-Contaminated articles which have been previously drained are considered to be generated by the person who removes them.

If a PCB article, which is authorized for use, is shipped to a facility for service, a manifest is not required. If the service facility removes from the item PCBs which are subject to the storage requirements specified in the definition of a commercial storer of PCB waste, the service facility is a commercial storer of PCB waste. The service facility is also the generator of PCB waste for any material which is received while not a waste and which is determined to be a waste while in the service facility's possession.

Question 4 was "Does the fact that the disposal firm pays the utility for the equipment remove them from the status of being a commercial storer?"

The exchange of money, or its equivalent, is not relevant to the issue of commercial storage of PCB waste. The issue is #1, who is the generator of PCB waste for the waste in question and #2, is the storage subject to 40 C.F.R. § 761.65(b)(1), (b)(2), or (c)(7)? The other issue may be, for items that are authorized for use, is the item being shipped for disposal or for service or as part of the sale of the item?

Question 5 was, "Does simply the receipt of oil filled contaminated equipment or drained contaminated equipment make a disposal facility a Commercial Storer?"

Storage of drained PCB-Contaminated articles is not subject to the requirements of 40 C.F.R. § 761.65 and cannot be commercial storage. The information needed to determine if equipment containing PCB oil (containing PCBs at concentrations of 50 ppm or greater) results in that facility being subject to the requirements for a commercial storer of PCB waste are (1) the nature of the waste upon receipt, (2) the function of the facility in regards to the particular waste, (3) the storage area requirements applicable to the waste, and (4) the owner of the waste at the time of receipt. Generally a facility receiving PCB waste liquids at concentrations of 50 ppm or greater, where the facility is not related to the generator, would have to be a commercial storer of PCB waste before receiving the waste.

Question 6 concerned the applicability of the 500 gallon threshold in the requirement for approvals by commercial storers of PCB waste.

There are two situations concerning your question. In the first case, when PCB waste is received and stored by a commercial storer of PCB waste, it is simply the waste as received for storage that is used to determine the volume stored. In another case, a service shop may receive several units, which are not designated as waste upon receipt, which contain more than 500 gallons of PCBs. These PCBs are only counted in the total of PCB waste commercially stored if they are removed from the equipment (owned by someone other than the storer) and brokered for disposal, as the service shop only becomes a commercial storer of these wastes when they are removed and brokered for disposal. If the entire unit, which was not a

waste at the time it was received, is shipped, intact, for disposal no commercial storage regarding it is involved.

Question 7 concerned the restriction on storage in a 100 year flood plain and has been responded to in our previous letter and again in this document on page 8.

Question 9 concerned export of PCB waste for disposal.

PCB waste at concentrations of 50 ppm or greater may not be exported for disposal. PCB articles which may be distributed in commerce for use may be exported for use.

G & S Technologies no longer limits receipt of PCB Items to drained PCB-Contaminated Electrical Equipment. EPA's letter of March 12, 1999 was based on the information most recently available to EPA.

With respect to other issues which you raise in your letter, the response to your Freedom of Information Act (FOIA) request is being processed and will be issued when that process is completed. You indicated in your letter that I appeared perplexed by your information at the time of your recent visit to my office. I was surprised at your unannounced visit after arrangements had been made for you to meet with the appropriate office of EPA on that day however I was willing to speak to you. Also you alluded to additional information that you possessed which you had not provided to us in previous communications and which was contrary to our information at that time. As to the literature from G&S which you attached to your letter, what we look at are the actual operations of a facility and we are aware that G&S has changed operations in response to changing markets and regulations and may continue to do so. Your allegations of violations of EPA regulations have not proved to be valid, nevertheless we will pursue any reasonable information, as we do with any allegations of violations of environmental regulations. If you have any additional information, please make it known immediately.

A violation of the PCB regulations and the penalty for the violation is determined through the process for Civil Administrative Proceedings, 40 C.F.R. Part 22. This letter is not part of that process and makes no finding regarding any specific action by any specific person. We have answered the questions you raised, both in writing and in conversations with myself and my staff. I trust that this has answered your questions on PCB requirements.

TOTAL P.06

-12-

This response has been reviewed and concurred on by our Office of Enforcement and Compliance Assurance, Toxics and Pesticides Enforcement Division, our Office of Pollution Prevention and Toxics, National Program Chemicals Division, and EPA Region 3.

Sincerely yours,

A handwritten signature in black ink, appearing to read "G. Pavlou", written in a cursive style.

George Pavlou, Director
Division of Enforcement and Compliance Assistance

R-000132

-13-

bcc: Jesse Baskerville, USEPA Office of Enforcement and Compliance Assurance; Toxics and Pesticides Enforcement Division (2245A)

John W. Malone, USEPA Office of Prevention, Pesticides, and Toxic Substances;
National Program Chemicals Division (7404)

Samantha P. Fairchild, USEPA Region 3, Office of Enforcement, Compliance, and Environmental Justice



4-4-01

per conversation w/ Kendall Moore

this is a draft that was
inadvertently left in file.
the final is different.

ENFORCEMENT SENSITIVE

This should have been destroyed

SUMMARY AND CONCLUSION:

FACILITY: G&S Technologies

LOCATION: Kearny, New Jersey

INSPECTION: December 14, 2000

SUMMARY OF FINDINGS:

1. G&S routinely receives transformers that they store until they can be tested. The requirement for commercial storage starts when the test results for PCBs are received. Because of varying sizes of transformers received at the facility, it is possible for G&S to exceed the 500 gallons storage limit if the volume of untested fluid is added. G&S may selectively avoid the less than 500 gallon storage requirement by never sampling all the untested transformers at one time.
2. G&S treats the oil from transformers they purchase as their own waste and not as commercially stored waste.
3. G&S filed its notification of PCB Activity as a commercial storer on Sept 9, 1999. It appears from their annual documents that they should have notified in 1990, when the notification requirement took affect.
4. The facility is located below the 100 year flood plain. Water was found near where drained transformers for scrapping were stored outside the building. Even though those were non PCB according to Mr. Spector, the concentration may still be between 2-49 ppm. Drained does not mean, no free flowing liquid, especially in the larger units (see photograph in attachment C).
5. The storage of the roll-off box for solid waste generated at the processing area, is outside the bermed area. It was found near the loading dock. It was empty at the time of inspection.
6. Since G&S applied for a commercial permit, the closure plan should address the whole facility, especially the processing area for PCB contaminated electrical equipment. Spills can occur in the processing area, receiving area, the area next to the scrap metal recovery oven as the load of dismantled core is charged into the oven. The warehouse where the current storage area is located is well maintained.

R004596

7. The Executive Summary of the remedial activities at lot 38 and 39 do not provide sufficient sampling information to determine if the post removal sampling was adequate.

R004597

----- ENFORCEMENT CONFIDENTIAL -----
----- NOT TO BE RELEASED UNDER FOIA -----

RE: Region 2's Response to the Recommendations of Region 5 regarding G&S Motor Equipment Corporation Inc.

Due to special circumstances surrounding G&S Motor Equipment Corp. in Kearney, New Jersey, inspectors from Region 5 were asked to come to Region 2 to perform an inspection at this facility. Region 5 recently provided this office with a copy of the report prepared after their December 14, 2000 inspection.

In an addendum to their report (attached), Region 5 staff made several recommendations regarding;

- 1) enforcement actions that they would bring against G&S, and
- 2) provisions that they would include in a storage approval that is pending before Region 2 at this time.

Region 2 has reviewed the Region 5 report and associated recommendations in detail, and offer comments below. For your information, we have also addressed each of Region 5's recommendations in detail (attached).

DRAFT

Recommendations for Enforcement Actions:

As a result of their inspection, Region 5 staff cited several areas where they would pursue enforcement action. It is important to note that each recommended action involves an alleged violation of the PCB *commercial* storage requirements.

My staff has spoken with the Region 5 inspectors, and has ascertained that their concerns are actually related to G&S's purchase of certain surplus transformers for evaluation/resale. The regulations allow that PCB Transformers and PCB-Contaminated Transformers may be sold for reuse. G&S has, as one small portion of its business, begun to purchase full, untested transformers for evaluation and potential resale. The shipping papers indicate the equipment is being shipped for resale. G&S's standard procedure is that the surplus equipment is tested upon receipt; transformers under 50 ppm are tagged for resale, transformers over 50 ppm are scrapped.

It is Region 2's position that G&S, as the new owner of this surplus equipment, is free to make the decision whether to resell or to scrap any particular piece of equipment, and any resultant waste is generated rather than *commercially stored*. In contrast, Region 5 has expressed the opinion that, if a transformer is eventually scrapped, it was *not* purchased for resale regardless of the stated intent of the seller on the shipping paper, and any waste must therefore be treated under the *commercial* storage requirements.

R004598

----- ENFORCEMENT CONFIDENTIAL -----
----- NOT TO BE RELEASED UNDER FOIA -----

We do not believe that this is a legally supportable position, since the shipping papers, etc. indicate the equipment was purchased for resale. It is true that, by initially purchasing this equipment for resale rather than for scrap, G&S is playing out a loophole in the regulation to the fullest practicable extent, but they still appear to be operating within these regulations. But they do, in fact, resell some of these surplus transformers. We have reviewed shipping papers and contacted sellers, and it is clear that the transformers are being purchased with the understanding that they may be resold. You are probably aware that Region 2 CID has also looked into this.

Based upon the above and on our coordination with HQ, it is our position that G&S is not, and has not been, a "commercial storer of PCB waste" as that term is defined in the PCB regulations. Therefore, no charges of *commercial storage* violations are appropriate.

During Region 2's own investigation, we did discover violations of the PCB storage requirements, but in these cases G&S is charged as the *generator* (i.e., not *commercial storer*) of the waste. Region 2 issued G&S an Administrative Complaint on October 3, 2000, citing them for these storage violations. That case is currently being negotiated; the parties have reached agreement but the CA/FO has not been finalized.

DRAFT

Recommendations for Special Provisions in the Pending Commercial Storage Approval:

In light of the knowledge that G&S has an application for a commercial storage approval pending before Region 2, Region 5 has recommended that several special provisions be included regarding issues that concerned them during the inspection. These special provisions would address such topics as the timely testing of surplus transformers, the storage of non-PCB transformers, and the processing of PCB Contaminated Transformers.

It must be noted here that the Notification and Manifesting Rule, under which such approvals are issued, addresses only commercial storage and commercial storage areas. The Rule does not cover any types of areas/activities except those directly related to commercial storage. It is our position that imposing such conditions in the commercial storage approval would be overreaching the bounds of EPA's regulatory authority.

Summary

It is our position that each of the issues raised has already been addressed at great lengths in Region 2's investigation. We remain satisfied that there is no additional supportable enforcement action that we can pursue, other than those violations charged in the recent Complaint. This position is based on our understanding of G&S's business policies at the time of our inspections

R004599

----- ENFORCEMENT CONFIDENTIAL -----
----- NOT TO BE RELEASED UNDER FOIA -----

in October 1998 - April 2000, but we have no reason to believe that their policies have changed substantially since that time.

I recommend that no further enforcement action be taken against G&S at this time, and that the commercial storage approval proceed without inclusion of any special provisions related to activities other than storage of PCB waste. If you would like to address these issues further, please contact me at your earliest convenience.

Thank you.

Attachments

DRAFT

R004600

----- ENFORCEMENT CONFIDENTIAL -----
----- NOT TO BE RELEASED UNDER FOIA -----

Responses to specific comments/recommendations:

1 - G&S routinely receives transformers which are then stored until they can be tested. G&S doesn't consider the fluid in the transformers commercially stored until they get the results back. The regulations say that the transformers are commercially stored whenever they come in to the facility as a waste.

This comments reflects a less than full understanding of the processes at G&S. G&S does not "routinely" receive transformers that are full of fluid and need to be tested. The bulk of their business is receiving drained transformers for scrap. These scrap transformers are all tested and drained of free liquid at the generator's facility prior to shipping.

G&S has begun only recently to purchase some full, untested transformers which they then evaluate for possible resale. Since these surplus transformers are owned by G&S, G&S does not, at any time, "consider the fluid in these surplus transformers to be commercially stored", no matter what the test results show. Region 2, with the support of HQ, concurs with this position.

DRAFT
Because of the varying sizes of the transformers, it is possible that G&S has on several occasions exceeded the 500 gallon storage limit. G&S may attempt to selectively avoid the 500 gallon storage requirement by never sampling all the untested transformers at one time. Region 5 recommends that this issue be addressed in the commercial storage permit.

This issue is not relevant to the storage approval. Because the oil in question is not considered to be commercially stored, it is not subject to regulation under this approval. In any case, Region 2 had the opportunity to review several shipments of surplus transformers that came in undrained. In each case, all transformers in a shipment were sampled at the same time and results were on the same printout.

Further investigation of this issue could result in a storage violation.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

R004601

----- ENFORCEMENT CONFIDENTIAL -----

----- NOT TO BE RELEASED UNDER FOIA -----

2 - G&S buys transformers for scrapping and treats the oil from these transformers as their own waste, rather than as commercially stored waste. Region 5 would treat this as a storage violation.

All scrap transformers brought in to G&S are tested and drained of free liquid at the generator's facility prior to shipping. Consistent with HQ policy, any residual PCB oil removed from PCB Contaminated Transformers which were previously drained is considered to be generated by the scrap facility. It is not commercially stored.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

3 - G&S filed its notification of PCB Activity as a commercial storer on September 9, 1999. It appears from their annual document that they should have notified in 1990 when the notification requirement took affect.

Since the oil in question is not considered to be commercially stored, there is not now, and never has been, any requirement for G&S to Notify as a commercial storer. Although they did send in a Notification in Sept. 1999, G&S has stated that they took this action simply as a precaution to cover any instance where they may receive a PCB Transformer in error and have to hold it for several days while they arrange for proper transport and disposal.

Region 5 would treat this as a notification violation.

This allegation is not supported by the evidence that Region 2 has collected.

4 - The facility is located below the 100-year flood plain.....

Although some parts of the property are within the 100-year flood line, the buildings and storage areas are raised such that they are physically located above the 100-year flood elevation. G&S provided a Elevation Certification to document this. HQ concurred that this is not considered to be "in" the flood plain.

Region 5 recommends this be addressed in the commercial storage permit

Storage of non PCB Transformers and drained PCB Contaminated Transformers is not subject to 761.65. Therefore the floodplain restriction does not apply. Imposing such conditions in the commercial storage approval is beyond our authority.

R004602

----- ENFORCEMENT CONFIDENTIAL -----
----- NOT TO BE RELEASED UNDER FOIA -----

5- Since G&S applied for a commercial storage permit, the closure plan should address the whole facility, especially the processing area....

The Notification and Manifesting Rule addresses only commercial storage and commercial storage areas. It did not propose that work areas for disassembling drained, PCB Contaminated equipment be included. The Rule does not cover any types of areas/activities except those directly related to commercial storage, and imposing such conditions in the commercial storage approval is beyond our authority.

6- The Executive Summary of the remedial activities at lot 38 and 39 do not provide sufficient sampling data to determine if the post removal sampling was adequate. Region 5 recommends further review of the data....

This is a New Jersey State issue that we do not have records for at hand, but our staff has knowledge that the State accepted the cleanup under the building sites. Based on the reported concentrations, these PCBs would not be regulated for disposal by the PCB regulations.

DRAFT

R004603

Ken,

Here are the answers to the questions/recommendations that Region 5 has raised as a result of their inspection at G&S. I would point out that each of these issues has already been addressed (some at great lengths) in Region 2's investigation and we were satisfied that there was no enforcement action that we can take, other than the one covered by our recent Complaint.

General Response:

I am confused by Region 5's repeated invocation of the commercial storage requirements. It appears almost as if they themselves do not understand the definition and application of the commercial storage rules. It is the position of Region 2, as well as HQ (well documented in our numerous FOIA responses on this issue), that G&S is not, and has not been, a commercial storer of PCB waste as that term is defined in the PCB regulations. They may have played out a loophole in the regulation to the fullest practicable extent, but they are still within the regulations. This position is based on our understanding of G&S's business policies at the time of our inspections in October 1998 - April 2000. I have no reason to believe that their policies have changed since that time.

In each recommendation for enforcement action, Region 5 fails to identify the specific regulatory requirement that G&S has allegedly violated.

In each recommendation that issues "be addressed in the commercial storage approval", they appear to be overreaching the bounds of EPA's regulatory authority.

Responses to specific comments/recommendations:

1 - G&S routinely receives transformers which are then stored until they can be tested. G&S doesn't consider the fluid in the transformers commercially stored until they get the results back. The regulations say that the transformers are commercially stored whenever they come in to the facility as a waste.

This comments reflects a less than full understanding of the processes at G&S. G&S does not "routinely" receive transformers that are full of fluid and need to be tested. The bulk of their business is receiving drained transformers for scrap. These scrap transformers are all tested and drained of free liquid at the generator's facility prior to shipping.

G&S has begun only recently to purchase some full, untested transformers which they then evaluate for possible resale. Since these surplus transformers are owned by G&S, G&S does not, at any time, "consider the fluid in these surplus transformers to be commercially stored", no matter what the test results show. Region 2, with the support of HQ, concurs with this position.

R004614

Because of the varying sizes of the transformers, it is possible that G&S has on several occasions exceeded the 500 gallon storage limit. G&S may attempt to selectively avoid the 500 gallon storage requirement by never sampling all the untested transformers at one time. Region 5 recommends that this issue be addressed in the commercial storage permit.

This issue is not relevant to the storage approval. Because the oil in question is not considered to be commercially stored, it is not subject to regulation under this approval. In any case, Region 2 had the opportunity to review several shipments of surplus transformers that came in undrained. In each case, all transformers in a shipment were sampled at the same time and results were on the same printout.

Further investigation of this issue could result in a storage violation.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

2 - G&S buys transformers for scrapping and treats the oil from these transformers as their own waste, rather than as commercially stored waste. Region 5 would treat this as a storage violation.

All scrap transformers brought in to G&S are tested and drained of free liquid at the generator's facility prior to shipping. Consistent with HQ policy, any residual PCB oil removed from PCB Contaminated Transformers which were previously drained is considered to be generated by the scrap facility. It is not commercially stored.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

3. - G&S filed its notification of PCB Activity as a commercial storer on September 9, 1999. It appears from their annual document that they should have notified in 1990 when the notification requirement took affect.

Since the oil in question is not considered to be commercially stored, there is not now, and never has been, any requirement for G&S to Notify as a commercial storer. Although they did send in a Notification in Sept. 1999, G&S has stated that they took this action simply as a precaution to cover any instance where they may receive a PCB Transformer in error and have to hold it for several days while they arrange for proper transport and disposal.

Region 5 would treat this as a notification violation.

This allegation is not supported by the evidence that Region 2 has collected.

4 - The facility is located below the 100 year flood plain.....

R004615

Although some parts of the property are within the 100-year flood *line*, the buildings and storage areas are raised such that they are physically located above the 100-year flood *elevation*. G&S provided a Elevation Certification to document this. HQ concurred that this is not considered to be "in" the flood plain.

Region 5 recommends this be addressed in the commercial storage permit

Storage of non PCB Transformers and drained PCB Contaminated Transformers is not subject to 761.65. Therefore the floodplain restriction does not apply. Imposing such conditions in the commercial storage approval is beyond our authority.

5- Since G&S applied for a commercial storage permit, the closure plan should address the whole facility, especially the processing area....

The Notification and Manifesting Rule addresses only commercial storage and commercial storage areas. It did not propose that work areas for disassembling drained, PCB Contaminated equipment be included. The Rule does not cover any types of areas/activities except those directly related to commercial storage, and imposing such conditions in the commercial storage approval is beyond our authority.

6- The Executive Summary of the remedial activities at lot 38 and 39 do not provide sufficient sampling data to determine if the post removal sampling was adequate. Region 5 recommends further review of the data....

This is a New Jersey State issue that we do not have records for at hand, but our staff has knowledge that the State accepted the cleanup under the building sites. Based on the reported concentrations, these PCBs would not be regulated for disposal by the PCB regulations.

R004616

DRAFT 3-26-01

Region 2's Response to the Recommendations of Region 5 regarding G&S Motor Equipment Corporation Inc.

3/26/01

Kenneth S. Stoller, Chief
Pesticides and Toxic Substances Branch

Ann

Lisa Jackson, Acting Director
Division of Enforcement and Compliance Assistance

Ltdo talk Wds

A.M

Ken

As you know, due to special circumstances surrounding G&S Motor Equipment Corp. in Kearney, New Jersey, inspectors from Region 5 were asked to come to Region 2 to perform an inspection at this facility. Region 5 recently provided this office with a copy of the report prepared after their December 14, 2000 inspection. In an addendum to this report, Region 5 staff have made several recommendations regarding: 1) enforcement actions that they would bring against G&S, and 2) provisions that they would include in a storage approval that is pending before Region 2 at this time.

We have reviewed the Region 5 report and associated recommendations in detail, and offer comments below. For your information, we have also addressed each of Region 5's recommendations in detail (attached).

Recommendations for Enforcement Actions:

As a result of their inspection, Region 5 staff cited several areas where they would pursue enforcement action. It is important to note that each recommended action involves an alleged violation of the PCB commercial storage requirements. During our review, Region 2 coordinated extensively with HQ on the issue of commercial storage as it relates to the operating procedures at this specific facility (well documented in our numerous FOIA responses on this facility). Based upon this coordination, it is our position that G&S is not, and has not been, a "commercial storer of PCB waste" as that term is defined in the PCB regulations. They may have played out a loophole in the regulation to the fullest practicable extent, but they still appear to be operating within these regulations. Therefore, no charges of commercial storage violations are appropriate.

During Region 2's own investigation, we did discover violations of the PCB storage requirements, but in these cases G&S is charged as the generator (i.e., not commercial storer) of the waste. Region 2 issued G&S an Administrative Complaint on October 3, 2000, citing them for these storage violations. That case is currently being negotiated; the parties have reached agreement but the CA/FO has not been finalized.

Handwritten notes:
- we believe Reg. 5 was not aware of our interaction with HQ on this matter.
G&S Motor Equip Corp. application for PCB Commercial Storage

Recommendations for Special Provisions in the Pending Commercial Storage Approval:

In light of the knowledge that G&S has an application for a commercial storage approval pending before Region 2, Region 5 has recommended that several special provisions be included regarding issues that concerned them during the inspection. These special provisions would address such topics as the timely testing of surplus transformers, the storage of non-PCB transformers, and the processing of PCB Contaminated Transformers.

It must be noted here that the Notification and Manifesting Rule, under which such approvals are issued, addresses only commercial storage and commercial storage areas. The Rule does not cover any types of areas/activities except those directly related to commercial storage. It is our position that imposing such conditions in the commercial storage approval would be overreaching the bounds of EPA's regulatory authority. *This is a position that HQ + Reg 2 has agreed upon based upon . . .*

I hope that the above satisfies your concerns on this facility. It is our position that each of the issues raised has already been addressed at great lengths in Region 2's investigation. We remain satisfied that there is no additional supportable enforcement action that we can pursue, other than those violations charged in the recent Complaint. This position is based on our understanding of G&S's business policies at the time of our inspections in October 1998 - April 2000, but we have no reason to believe that their policies have changed substantially since that time.

*not discussed
THC*

I recommend that no further enforcement action be taken against G&S at this time, and that the commercial storage approval proceed without inclusion of any special provisions related to activities other than storage of PCB waste. If you would like to address these issues further, please contact me at your earliest convenience.

Thank you.

R006390

Responses to specific comments/recommendations:

1 - G&S routinely receives transformers which are then stored until they can be tested. G&S doesn't consider the fluid in the transformers commercially stored until they get the results back. The regulations say that the transformers are commercially stored whenever they come in to the facility as a waste.

This comments reflects a less than full understanding of the processes at G&S. G&S does not "routinely" receive transformers that are full of fluid and need to be tested. The bulk of their business is receiving drained transformers for scrap. These scrap transformers are all tested and drained of free liquid at the generator's facility prior to shipping.

G&S has begun only recently to purchase some full, untested transformers which they then evaluate for possible resale. Since these surplus transformers are owned by G&S, G&S does not, at any time, "consider the fluid in these surplus transformers to be commercially stored", no matter what the test results show. Region 2, with the support of HQ, concurs with this position.

Because of the varying sizes of the transformers, it is possible that G&S has on several occasions exceeded the 500 gallon storage limit. G&S may attempt to selectively avoid the 500 gallon storage requirement by never sampling all the untested transformers at one time. Region 5 recommends that this issue be addressed in the commercial storage permit.

This issue is not relevant to the storage approval. Because the oil in question is not considered to be commercially stored, it is not subject to regulation under this approval. In any case, Region 2 had the opportunity to review several shipments of surplus transformers that came in undrained. In each case, all transformers in a shipment were sampled at the same time and results were on the same printout.

Further investigation of this issue could result in a storage violation.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

R005391

2 - G&S buys transformers for scrapping and treats the oil from these transformers as their own waste, rather than as commercially stored waste. Region 5 would treat this as a storage violation.

All scrap transformers brought in to G&S are tested and drained of free liquid at the generator's facility prior to shipping. Consistent with HQ policy, any residual PCB oil removed from PCB Contaminated Transformers which were previously drained is considered to be generated by the scrap facility. It is not commercially stored.

Since the oil in question is not considered to be commercially stored, there can be no storage violation. This allegation is not supported by the evidence that Region 2 has collected.

3 - G&S filed its notification of PCB Activity as a commercial storer on September 9, 1999. It appears from their annual document that they should have notified in 1990 when the notification requirement took affect.

Since the oil in question is not considered to be commercially stored, there is not now, and never has been, any requirement for G&S to Notify as a commercial storer. Although they did send in a Notification in Sept. 1999, G&S has stated that they took this action simply as a precaution to cover any instance where they may receive a PCB Transformer in error and have to hold it for several days while they arrange for proper transport and disposal.

Region 5 would treat this as a notification violation.

This allegation is not supported by the evidence that Region 2 has collected.

4 - The facility is located below the 100 year flood plain.....

Although some parts of the property are within the 100-year flood line, the buildings and storage areas are raised such that they are physically located above the 100-year flood elevation. G&S provided a Elevation Certification to document this. HQ concurred that this is not considered to be "in" the flood plain.

Region 5 recommends this be addressed in the commercial storage permit

Storage of non PCB Transformers and drained PCB Contaminated Transformers is not subject to 761.65. Therefore the floodplain restriction does not apply. Imposing such conditions in the commercial storage approval is beyond our authority.

R005392

4-4-01

per conversation w/Kendall Moore

this is a draft that was
inadvertently left in file,
the final is different.

ENFORCEMENT SENSITIVE

This should have been destroyed

SUMMARY AND CONCLUSION:

FACILITY: G&S Technologies

LOCATION: Kearny, New Jersey

INSPECTION: December 14, 2000

SUMMARY OF FINDINGS:

1. G&S routinely receives transformers that they store until they can be tested. The requirement for commercial storage starts when the test results for PCBs are received. Because of varying sizes of transformers received at the facility, it is possible for G&S to exceed the 500 gallons storage limit if the volume of untested fluid is added. G&S may selectively avoid the less than 500 gallon storage requirement by never sampling all the untested transformers at one time.
2. G&S treats the oil from transformers they purchase as their own waste and not as commercially stored waste.
3. G&S filed its notification of PCB Activity as a commercial storer on Sept 9, 1999. It appears from their annual documents that they should have notified in 1990, when the notification requirement took affect.
4. The facility is located below the 100 year flood plain. Water was found near where drained transformers for scrapping were stored outside the building. Even though those were non PCB according to Mr. Spector, the concentration may still be between 2-49 ppm. Drained does not mean, no free flowing liquid, especially in the larger units (see photograph in attachment C).
5. The storage of the roll-off box for solid waste generated at the processing area, is outside the bermed area. It was found near the loading dock. It was empty at the time of inspection.
6. Since G&S applied for a commercial permit, the closure plan should address the whole facility, especially the processing area for PCB contaminated electrical equipment. Spills can occur in the processing area, receiving area, the area next to the scrap metal recovery oven as the load of dismantled core is charged into the oven. The warehouse where the current storage area is located is well maintained.

R005387

7. The Executive Summary of the remedial activities at lot 38 and 39 do not provide sufficient sampling information to determine if the post removal sampling was adequate.

R005388

they only deny it if they get a request for the whole file

its more an addendum, ~~not~~ a separate summary document a memo

When they get a FOIA for "the inspection report" they do not include it, and do not deny it. → don't mention it since its not part of the official report

Region 5 treats "summary + conclusion" as a separate document (memo)

Q. are inf recommendations part of the inspection report? → A. yes: G+S "FOIA" (not really a FOIA)

to Kendall Moore Reg 5
from AF 773 445 5051

4-4-01

to Kendall Moore Reg 5

Residual oil

Reg 2 coordination w/HQ said that residual oil from desired PCB equip taken in as scrap is considered to be generated not commercially stored.

→ he understood the same thing

Surplus XFMRs

his understanding is :

(hang in there hitler)
Q+A format

you cannot buy or sell equipment in order to avoid commercial storage

if you buy it
+ find out its PCB cont.
you're commercially storing it
if you scrap it

R004611

can't prove they purchased it for resale or scrap

→ if they end up scrapping it, they didn't buy it for resale + it is commercially stored. no matter what "intent" was

talked to Tony Maritz

→ checked XFMR oil is clean in Reg 2

could use fact that G+S
sends a CD as proof
that original owner
knew it could be scrapped

possibility exists that they
know they will scrap
them eventually

Reg 5 would at least
pursue the issue
not sure that ORC
would support it, but
it's something to
look into...

may be taking a case on a similar
situation soon

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January 2007, service of the foregoing Appellant Environmental Protection Services, Inc.'s Reply to U.S. EPA, Region III's Response to EAB Request During Oral Argument was made by federal express to the following:

Honorable Carl C. Charneski
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street, N.W., Suite 350
Washington, DC

Cheryl L. Jamieson, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency – Region III
1650 Arch Street, Mail Stop (3RC30)
Philadelphia, PA 19103-2029

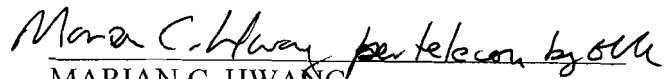
John J. Ruggero, Esquire
Assistant General Counsel
U.S. Environmental Protection Agency – Region III
1650 Arch Street, Mail Stop (3RC30)
Philadelphia, PA 19103-2029

Lee A. Spielman, Esquire
U.S. Environmental Protection Agency – Region II
290 Broadway, 16th Street
New York, NY 10007-1866

Lydia A. Guy
Regional Hearing Clerk
United States Environmental Protection Agency, Region III
1650 Arch Street, Mail Stop (3RC00)
Philadelphia, PA 19103-2029



EDWARD L. KROPP
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322



MARIAN C. HWANG
Miles & Stockbridge PC
10 Light Street
Baltimore, Maryland 21202