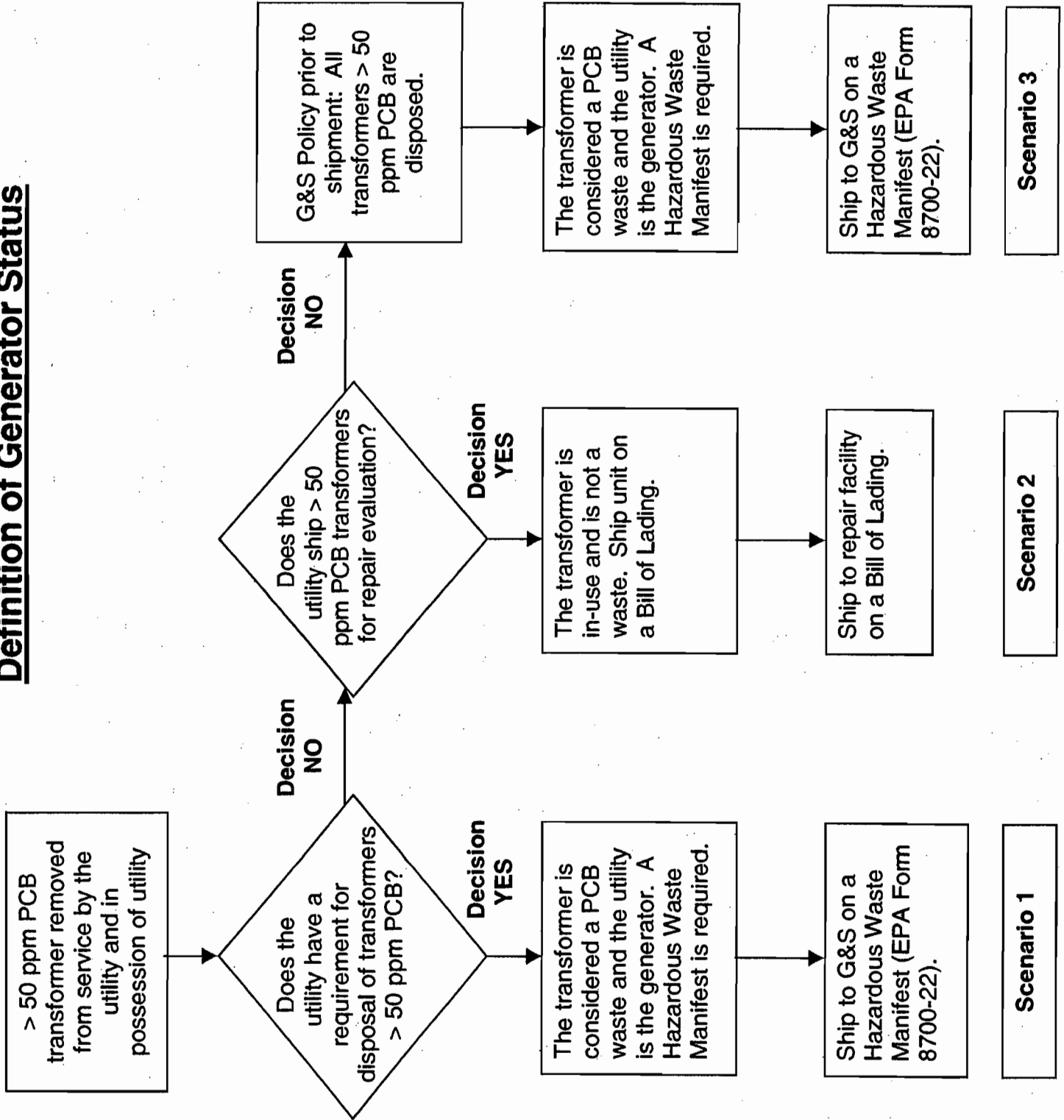


A

Definition of Generator Status



B



EPA v. EPS APPEAL ERRORS

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
1	5	<p>The parties, however, were unsuccessful in their efforts to settle the matter. As a result, a number of events then took place in this case as it moved toward hearing. One of them was the discovery phase which began in February of 2003 and continued on through May of 2003. Another development was EPA's filing a Second Amended Complaint on April 23, 2003, changing the description of "PCB transformers" in the Complaint as it relates to Count III to "PCB-contaminated transformers."</p>	<p>The Court ignored the undisputed fact that the "discovery phase," in fact, continued through the first week of the hearing and until EPA itself received data it subpoenaed only 10 days prior to the start of the hearing, data which EPA itself described as "the heart of" its case as late as June 20, 2003, but data which it admittedly did not have when it filed its Complaint, nearly <u>two full years</u> after it filed its Complaint.</p>	<p>Initial Decision, pg 5 Respondent's Brief, pgs 40-42</p>
2	6	<p>In order to carry out the PCB-related business activities identified in the company's brochure (CX 56), EPS had to first obtain from EPA a TSCA PCB Commercial Storage Approval. Respondent made such an application to the EPA Regional Administrator for Region III on December 29, 1992, pursuant to 40 C.F.R. 761.65. CX 1.</p>	<p>The Court ignored the fact that the regulations regarding commercial storage of PCBs were revised in 1998, significantly affecting the requirement for EPS to hold a commercial storage approval. Further the record supports EPS' contention that operating in the same manner as G&S, it would not have been required to abide by the commercial storage approval requirements.</p>	<p>EPS Reply Brief, pg 6-c) REX 401 (R003622-3624) REX 479 (R000139-R000142) Transcript Volume XIII, Pg 186-194, Pg 216-217 Pg 336 (22)-338 Dave Dillon-Transcript, Pg 338-344</p>

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
				<p>EPS Brief, Pg 53-110</p> <p>Attachment A of EPS Brief</p> <p>REX 489 R-003797</p> <p>Kraft, Volume XIII, pg 261 (15)-262 (19)</p> <p>Fingegan Testimony, Volume XII, pg 176(19)-178(9)</p>
3	7	<p>This TSCA Storage Approval took effect immediately and its terms and conditions governed respondent's PCB storage operation when the events of this case took place.</p>	<p>The EPS commercial storage approval was renewed in 1998, and the subsequently revised commercial storage regulations impacted the conditions of the EPS commercial storage approval, changing the storage requirements from the initial approval when the events of this case took place.</p>	<p>EPS Brief, Pg 14- 1</p> <p>EPS Brief, pg 19- 3</p> <p>EPS Brief, pg 21- 4</p> <p>EPS Brief, pg 25- 7</p> <p>EPS Brief, pg 31- d.</p> <p>EPS Reply Brief, pg 6-d</p> <p>EPS Reply Brief, pg 4- B.</p> <p>EPS Reply Brief, pg 5- 2.-pg 7</p>
4	8	<p>According to an affidavit by company president Keith</p>	<p>The Court recognized Keith</p>	

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
		<p>Reed, EPS's scrap metal recovery oven is comprised of a primary and a secondary combustion chamber.</p> <p>fn.12: Keith Reed is a transfer design engineer. He was accepted as an expert in the areas of (1) combustion of dielectric fluid, including PCBs, and (2) the design and operation of scrap metal ovens as defined in 40 C.F.R. 761.72 (1999). Tr. 12 (Vol. VI), 202, 226 (Vol. VIII).</p>	<p>Reed as an expert but then erred by not accepting the testimony and documents submitted by EPS and Reed in defense of Count III. At the same time, the Court accepted the testimony of EPA Expert John Smith, regarding emissions form uncontrolled or open burning of PCBs, which has no relevance to the EPS furnace which operates under 40 CFR 761.72(a)(3) and is controlled combustion.</p>	<p>Volume IX, Keith R Reed, pg 154(1)-201(21)</p> <p>Volume II, John Smith, pg 247(10)-262(10)</p> <p>Volume III, John Smith, pg 9(7)-20(22)</p> <p>Pg 179(5)-200(19)</p>
5	9	<p>Charlene Creamer, the Region III PCB Coordinator at the time, played a key role in evaluating EPS's request to change its financial assurance mechanism, as well as in the Region's subsequent decision to conduct an inspection of respondent's facility. Creamer's responsibilities included reviewing companies' financial assurance mechanisms, as well as deciding which PCB storage facilities were to be inspected. Tr. 13-15, 17-19 (Vol. XII).</p>	<p>This witness testified at length about EPA's interpretation of 40 CFR 761.79, and the Court completely ignored her testimony about that EPA position, while relying on her testimony regarding the financial assurance mechanism.</p>	
6	10	<p>Consistent with the concern expressed in the Bobbie Wright memorandum, <i>supra</i>, Inspector McPhilliamy explained that they went at the EPS facility to compare the actual quantity of material being stored with the Maximum Storage Capacity allowed in respondent's then applicable TSCA PCB Commercial Storage Approval. Tr. 238 (Vol. I).</p>	<p>Neither McPhilliamy nor Rice were aware of the affect of the new PCB rule regarding 761.20(c) on the EPS commercial storage approval at the time of either inspection.</p>	<p>Vol. II, Scott McPhilliamy, pgs. 30-45</p> <p>Vol. 11, Scott Rice, pgs. 203, 217-218.</p>
7	10	<p>Inspector McPhilliamy testified that during this inspection he observed PCB transformers in the storage area of the</p>	<p>McPhilliamy and Rice admitted they had no</p>	<p>EPS Brief, pg 6- B.</p>

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
		<p>facility. These transformers were intact and were in a non-leaking condition. Also, no one was working on them at the time of inspection. The inspector took a photograph of these stored PCB transformers (CX 8) and he was able to count their number "within reason." McPhillihamy concluded that there were approximately 32 transformers. Tr. 243, 246-247 (Vol. I).</p>	<p>knowledge at the time of either inspection of the ultimate disposition of the transformers they observed during the inspection, making their estimate of weights of transformers being commercially stored fatally flawed.</p>	<p>EPS Brief, pg 10-14. EPS Brief, pg 25-26</p>
8	10	<p>EPA conducted a second inspection of respondent's Wheeling facility on November 2, 1999. This inspection was again conducted at the request of EPA Region III's PCB Program and it again was performed by Inspectors McPhillihamy and Rice. Tr. 258-259 (Vol. I). Rice explained that they were requested to check respondent's transformer storage against its allowable Maximum Storage Capacity as set forth in the TSCA PCB Commercial Storage Approval.</p>	<p>McPhillihamy and Rice admitted they had no knowledge at the time of either inspection of the ultimate disposition of the transformers they observed during the inspection, making their estimate of weights of transformers being commercially stored fatally flawed.</p>	<p>EPS Brief, pg 6- B. EPS Brief, pg 10-14. EPS Brief, pg 25-26</p>
9	11	<p>On the November 2 inspection, McPhillihamy and Rice conducted another inventory of the PCB material that was in storage.</p>	<p>McPhillihamy and Rice admitted they had no knowledge at the time of either inspection of the ultimate disposition of the transformers they observed during the inspection, making their estimate of weights of transformers being commercially stored fatally flawed. The Court erred in</p>	<p>EPS Brief, pg 6- B. EPS Brief, pg 10-14. EPS Brief, pg 25-26 EPS Reply Brief, pg 4-16.</p>

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
10	12	<p>Respondent did so in accordance with 40 C.F.R. 761.65(d) (1999).</p> <p>fn.16: 40 C.F.R. 761.65(d)(3)(vi) (1999) provides that the application for commercial storage approval shall include “[t]he owner’s or operator’ estimate of maximum PCB waste quantity to be handled at the facility.”</p>	<p>failing to acknowledge that EPA had no information at the time it filed its Complaint regarding which transformers were subject to the commercial storage approval, making its estimate of transformer weight in commercial storage fatally flawed.</p> <p>The Court accepted 40 CFR 761.65(d), not explicitly included in the EPS Commercial Storage Permit, as having an impact on the EPS commercial storage approval in effect at the time of the inspections but then, inconsistently and erroneously, denies that newly promulgated regulations 40 CFR 761.65(g)(9), 761.20(c), and 761.79 had any impact on the storage approval.</p>	<p>40 CFR 761.65 (g)(9)</p> <p>40 CFR 761.20(c)</p> <p>40 CFR 761.79</p>
11	12	<p>With respect to PCB transformers, EPS was authorized to store up to 5,000 pounds, the amount that respondent had requested in its application. This Approval to Commercially Store PCB Waste was renewed by the Regional Administrator for Region III in 1998, and it was in effect at the time that the events in this case took place. CX 2.</p>	<p>EPS was authorized to <u>commercially store</u> up to 5,000 pounds of PCB transformers. EPA did not prove that any of the transformers in question were commercially stored, while EPS proved that it was the owner of the transformers</p>	<p>CFR 40 Part 761.3, definition of Commercial Storage.</p> <p>EPS Brief, pg 6 B.</p> <p>EPS Brief, pg 10- 19.</p>

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12			<p>when McPhilliamy and Rice in observed them at the EPS facility storage, so the commercial storage approval did not apply to those transformers. The Court ignored the regulatory difference between storage and commercial storage.</p>	<p>EPS Brief, pg 25-26. EPS Reply Brief pg 8-10.</p>
13	13	<p>Respondent maintains that this increase occurred as a result of its July 19, 1999, notification to EPA that the company would be substantially increasing its PCB storage capacity. See CX 52; RX 28 (R006068).</p>	<p>All of the depositions cited by Respondent were admitted into the record.</p>	<p>John Smith Deposition REX 277 and REX 278 Volume III, pg 200(20)-204(16) Scott Rice Deposition, REX 558, Volume VIII pg 279(2)-280(2)</p>
13	14	<p>fn:19: In its brief, respondent cites to various deposition transcripts to support its assertions, including its position as the applicable Maximum Storage Capacity. Unless formally admitted into the record, however, deposition testimony may not be cited either to prove or disprove any fact at issue.</p>	<p>Once again, the Court completely ignores the difference between commercial storage and storage, a significant regulatory</p>	<p>Scott McPhilliamy Deposition, REX 570, Volume IX pg 37(2-22) CFR 40 Part 761.3, definition of Commercial Storage. EPS Brief, pg 6-10.</p>
14	14	<p>As to this important issue, EPA is correct that the Maximum Storage Capacity for waste PCB transformers at respondent's Wheeling facility was 5,000 pounds, at any one time, when the two inspections occurred. This fact is well established by the record evidence. * * * Like</p>		

No.	Decision Page	Excerpt	Error	Record Support Confirming Error
14	14	<p>respondent's initial permit, the renewed permit provided that the MSC for PCB transfers was 5,000 pounds. <i>Id.</i> At 5.</p> <p>Despite this commercial storage permit renewal, EPS nonetheless argues that by letter dated July 19, 1999, it had unilaterally modified its PCB waste storage permit by increasing the Maximum Storage Capacity of PCB transformers at its facility from 5,000 to 100,000 pounds.</p> <p>fn. 21: Of course, even if this argument were accepted, it would apply only to EPA's inspection of November 2, 1999, and not to the earlier July 15 inspection.</p>	<p>difference. In addition, the Court ignores in its finding that the notification under 40 CFR 761.65(g)(9) did not increase the approved storage capacity to 100,000 pounds.</p> <p>Modification is permitted under 40 CFR 761.65(g)(9) promulgated in June of 1998. The regulation provides for a 30-day notice period, and therefore the July 9, 1999, inspection was included.</p>	<p>EPS Brief, pg 10-27.</p> <p>EPS Reply Brief pg 8-¶ 10.</p> <p>40 Part CFR 761.65 (g) (9)</p> <p>EPS Reply Brief, pg 2-¶3.</p> <p>EPS Reply Brief, pg 10-16.</p> <p>EPS Reply Brief, pg 12-¶'s 10,11.</p> <p>EPS Reply Brief pg 15-¶ 17.</p>
15	14	<p>This argument is clearly contrary to the permitting procedure articulated in 40 C.F.R. 761.65(d)</p>	<p>The Court, inconsistently and erroneously, denies that newly promulgated regulations 40 CFR 761.65(g)(9), 761.20(c), and 761.79 have any impact on the storage approval.</p>	<p>40 Part CFR 761.65 (g) (9)</p> <p>EPS Reply Brief, pg2-¶ 3.</p> <p>EPS Reply Brief, pg 10-¶ 8.</p> <p>EPS Reply Brief, pg 12 ¶'s 10,11.</p> <p>40 Part CFR 761.65 (g)</p>
16	14	<p>At no time did the Regional Administrator approve the</p>	<p>Regional Administrator</p>	<p>40 Part CFR 761.65 (g)</p>

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		MSC increase to 100,000 pounds. Tr. 30 (Vol. XII).	approval is not required under the plain language of 40 CFR 761.65(g)(9). The regulation contains the word "notify" and variants but does not contain the word "approve" or "approval" at all, an error of law by the Court.	(9) EPS Reply Brief, pg 2- ¶ 3. EPS Reply Brief, pg 10- ¶ 8. EPS Reply Brief, pg 12- ¶'s 10,11.
17	15	It would be inconsistent, to say the least, to require a commercial storer of PCB waste to maintain an EPA-approved financial assurance mechanism to guarantee environmental cleanup in a sound manner, only to allow that same storer unilateral authority to increase its Maximum Storage Capacity, and thereby jeopardize the adequacy of the financial assurance.	The record supports the fact that the EPS financial assurance trust, of which EPA is the sole trustee, was sufficient to cover the cost of environmental cleanup, so this statement has no basis in the record, an error of fact. The regulation does not require approval for changes that are not substantive. In this case, the only change was the vehicle of financial assurance, not the amount, so no approval was required.	40 Part CFR 761.65 (g) (9) EPS Reply Brief, pg 2- 3. EPS Reply Brief, pg 10- 8. EPS Reply Brief, pg 12- 10.-11.
18	15	In sum, the plain language and context of 40 C.F.R. 761.65(d) could not be clearer— <i>i.e.</i> , that TSCA PCB	The Court erroneously, denies that newly promulgated	40 Part CFR 761.65 (g) (9)

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		<p>Commercial Storage Approvals (and the terms therein) are issued exclusively by the EPA Regional Administrator.</p>	<p>regulations 40 CFR 761.65(g)(9), 761.20(c), and 761.79 have any impact on the storage approval. Note that 40CFR 761.65(g)(9) does not contain the word "approve" or "approval;" rather, it contains the word "notify" and variants.</p>	<p>3. EPS Reply Brief, pg 2-¶ 8. EPS Reply Brief, pg 10-¶ EPS Reply Brief, pg 12-¶'s 10,11.</p>
19	15	<p>The evidence supporting the PCB transformer storage violation charged in Count 1 was collected by EPA Inspectors McPhilliamy and Rice as part of their July 15 and November 2, 1999, inspections of respondent's Wheeling, West Virginia, facility.</p> <p>fn. 22: Both McPhilliamy and Rice are seasoned PCB inspectors. Tr. 237 (Vol. I, 91 (Vol. II).</p>	<p>Neither McPhilliamy nor Rice were aware of the impact of newly promulgated 40 CFR 761.29(c) or 761.79 n the EPS commercial storage approval at the time of their two inspections. Moreover, "seasoned PCB inspector" Rice testified that the July 15, 1999, inspection of EPS was his <u>first ever</u> PCB inspection, an egregious error of fact by the Court demonstrating his bias in favor of EPA's positions, regardless of their merit.</p>	<p>Scott Rice Deposition REX 558, Pg 20 (13-24), pg 22 (6-24), pg 74 (9-12), pg 117 (17-19) Scott McPhilliamy Deposition, REX 570,</p>
20	15	<p>He explained that the purpose of the two inspections 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, 259 (Vol. I), 97 (Vol. II).</p>	<p>The record supports the fact that neither Rice nor McPhilliamy knew of the impact of 40 CFR 761.20 on the EPS commercial storage approval at the time of their</p>	<p>Scott Rice Deposition REX 558, Pg 136(17)-137(24) <u>Vol. II, Scott McPhilliamy, pgs. 30-45</u></p>

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21	16	<p>As explained by Inspector McPhilliamy, this weight is more than double the Maximum Storage Capacity allowed for in EPS's TSCA PCB Commercial Storage Approval. Tr. 248-252 (Vol. I); CX 2. Because Inspector McPhilliamy had requested transformer weight from EPS, he had no reason to believe that the data provided by EPS was for something other than the PCB transformers that he observed in storage. See 24, 29 (Vol. II). Accordingly, the foregoing data provided to EPA establishes a violation of 40 C.F.R. 761.65(d) (1999).</p>	<p>inspections, despite the fact that the regulation was promulgated a full year prior to the first inspection.</p> <p>The Court seems to imply here, erroneously, that a belief by the inspector establishes a fact, rather than requiring that EPA gather data to prove its facts. In addition, the Court fails to distinguish between storage and commercial storage, and fails to recognize and accept the impact of 40 CFR 761.20(c) and 761.79 on the EPS commercial storage approval in effect at the time of the two inspections.</p>	<p><u>Vol. II, Scott Rice, pgs. 203, 217-218.</u></p> <p>EPS Reply Brief, Pg 8 - 10.</p>

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22	16	<p>Of the 45 units identified by EPS on this list, EPA determined that 16 units were PCB transformers in storage at respondent's facility on November 2.</p>	<p>The EPA determination was based on ACTI lab data that the record supports was not only misinterpreted by Inspector Rice, it could not be linked to the specific transformers subject to the Complaint allegations.</p>	<p>EPS Brief, pg 6-27</p>
	17	<p>fn. 23: The 16 items identified on Complainant's Exhibit 11 (Attach. 3) bear descriptive references such as "T" for transformer, "Pad" for pad mounted transformer, and "pole" for polemount transformer. Tr. 107-109 (Vol. X); see Compl. Br. At 17, citing CX 64 (CBI) in explanation that "T" stands for "transformer."</p>	<p>Further, the Court completely failed to consider the impact that the adoption of 40 CFR 761.20(c), and 761.79 had on the EPS commercial storage approval and whether the promulgation of those regulations should have resulted in the weights of most, if not all, of the transformers subject to Counts I and II of the Complaint being excluded from the inventory for the purpose of the commercial storage approval MSCs.</p>	
	16	<p>The weight of these 16 transformers is 15,320 pounds. See n.3, <i>supra</i>. This is substantially in excess (more than three times the allowable amount of the applicable MSC which provides for a maximum PCB transformer storage of 5,000 pounds. Thus, as was the case regarding its inspection of July 15, EPA established that EPS stored waste PCB transformers at its Wheeling facility on November 2 in violation of 40 C.F.R. 761.65(d) (1999).</p>		
23	17	<p>The immediate issue, however, is not whether complainant performed the storage inspections to respondent's liking, or to its expected degree of thoroughness. Instead, the immediate issue is whether, under the facts of the case, the EPA inspections were sufficient to establish a prima facie case of violation. This tribunal concludes that they were. *</p> <p>* * Based upon the inspectors' observations of the</p>	<p>The Court erred in law by failing to consider appropriate case law and the CROP, specifically <u>In Re L&C Services, Docket No. VII-93-CAA-112, 1997 EPA ALJ LEXIS 113 (January 29, 1997)</u>.</p>	<p>EAJA Appeal No. 98-1 L&C Services</p> <p><u>EPS Brief, pg 6-32</u></p> <p><u>EPS Reply Brief, pg 4-19</u></p>

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		<p>Wheeling facility storage area, and based upon the storage information provided by respondent, EPA determined that EPS exceed its MSC on both July 15 and November 2, 1999. The record supports EPA on this point.</p>	<p>40 CFR 22.24(a), In Re: <u>Louisiana Pacific Corporation</u>, Docket No. CAA 120-V-84-2, 1987 EPA ALJ LEXIS 34 (March 24, 1987), and <u>Rodale Press v. Federal Trade Commission</u>, 407 F. 2d 1252 (D.C. Cir. 1968) In addition, the Court erred in fact and at law in failing to distinguish between commercial storage and storage.</p>	
24	18	<p>Section 761.20(c)(2)(I) further states, "Processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval."</p>	<p>First, the Court cited the wrong section of the regulation in support of its finding. The proper cite is 761.20(c)(2)(ii), and the quote is inaccurate if the Court had cited the proper section. Second, in order to establish a prima facie case the EPA needed to establish: 1. Commercial Storage actually existed relative to Counts I and 2 2. The PCB content of the units to establish whether they were if fact PCB units. The Court erred in fact because</p>	40 CFR Part 761.20

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			<p>it found that the facts supported the allegations when, in fact, EPA had none of this information at the time it filed its Complaint, in contravention of case law. See <u>Rodale Press v. Federal Trade Commission</u>, 407 F. 2d 1252 (D.C. Cir. 1968)</p>	
25	18	<p>EPS's articulation of its Section 761.20(c)(2)(i) argument, however, is somewhat unclear. Nonetheless, given EPS's citation to certain testimony of EPA witnesses Charlene Creamer (Region III PCB Coordinator), Dr. John Smith (expert witness), and Inspectors McPhilliamy and Rice, respondent appears to be arguing that the Section 761.20(c)(2)(i) exception applies here because, with respect to the waste PCB transformers, it was engaged at the Wheeling facility in the "self-implementing decontamination procedures" of 40 C.F.R. 761.79(c) (1999). See Resp. Br. At 15; see also, Tr. 234 (Vol. III). This argument was anticipated by EPA and is addressed fully in complainant's main brief. See Compl. Br. At 20-28.</p>	<p>The Court erroneously found that EPS was not engaging in self-implementing decontamination procedures in accordance with 40 CFR 761.79 (c). That EPS was, in fact, doing so, is fully supported in the record. 40 CFR 761.20(c)(2)(i) clearly exempts transformers that are decontaminated in accordance with those self-implementing decontamination procedures and exempts facilities that are using that process from commercial storage approval requirements.</p>	<p>Volume II, pg 235(16)-236(19)</p> <p>EPS Brief, pg 19-21</p> <p>EPS Brief, pg 14-15</p> <p>EPS Reply Brief, pg 16-</p>

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26	19	<p>The facts of this case do not establish that respondent's activities relative to the waste PCB transformers that are the subject of Count I satisfy the regulatory exception. As pointed out by EPA, the facts show otherwise. In that regard, EPA compiled a list of 16 PCB transformers (identified by barcode numbers) being stored at respondent's Wheeling facility on November 2, 1999. This list identifies the number of days that the transformers were in storage as of the EPA inspection of November 2. This evidence shows that, as a matter of fact, the subject transformers were in "storage" and were not being processed for storage or transportation incident to disposal as respondent maintains.</p>	<p>The record is replete with support for the proposition that the EPS activities related to the PCB transformers subject to the allegations in Count I satisfy the regulatory exception. The Court thus erred in fact.</p>	<p>18. EPS Reply Brief, pg 14-16. EPS Reply Brief, pg 5-7.</p>
27	20	<p>Inspector McPhilliomy testified that the PCB transformers that he viewed were in storage and he described them as being intact and non-leaking. Also, McPhilliomy did not observe any EPS employees working on the transformers to decontaminate them. In fact, the transformers were not even disassembled. Tr. 243, 247, 266 (Vol. I). The inspector added that he was not informed by EPS that the transformers pictured in Complainant's Exhibit 8 (taken on July 15) would be "processed." Tr. 60 (Vol. II).</p>	<p>The statement that McPhilliomy did not observe anyone working on the transformers is completely irrelevant to the issue. The record supports the fact that McPhilliomy's inspection report noted that EPS was processing transformer using the self-implementing</p>	<p>CEX 11</p>

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28	20	<p>Inspector Rice added it was necessary to request a list from the facility as to the transformers in storage because the manner in which they were being stored prevented the inspectors from making an accurate count. Tr. 96 (Vol. II). Furthermore, the photograph taken by the inspectors during the July 15, 1999 inspection (CX 8) substantiates the testimony of McPhilliamy and Rice. See Tr. 244 (Vol. I). Together with the testimony of the EPA inspectors, this photograph shows transformers in storage, and not transformers involved in processing activities to facilitate storage and transportation for disposal.</p>	<p>decontamination procedures established at 40 CFR 761.79(c). The Court utterly failed to understand that the transformer area subject to the inspection is a holding area used by EPA to store equipment <u>prior</u> to processing.</p> <p>The Court erroneously assumed that the photograph represented a static situation instead of understanding that the storage areas in question are a holding area for equipment in which it is stored prior to EPS processing it under 40 CFR 761.79(c).</p>	<p>EPS Reply Brief, pg 14-16.</p> <p>EPS Reply Brief, pg 5-7.</p> <p>EAJA Appeal No. 98-1 L&C Services</p>
29	21	<p>In other words, EPS seems to be arguing that EPA cannot bring the present enforcement action for the waste PCB transformer storage violation (and the waste PCB capacitor storage violation for that matter) because the specific regulation violated, Section 761.65(d), was not specifically mentioned in respondent's TSCA Storage Approval to Commercially Store PCB Waste. This argument is frivolous. It completely ignores the statutory scheme of the Toxic Substance Control Act, and the implementing regulatory scheme of 40 C.F.R. Part 761, which addresses the "manufacturing, processing, distribution in commerce, and use prohibitions" of Polychlorinated Biphenyls.</p>	<p>The Court erroneously failed to recognize the regulatory program established in 1998 when the newly promulgated 40 CFR 761.20 (c), 761.79, and 761.65 became effective.</p>	<p>EPS Brief, pg 21-22</p>

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30	22	<p>Similar to the argument raised above, EPS maintains that there can be no violation here because "EPA provided no evidence to support an allegation that a single unit on site during either inspection was being commercially stored." Resp. Br. at 23. As explained earlier, it has been found that EPS is a commercial storer of PCB transformers and that it stored such items in excess of its applicable Maximum Storage Capacity. Accordingly, this argument is rejected.</p>	<p>The Court compounds a prior erroneous finding here by basing a new finding on the prior error. The prior erroneous finding that EPS is a commercial storer was not supported by any evidence presented by EPA during the entire case. Accordingly, rejection of the argument that no violation has been proved because of the prior erroneous finding that EPS is a commercial storer is itself an error in fact.</p>	<p>EAJA Appeal No. 98-1 L&C Services See H.E.L.P.E.R 40 CFR Part 761.3, definition of commercial storage. EPS Brief at 23.</p>
31	22	<p>The argument advanced here is that respondent's financial assurance fund, established in accordance with 40 C.F.R. 761.65, was at all times sufficient for closure of the facility. Resp. Br. at 24. Even if EPS is correct in this assertion, and there has not been an adequate showing that it is, this argument is beside the point. Count I deals with excessive storage of waste PCB transformers, not with the adequacy of a financial assurance mechanism. That simply is not the issue here.</p>	<p>The Court finds at page 9 of the Initial Decision that the reason for the whole process that resulted in the inspections conducted by EPA was the concern of an EPA manager regarding whether the financial assurance mechanism was sufficient, and now erroneously finds that the argument that the financial assurance mechanism was sufficient at all times, the argument is "beside the point." The Court is erroneously buying into the EPA argument</p>	<p>Initial Decision, pg 8 (1.)-10 EPS Reply Brief, pg 23(6.)-25 Volume IX, Keith R Reed, pg 7(1)-53(1)</p>

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32	22	<p>Finally, EPS argues that it cannot be found liable for the waste PCB transformer storage violation alleged in Count I because it is the owner of the transformers. Resp. Br. at 25. Respondent states, “[u]nder 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.” Resp. Br. at 26 (citation omitted).</p>	<p>that its concern over the financial assurance mechanism, rather than its improper desire to punish EPS for attempting to get EPA to enforce the PCB regulations against a competitor, was the real motive for its inspections.</p> <p>The Court erroneously rejected the argument, supported in the record, that EPS owns all of the equipment it processes as of the time it takes possession, and the commercial storage approval only applies to materials owned by others.</p>	<p>Respondent’s Brief at 25 and 26.</p> <p>Vol. II, 80-89.</p>
33	22	<p>EPS’s argument that it is the owner of the PCB transformers involved in this case is contrary to evidence. First, respondent applied to the EPA Regional Administrator for permission to commercially store PCB transformers. In fact, it sought this status more than once. On both occasions the Regional Administrator granted the requested permit, setting the Maximum Storage Capacity (the “MSC”) for the PCB transformers at 5,000 pounds. This was the specific MSC weight sought by respondent. Despite this scenario, EPS now argues that it was in fact the owner of the PCB transformers that it collected and that the TSCA PCB Commercial Storage Approval was never really needed. This argument now raised by EPS is totally inconsistent with its actions in seeking and maintaining an EPA-approved permit to store waste PCB transformers.</p>	<p>The Court rejects all of the evidence presented during the hearing, erroneously assuming, apparently, that the fact that an entity applies for a commercial storage approval must mean that the entity intends to <u>and does</u> commercially store every piece of equipment that comes in the door from the time the approval is used. That flies in the face of the record.</p>	<p>EPS Brief, Pg 25 (7.)-26</p> <p>EPS Reply Brief, pg 7 (4.)</p> <p>REX 485, R5321-R5333</p> <p>REX 406, R3372-R3381</p> <p>EPS Reply Brief, pg 16-18.</p>

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34	22	<p>Second, it already has been found that EPS is a commercial storer of waste PCB transformers. This basis for this finding is well-summarized by EPA as follows:</p>	<p>CEX64 was thoroughly discredited by evidence presented during the hearing. It is based on EPA's mischaracterization of data supplied by its laboratory, ACTI, and about which ACTI itself provided documentation stating that the EPA assumption about EPS barcodes to identify transformers was erroneous. The Court erred in basing any finding on CEX64.</p>	<p>EPS Brief, Pg 25 (7.)-26</p> <p>EPS Reply Brief, pg 7 (4.)</p>
	23	<p>An examination of C.Ex. 64 (CBD) reveals that the utility company customers send their PCB-contaminated transformers to EPS with hazardous waste manifests with the utility company's names filled out on the generator lines of the manifests. Respondent, as the disposer, sends certificates of disposal to the generators [Tr. 43 (Vol. X)] as further described in Respondent's brochure. C. Ex. 56 [Tr. 42 (Vol. X)]. EPS, as the disposer, provide to the generators of PCB waste "a documented 'Cradle-to-Grave' disposal process." C. Ex. 56 [Tr. 41 (Vol. X)]. Therefore, all of the PCB-contaminated transformers as alleged in Count I were being commercially stored prior to disposal, and the Maximum Storage Capacities in Respondent's TSCA Approval applied to such materials.</p> <p>Compl. Br. at 10.</p>	<p>In addition, Respondent established that it owned the materials being shipped for disposal at the time of shipment, even though another entity was the initial generator. Therefore, the MSC's did not apply to those materials because they were being stored, not commercially stored.</p>	
35	23	<p>The evidence in this case shows that on July 9, 1999, EPS was storing 26,367 pounds of PCB capacitors at its facility. As noted by EPA, this is more than 26 times the capacitor storage allowed in respondent's MSC. Accordingly, EPA has established that EPS violated 40 C.F.R. 761.65(d) (1999), as alleged in Count II.</p>	<p>EPS owned the capacitor bank on July 9, 1999, and therefore was storing, but not commercially storing, the capacitors in anticipation of transportation for disposal.</p>	<p>EPS Brief, pg 27-32</p> <p>EPS Brief, pg 25-26</p> <p>EPS Reply Brief, pg 4-5</p>

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36	23	<p>Inspector McPhilliomy testified that there were no capacitors in storage when he and Inspector Rice visited he facility on that date. After the inspection, however, McPhilliomy obtained a manifest from respondent indicating that on July 9, 1999, there were 26,367 pounds of PCB capacitors that had been shipped from its Wheeling facility. Tr. 253 (Vol. D); CXs 7 & 10. McPhilliomy added, “[a]fter I received the manifest indicating . . . the 26,367 pounds, I did return a call to Mrs. Reed just to confirm that number.” Tr. 254 (Vol. D). Based upon this confirmation, EPA determined that a PCB capacitor storage violation occurred. – i.e., a violation of Section 761.65(d).</p>	<p>In addition, EPS processed the capacitors to facilitate transportation for disposal by breaking them down over the course of an entire work shift. The capacitors were therefore exempt from the EPS commercial storage approval MSCs under 40 CFR 761.20(c)(2)(i).</p> <p>EPS owned the capacitor bank on July 9, 1999, and therefore was storing, but not commercially storing, the capacitors in anticipation of transportation for disposal. In addition, EPS processed the capacitors to facilitate transportation for disposal by breaking them down over the course of an entire work shift. The capacitors were therefore exempt from the EPS commercial storage approval MSCs under 40 CFR 761.20(c)(2)(i).</p>	<p>EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p> <p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p>
37	24	<p>Because respondent cannot burn PCB materials at 500 ppm, or greater, in its scrap metal recovery oven (it can only burn material with a PCB concentration between 50 and 499 ppm), EPS chose to ship the capacitors to a TSCA-approved disposal facility owned by Safety-Kleen. Tr. 46-</p>	<p>There was no evidence of commercial storage presented by EPA. Rather, EPS acknowledged that it stored the capacitors for a period not</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5</p>

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		<p>47 (Vol. IX); CX 10. Prior to their being shipped to Safety Kleen, however, these PCB capacitors were commercially stored by EPS in violation of its TSCA PCB Commercial Storage Approval, and thus in violation of 40 C.F.R. 761.65(d) (1999).</p>	<p>exceeding 10 days as it processed them to facilitate transportation for disposal. Accordingly, the Court erred in failing to find that the capacitors were exempt from the EPS commercial storage approval MSCs as a result of the exemption established at 40 CFR 761.20(c)(2)(i).</p>	<p>EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p>
38	24	<p>The violation proven by EPA in Count II is relatively straightforward. Manifests provided by respondent (RX 515) show that it commercially stored 26,367 pounds of PCB capacitors when its commercial storage permit allowed for only 1,000 pounds to be stored at any one time. See CXs 7 & 10.</p>	<p>EPS owned the capacitor bank on July 9, 1999, and therefore was storing, but not commercially storing, the capacitors in anticipation of transportation for disposal. In addition, EPS processed the capacitors to facilitate transportation for disposal by breaking them down over the course of an entire work shift. The capacitors were therefore exempt from the EPS commercial storage approval MSCs under 40 CFR 761.20(c)(2)(i).</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 -d EPS Reply Brief, pg 7 -4. EPS Reply Brief, 16 -C. - pg 19</p>
39	25	<p>EPS, however, argues that the facts of this case do not</p>	<p>Respondent was not obligated</p>	<p>EPS Brief, pg 27-32</p>

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		<p>support the finding of a Section 761.65(d) violation. Respondent submits that “[t]he effect of EPA’s failure to take fluid samples, determine PCB Concentrations, weigh the units, determine whether EPS was the generator of the waste, and determine whether the capacitors were processed to facilitate the transportation to another site for disposal, is that EPA filed its Complaint against EPS without any supporting evidence.” Resp. Br. at 29.</p> <p>Respondent’s argument is rejected. The testimony of Inspector McPhilliomy and Keith Reed, along with Complaints Exhibits 7 and 10, and Respondent’s Exhibit 515, is sufficient to establish a prima facie case that the alleged PCB capacitor storage violation occurred. Respondent has not rebutted this prima facie showing of violation.</p>	<p>to rebut a presumption because EPA failed to establish it prima facie case. See <u>Rodale Press v. Federal Trade Commission</u>, 407 F. 2d 1252 (D.C. Cir. 1968).</p> <p>In addition, EPA never presented any evidence regarding the ownership of the capacitors on July 9, 1999, and thus failed to establish commercial storage; rather, it established storage at best, which is significantly different under the PCB regulatory definitions and, more importantly, which does not trigger a requirement for a commercial storage approval. Finally, the Exhibit cited by the Court is only the manifest that was used to transport the capacitors to EPS. There was another manifest, listing EPS as the generator, used to transport the capacitors to Safety Kleen</p>	<p>EPS Brief, pg 25-26</p> <p>EPS Reply Brief, pg 4-5</p> <p>EPS Reply Brief, pg 6 (d)</p> <p>EPS Reply Brief, pg 7 (4.)</p> <p>EPS Reply Brief, 16 (C.)-19</p> <p>CEX 10</p>
40	26	<p>EPS submits that its Wheeling operation meets the above definition of “transfer facility” and, as such, the exemption to the commercial storer provisions of Sections 761.65(d)(5) applies. In other words, according to</p>	<p>The Court erroneously failed to give weight to the facts established at the hearing that EPS is a storer, but EPS never</p>	<p>EPS Brief, pg 27-32</p> <p>EPS Brief, pg 25-26</p>

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		<p>respondent, the Maximum Storage Capacity contained in its TSCA PCB Commercial Storage Approval does not apply to the PCB capacitors involved here.</p> <p>Respondent's argument must fail, however, for the reason that it is contrary to the facts established at the hearing. While EPS is correct in asserting that several EPA witnesses testified that its facility "can be a transfer facility as well as a disposal facility under the PCB regulations" (Resp. Br. at 29-30), and while EPA concedes that point (Compl. R.Br. at 4), respondent's activities regarding the PCB capacitors at issue in Count II were those of a commercial storer, and not those of a transfer facility.</p>	<p>once admitted nor did EPA prove that commercial storage of any materials takes place at the EPS facility because EPA failed to prove ownership of a single piece of equipment stored at the EPS facility on the dates of its inspections.</p>	<p>EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19 EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p>
41	26	<p>Here, respondent completely failed in its attempt to show that the capacitors were in any way connected to being in transport. What the record does show is that respondent received the PCB capacitor banks from American Electric Power, broke them down in preparation for disposal on site, and then sampled them as part of the disposal process.</p> <p>fn. 28: Inspector McPhilliamy testified that a typical-sized</p>	<p>The record clearly establishes that the sampling took place prior to any other work on the capacitor bank and that, once the capacitors were found to be PCB capacitors, their ultimate disposition was changed from processing by EPS to shipment</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d)</p>

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		<p>capacity weighs 110 pounds and that it would ne have to be dismantled in order to be transported. Tr. 63-64 (Vol. II).</p>	<p>for disposal to a facility approved for disposal of PCBs, which EPS was not permitted to do in its scrap metal recovery furnace. The Court therefore erred in ignoring the facts established on the record.</p>	<p>EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p>
42	26	<p>Only upon discovering that the PCB capacitors contained 500,000 ppm did the company initiate efforts to transport the capacitors off-site to Safety-Kleen for proper TSCA disposal. These actions are not at all indicative of PCB waste being “held during the normal course of transportation.”</p> <p>fn. 29: The preamble to this rule casts additional light on an already clear directive. It states “[t]he 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. 52720. This is not what took place at the EPS Wheeling facility in connection with the PCB capacitors.</p>	<p>The record established that EPS shipped the capacitors by truck to an approved disposal facility, and that the capacitors had to be dismantled in order to fit on the truck. The Court erred in rejecting the facts established and finding that EPS is not a transfer facility as defined in 40 CFR 761.3</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7 (4.) EPS Reply Brief, 16 (C.)-19</p>
43	26	<p>What is significant is the fact, as argued by EPA that EPS is not listed on the manifest (RX 515) as a transporter. Compl. Br. at 32. As complainant notes, “[t]he fact Respondent was listed and signed as the ‘designated facility,’ and not as a second ‘transporter’ on the manifest from AEP [American Electric Power] at Box 13, is further evidence that Respondent was not operating a transfer facility in regard to the PCB waste capacitors at issue.” <i>Id.</i></p>	<p>The Court erred in failing to correctly interpret REX 515. That manifest was prepared by AEP before it knew that the capacitors were PCB capacitors. At the time the original manifest was prepared, the capacitors were destined for processing and disposal at</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 (d) EPS Reply Brief, pg 7</p>

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			<p>EPS, so AEP was the generator. Once the tests were done, and EPS discovered that the capacitors were PCB capacitors; it could not dispose of them and they then had to be shipped for disposal at an approved PCB disposal facility. To find, as this Court does, that the category of a waste, once initially established, can never be changed, is not only erroneous, it is contrary to the whole PCB waste management program.</p>	<p>(4.) EPS Reply Brief, 16 (C.)-19</p>
44	27	<p>The preamble to this regulation provides some examples of the processing activities contemplated by Section 761.20(c)(1). Both EPS and EPA cite to this language to support their respective positions. Resp. Br. at 32; Compl. Br. at 34. The preamble states:</p> <p>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</p>	<p>The Court erred in creating from whole cloth an intent factor that is dispositive of whether a waste is being processed for transportation for disposal or stored in anticipation of processing. Nowhere in the PCB regulatory program is there any language regarding the intent of anyone being a determinative factor regarding the storage of a PCB waste. The manifest establishes the fact that the capacitors were shipped off site for disposal</p>	<p>EPS Brief, pg 27-32 EPS Brief, pg 25-26 EPS Reply Brief, pg 4-5 EPS Reply Brief, pg 6 -d EPS Reply Brief, pg 7 - 4.) EPS Reply Brief, 16 -C.-pg 19 EPS Reply Brief, pg16-18.</p>

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		<p>serviceable equipment pieces or components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.</p> <p>63 Fed. Reg. 35392.</p> <p>Upon review of the above passage, EPS concludes, “[c]learly, the dismantling of the capacitor banks and repackaging of the capacitors for shipment to a licensed PCB disposal site are not only similar to those activities cited by EPA, they are the <i>exact</i> activities.” Resp. Br. at 32 (emphasis in original). EPA, however, concludes that “[t]he actions EPS took with respect to the capacitor bank are not analogous to any of the examples stated in the above Preamble. Compl. Br. at 34.</p> <p>While the parties may differ over the similarity of the EPS operation to the activities illustrated in the preamble, it is the testimony of Keith Reed that is dispositive of this issue. Reed testified that “if they were non-PCB capacitors, they would have been processed at EPS.” Tr. 46-47 (Vo. IX). The fact of the matter is that they were PCB capacitors. The only reason that these PCB capacitors were not processed at the 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 form [sic] 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</p>	<p>within 10 days of receipt by EPS. That is the fact. Whether EPS would have liked to process them is irrelevant. Using the logic of the Court, if Mr. Reed had testified that EPS intended to simply pour the PCBs onto the ground, this Court would have found that EPS had committed illegal disposal because it intended to illegally dispose of the PCBs, irrespective of the fact that the PCBs were legally shipped for disposal at an approved facility.</p>	

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45	28	<p>respondent's own scrap metal recovery oven.</p> <p>The conclusion that the capacitors were not being processed to facilitate transportation for disposal is further supported by the testimony of Reed that it usually takes two or three employees eight to ten hours to dismantle the rack of capacitors. Tr. 67-68 (Vol. IX). Essentially, this is a one day job. Yet, the capacitors remained at respondent's Wheeling facility for approximately 10 days. There has been no explanation by respondent accounting for this delay in the transportation of the PCB capacitors to Safety-Kleen for disposal. In sum, on the basis of Keith Reed's overall testimony, it is the finding of this tribunal that EPS did not process the capacitors to facilitate storage or transportation for disposal as contemplated by 40 C.F.R. 761.20(c)(1).</p>	<p>The Court erred in finding that, despite the clear language of the regulations that waste stored "not more than" 10 days is exempt from commercial storage approval requirements, this waste should have been shipped earlier, apparently because the Court believed that it could have been, despite there being nothing in the record to support that assumption. The regulation states "not more than 10 days." It does not say "as soon as it can be shipped but not more than 10 days," or "as quickly as possible but not more than 10 days." It simply states that waste qualifying for the exception may be stored for "not more than 10 days." The record establishes that these capacitors were not stored more than 10 days and, therefore, that the exception applies.</p> <p>The Court erroneously failed to find that the evidence EPA presented in support of its</p>	<p>EPS Brief, pg 27-32</p> <p>EPS Brief, pg 25-26</p> <p>EPS Reply Brief, pg 4-5</p> <p>EPS Reply Brief, pg 6 (d)</p> <p>EPS Reply Brief, pg 7 (4.)</p> <p>EPS Reply Brief, 16 (C.)-19</p> <p>EPS Reply Brief, pg 14-(16.)</p>
46	33	<p>In Count III of the Second Amended Complaint, EPA has charged that during 15 different burn cycles on 11 dates in March, September, and October of 1999, EPS failed to</p>		<p>EPS Brief, pg 38-45</p> <p>EPS Reply Brief, pg 19-</p>

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		<p>operate the primary chamber of its scrap metal recovery oven in accordance with the provisions of 40 C.F.R. 761.72(a)(3) (1999).</p> <p>fn. 33: In its post-hearing brief, however, the complainant asserts that the evidence shows that respondent actually 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" during 51 burn cycles over the randomly sampled three-week period. Compl. Br. at 39-40, citing Tr. 34-42 (Vol. IV) (CBI testimony of Inspector Rice). The evidence in this case, however, only supports the charges relating to the 15 burn cycles cited in the Second Amended Complaint.</p>	<p>allegations in Count III was based solely on data from EPS' laboratory, ACTI, and that ACTI provided documentation that EPA mischaracterized the data and EPS presented testimony that the data was mischaracterized. On cross examination, even EPA inspector Rice admitted that there were many of what he had called "EPS barcodes" that were either duplicative or did not conform to the six digit barcode format that EPA conceded is used by EPS, clearly establishing that the data subpoenaed by EPA from ACTI was not what EPA thought it was and was not representative of the equipment EPS was alleged to have processed. Accordingly, EPA did not prove its prima facie case and the Court erred in failing to find that EPA failed to prove its prima facie case.</p>	<p>D.- pg 24</p> <p>EPS Reply Brief, pg 24-59</p> <p>EPS Reply Brief, Attachment A</p> <p>EAJA Appeal No. 98-1 L&C Services</p> <p>H.E.L.P.E.R., INC.</p> <p>EPCRA Appeal No. 98-3</p>
47	33	<p>Complainant charges that during these periods respondent failed to comply with the time and temperature requirements of Section 761.72(a)(3) for the burning of</p>	<p>The Court erred in reading the word "continuous" into 40 CFR 761.72(a)(3). It is not</p>	<p>EPS Brief, pg 45-46</p> <p>EPS Reply Brief, pg 19-</p>

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		<p>“regulated materials” (i.e., contaminated electrical equipment of 50 to 499 ppm PCB, regulated for disposal under Section 761.60(b)(4) by failing to maintain the minimum temperature of 537 degrees C (999 degrees F) for a minimum of 2-1/2 hours. See Compl. Br. at 36. These time and temperature requirements are as follows:</p> <p>§ 761.72 Scrap metal recovery ovens and smelters.</p> <p>Any person may dispose of residual PCBs associated with PCB-Contaminated article 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:</p> <p>(a) in a scrap metal recovery oven: ***** (3) <i>The primary chamber shall operate at a temperature between 537° C and 650° C for a minimum of 2-1/2 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.</i></p> <p>40 C.F.R. 761.72(a)(3) (1999) (emphasis added).</p> <p>Inspector Rice described the data contained in Exhibits</p>	<p>there. The regulation simply states that the temperature must be maintained for 2 ½ hours. As was fully briefed both in Respondent’s brief and again in Respondent’s Reply Brief, the burn cycles in question all lasted more than 2 ½ hours and, once the temperature dropped below the minimum required temperature for one five minute period, it was brought back up above he minimum required temperature long enough so that the total time in each cycle above the minimum required temperature met or exceeded 2 ½ hours. The Court erroneously ignored the briefs. In addition, and after having admitted an expert witness in the field of PCB combustion, Keith Reed, the Court erroneously ignored the testimony of the expert it admitted and relied instead on the testimony of an EPA inspector who testified that he was conducting his very first PCB inspection when he inspected the EPS facility on</p>	<p>D.- pg 24</p> <p>Volume I, Ernest, pg 209(24)-210(19), pg 229(11)-232 (4)</p> <p>Volume II, Rice, pg 113(8)0-114(11), 209(2)-210(12), 220(9)-222(20)</p> <p>CBI, June 20, 2003, Rice Pg 71(4)-72(3)</p> <p>Rice Deposition REX 558, pg 107(19)-110(10)</p> <p>EPS Brief, pg 45-46</p>

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		<p>16A, 16B, and 16C as "computer-generated furnace operating measurement levels as well as inventory sheets of what was burned during each burn cycle of that one-week period." Tr. 101 (Vol. II). For example, he testified that Exhibit 16A contains computer-generated data that is recorded every five minutes during the burn cycles for the primary oven. In that regard, the date, hour, and minutes of each burn cycle are included, as well as the afterburner temperature and the primary oven temperature. Tr. 108 (Vol. II). EPS furnace operator Ernst also testified that the temperature of the primary chamber is downloaded on the computer every 5 minutes. Tr. 227 (Vol. I).</p> <p>fn. 35: In addition, Ernest testified that there are two temperature gauges in the primary chamber and that their readings differ by 100 degrees C. As it turns out, this lower temperature reading was taken from the lower probe which was only about three feet above the cart containing the material to be burned. The higher temperature probe is located on the roof of the primary chamber. Tr. 229-231 (Vol. I).</p> <p>Inspector Rice then proceeded to mark this data in 2-1/2 hour increments in order "to quantify how many burns were in violation." Tr. 102 (Vol. II). He explained, "for the round charts the first thing I did was counted up the number of burns indicated by the peaks on each round chart and compared that to the number of burns that re indicated on the computer-generated data to ensure that they matched up." Tr. 105 (Vol. II). The inspector performed this review for all the March, September, and October, 1999, data</p>	<p>July 9, 1999.</p>	

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48	36	<p>provided. Tr. 105-106 (Vol. II). See n.27, <i>supra</i>. Rice reviewed this data and identified the dates and the burn cycles in which respondent's scrap metal recovery oven failed to meet Section 761.72(a)(3)'s 999 degree Fahrenheit minimum temperature requirement for a 2-1/2 period. This is a critical first step in EPA's establishing the violation alleged in Count III. In that regard, the inspector's testimony regarding EPS's failure to meet the time and temperature requirement may be summarized as follows:</p>	<p>The Court erred in reading the word "continuous" into 40 CFR 761.72(a)(3). It is not there. The regulation simply states that the temperature must be maintained for 2 1/2 hours. As was fully briefed both in Respondent's brief and again in Respondent's Reply Brief, the burn cycles in question all lasted more than 2 1/2 hours and, once the temperature dropped below the minimum required temperature for one five minute period, it was brought back up above the minimum required temperature long enough so that the total time in each cycle above the minimum required temperature met or exceeded 2 1/2 hours for all but one cycle, the cycle on</p>	<p>EPS Brief, pg 45-46</p>

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		<p><u>Date</u></p> <p>March 23, 1999</p> <p>September 27, 1999</p> <p>September 28, 1999</p> <p>September 30, 1999</p> <p>October 1, 1999</p> <p>October 2, 1999</p> <p>October 26, 1999</p> <p>October 26-27, 1999</p> <p>October 27, 1999</p> <p>October 28, 1999</p> <p>October 29, 1999</p> <p>October 30, 1999</p>	<p>9/28/99. The Court erroneously ignored the briefs. In addition, and after having admitted an expert witness in the field of PCB combustion, Keith Reed, the Court erroneously ignored the testimony of an expert it admitted and relied instead on the testimony of an EPA inspector who testified that he was conducting his very first PCB inspection when he inspected the EPS facility on July 9, 1999.</p>	
		<p><u>Two and One-Half Hour Burn Cycle Periods:</u></p> <p>8:03 am. – 10:37 pm.</p> <p>11:50 am – 2:22 pm.</p> <p>11:22 am – 1:54 pm.</p> <p>8:57 pm. – 10:41 pm.</p> <p>10:14 am. – 12:45 pm.</p> <p>5:13 am. – 7:47 am.</p> <p>1:50 pm. – 4:23 pm.</p> <p>5:12 pm. – 7:46 pm.</p> <p>1:25 am. – 3:59 am.</p> <p>9:14 am. – 11:47 am.</p> <p>2:48 pm. – 5:21 pm.</p> <p>11:17 pm. – 1:50 pm.</p> <p>10:52 am. – 1:24 pm.</p> <p>2:28 pm – 5:00 pm.</p> <p>8:11 pm. – 10:43 pm.</p> <p>3:23 a.m. – 5:54 am.</p> <p>1:38 pm. – 4:09 pm.</p> <p>2:50 am. – 5:20 am.</p>		
		Tr. 34-42 (Vol. IV) (CBD); see Compl. Br. at 40-41.		

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		<p>fn. 36: Inspector Rice's testimony appears in the Confidential Business Information portion of the transcript, but his testimony in this regard is not considered to be "CBI." See Compl. Br. at 40 n. 13.</p>		
49	36	<p>fn. 36: Inspector Rice's testimony appears in the Confidential Business Information portion of the transcript, but his testimony in this regard is not considered to be "CBI." See Compl. Br. at 40 n. 13.</p>	<p>Add above that EPA offered no proof of the PCB concentration of a single transformer processed on any of the cycles during which the alleged violations took place. Accordingly, it has not established its prima facie case.</p>	
50	36	<p>Having overcome the initial hurdle in proving a violation here by showing that the time and temperature requirements of Section 761.72(a)(3) were not compiled with on at least 15 different occasions, complainant's next critical task is to show that "regulated material" (i.e., material containing a PCB concentration between 50 and 499 ppm) was burned in respondent's furnace during these burn cycles. EPA has carried its burden of proof as to this issue on the strength of analytical data obtained from a company by the name of Weidmann-ACTI, Inc. ("ACTI").</p>	<p>The Court erred in giving weight to any of the ACTI data after ACTI provided documentation establishing that EPA has mischaracterized its data and EPS witness Keith R Reed testified at length about the same mischaracterization. Further, inspector Rice, on cross examination, admitted that many of the numbers he erroneously assumed were EPS barcode identifiers were either duplicative (i.e., there were more than one unit with the same bar code, which Rice</p>	<p>EPS Brief, pg 38-45 EAJA Appeal No. 98-1 L&C Services H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3</p>

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51	37	<p>The information contained in Exhibit 44 is a critical element in complainant's proof concerning the charged Section 761.72(a)(3) violation in Count III. In providing an overview of this exhibit, and just how it relates to this case, EPA states:</p> <p style="padding-left: 40px;">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 Respondent's six-digit barcode numbers on Respondent's Transformer Furnace Data sheets provided to EPA with the oven operating data. C. Ex. 44 (CBI) and C. Ex. 16A, 16B, 16C; Tr. Sept. 8 at 15-17. The other column of critical data is the analytical results in parts per million PCB which correspond to the serial numbers (barcodes). C. Ex. 44 (CBI). The dates on the ACTI lab data for samples analyzed correspond to the dates of the dates of the oven burns at issue. C. Ex. 16A, 16B and 16C (Transformer Furnace Data Sheets); C. Ex. 44 (CBI).</p> <p>Compl. Br. at 46. EPA was able to show this analysis</p>	<p>admitted could not be true) or did not fit the "unique six digit" number used by EPS to identify equipment. The ACTI data should have been given no weight whatsoever in this case.</p> <p>EPA states that "many of them match," regarding what it says are EPS barcodes. However, ALL of the numbers should have matched based on the fact that EPA had conceded (and even based its case on) the fact that every unit processed by EPS was linked to a "unique six digit bar code identifier number," or only conclusion logically drawn is that the lab data did not mean what EPA thought it meant, a fact that was proven by ACTI documentation, testimony of EPS witnesses, and the cross examination of inspector Rice. The Court erroneously ignored all of that evidence.</p> <p>The fact is that EPA did not have what it thought it had in the ACTI data and that data could not be inked to a single piece of equipment subject to</p>	<p>EPS Brief, pg 38-45</p> <p>EPS Reply Brief 27-59</p> <p>EAJA Appeal No. 98-1 L&C Services</p> <p>H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3</p>

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		through the testimony of Inspector Rice. Tr. 7-42 (Vol. IV) (CBI).	the EPA allegations in Count III. Thus, EPA failed to establish a prima facie case of a violation.	
52	37	In reviewing the ACTI laboratory analytical data of Complainant's Exhibit 44 with the Transformer Transfer Data Sheets contained in Complainant's Exhibits 16A, 16B, and 16C, it is held that 73 items containing "regulated material" were burned in respondent's scrap metal recovery oven at various times when the oven failed to meet the minimum time and temperature requirements of 40 C.F.R. 761.72(a)(3). These instances of non-compliance, <i>i.e.</i> , a violation of Section 761.72(a)(3), involve the protected ACTI data and, therefore, are set forth in the Confidential Business Information section appearing below.	The Court erred in giving weight to any of the ACTI data after ACTI provided documentation establishing that EPA has mischaracterized its data and EPS witness Keith reed testified at length about the same mischaracterization. Further, inspector Rice, on cross examination, admitted that many of the numbers he erroneously assumed were EPS barcode identifiers were either duplicative (<i>i.e.</i> , there were more than one unit with the same bar code, which Rice admitted could not be true) or did not fit the "unique six digit" number used by EPS to identify equipment. The ACTI data should have been given no weight whatsoever in this case.	EPS Brief, pg 38-45 EPS Reply Brief 27-59 EPS Reply Brief, pg 19-D.- pg 24 EAJA Appeal No. 98-1 L&C Services H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3
53	39	In considering the parties' arguments, the only thing that may be said with certainty is that this issue does not want for complexity. When the discovery order was issued on March 5, 2003, and when the sanctions order was issued on June 3, 2003, of which the PCB concentration data material	The Court states that the first time a discovery order was issued for critical PCB concentration needed for Count III was on March 5,	EPS Motion to Dismiss EAJA Appeal No. 98-1 L&C Services

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		<p>was only a part, this case was in its developing stage. At that time, it was the expectation of this tribunal that the significance of respondent's non-compliance with the ordered discovery would come to light as the case took shape factually. That has not happened with respect to the unavailable PCB concentration data. While the significance of this data to EPA's establishing the scope of the violation at issue in Count III is quite clear, what is unclear (and is hotly contested by the parties) is the extent to which EPS is in the possession of the requested PCB concentration data for individual transformers. Thus, notwithstanding the Orders of March 5 and June 3, 2003, it is the opinion of this tribunal that, insofar as the PCB concentration data is concerned, the record is insufficient for a determination to be made that EPS intentionally withheld discoverable material, contrary to this tribunal's order, and should be sanctioned. Accordingly, EPA's request for sanctions is <i>denied</i>.</p>	<p>2003, approximately two years after the Notice of Violation for the Complaint was served. Accordingly, EPA could have had no evidence of a violation of the PCB program when it filed its Complaint two years before this hearing commenced. The Court therefore erred in failing to dismiss Count III when EPS filed a Motion to Dismiss based on lack of Evidence.</p>	<p>H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3</p>
54	39	<p>In that regard, the most troubling issue preventing a clear understanding of the PCB concentration issue, <i>i.e.</i>, in determining who is right and who is wrong as to the existence of this information, is the confusion surrounding "batch testing." The argument articulated by respondent in its Reply Brief casts sufficient doubt, in this tribunal's mind, as to whether the data that EPA wants actually exists.</p>	<p>The Court's own comment is that it is troubled in clearly understanding the PCB concentration issue. However, the Court has already erroneously found a violation, despite that fact that it admittedly did not understand the PCB concentration issue. Without knowing the PCB concentrations of the equipment allegedly processed in violation of the regulations,</p>	<p>Initial Decision Issued: March 7, 2006 By: Carl C. Charneski Administrative Law Judge EAJA Appeal No. 98-1 L&C Services H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3</p>

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55	39	<p>For example, EPS cites to 40 C.F.R. 761.60(g), as well as to this regulation's preamble (44 Fed. Reg. 31520, 31531) for the proposition that batch testing is an appropriate method for determining the concentration of PCBs in dielectric fluid. Resp. Br. at 43-44. EPS also cites to the testimony of a number of EPA witnesses (McPhilliamy, Rice, Barto, and Smith), as well as "e-mails" between EPA employees, asserting that this evidence supports its position regarding batch testing. <i>Id.</i> At 44-48. Despite the fact that EPA addresses batch testing in its Reply Brief (<i>see</i> p. 39), taking a position on the facts and the law contrary to that advanced by EPS, it is not sufficient to ease this tribunal's concerns as to whether sanctions are warranted and, if so, the appropriate sanctions to be assessed. This "batch testing" issue is probably better left for another day.</p>	<p>EPA cannot possibly have established a prima facie case of a violation.</p> <p>The Court erred in failing to address the "batch testing" issue, because the batch testing data provided by EPA and admitted into evidence by the Tribunal was exculpatory to EPS. It clearly demonstrated that none of the units processed by EPS on the days alleged by EPA to have been in violation of the regulations were PCB regulated units. Accordingly, there can be no violation of the rule because to establish a violation, EPA had to prove the PCB concentration of the units it alleged were improperly processed.</p>	<p>Volume II, Comments by ALJ, Pg 236(16-19)</p> <p>EPS Brief, pg 25-26</p> <p>EPS Brief, Attachment A</p> <p>CFR Part 22, Vol 64, pg 40165</p> <p>The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent the Agency as a whole, rather than just the position of one Region, one enforcement officer, or one Presiding officer.</p>
56	57	<p>Insofar as Count III is concerned, Section 761.72(a)(3) establishes specific oven operating requirements as to time</p>	<p>the EPS furnace is controlled combustion, neither the</p>	<p>Volume III, John Smith Pg 179(5)-200(19)</p>

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		<p>and temperature in order to ensure that “[a]ny PCBs present in the drained PCB-Contaminated articles will vaporize or be destroyed at these temperatures.” 63 Fed. Reg. at 35402. Moreover, as argued by EPA, “[r]espondent’s failure to operate the primary chamber of its SMRO at a temperature of at least 537 [degrees] C for at least two and one-half hours during the burn cycles . . . presented a high risk of harm to health, the environment, and the PCB regulatory program.” Compl. Br. at 81.</p> <p>Furthermore, EPA properly argues that a high penalty is warranted for this Count III violation because of the toxic nature of the PCBs involved, and the potential for human and environmental exposure. <i>Id.</i> Along these lines, EPA witness, Dr. John Smith, offered as an expert in the areas of PCB disposal, processing, and incineration (Tr. 246 (Vol. II), testified that “the problem with uncontrolled burning was that there were residues of incomplete combustion of PCBs, or, could be, on the surfaces of the material.” Tr. 254 (Vol. II). (Inspector McPhilliamy also testified that if the primary chamber of the oven is not operating at a specified temperature, it would not be as effective in removing the PCBs. Tr. 59 (Vol. II).</p>	<p>testimony of Dr. Smith nor inspector McPhilliamy is relevant to this case.</p>	<p>Volume IX, Keith R Reed, pg 154(1)-201(21)</p> <p>40 CFR Part 761, Section 761.3 definition of Open Burning</p> <p>Volume III, John Smith Pg 197(5)-200(19)</p> <p>Volume IX, Keith R Reed, pg 176(6)-179(20)</p>
57	57	<p>Dr. Smith added, “people who would be handling those, people who would be working in workshops where that material would be allowed to escape or be brushed off of that equipment, would not be aware of that, could become contaminated, could become sick from those products of incomplete combustion.” <i>Id.</i> See 63 Fed. Reg. at 35402 (open burning of PCB-contaminated articles can create “significant amounts of products of incomplete combustion</p>	<p>Open burning is defined at 40 CFR 761.3. Since the EPS furnace is controlled combustion, neither this testimony of Dr. Smith nor inspector McPhilliamy is relevant to this case.</p>	<p>40 CFR Part 761, Section 761.3 definition of Open Burning</p> <p>Volume III, John Smith, pg 179(5)-200(19)</p>

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		<p>such as PCBs, polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans.”)</p> <p>fn. 51: Dr. Smith also subsequently reiterated:</p> <p>And the reason those surfaces must be cleaned is that, even though there may be fairly low amounts of PCBs on those surfaces to start, if the temperatures are insufficient to destroy and volatilize those PCBs, potential incomplete products of combustion from PCBs, such as I mentioned in that preamble text, polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, are <i>much more toxic than PCBs</i>, and could be left on those surfaces.</p> <p>And those handling those surfaces, managing those surfaces, further – perhaps, melting those surfaces, could become exposed to those surfaces not knowing their – the contamination.</p>		<p>Volume IX, Keith R Reed, pg 176(6)-179(20)</p> <p>EAJA Appeal No. 98-1 L&C Services</p> <p>H.E.L.P.E.R., INC.</p> <p>EPCRA Appeal No. 98-3</p>
58	60	<p>Tr. 261-262 (Vol. II) (emphasis added).</p> <p>Insofar as the storage violations of Counts I and II are concerned, EPS was highly negligent. The facts are straightforward.</p>	<p>The Court erred in finding there were violations in Counts I and II because EPA proved no PCB concentrations for any units and failed to prove that any unit was being commercially stored.</p>	<p>EPS Brief , pg 6-32</p> <p>EPS Reply Brief, pg 2-19</p>
59	60	<p>EPS's violation of 40 C.F.R. 761.72(a)(3) also was the</p>	<p>EPA did not have barcodes to</p>	<p>EPS Reply Brief, pg 19-</p>

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		<p>result of a high degree of negligence. Here, respondent was shown to have violated the time and temperature requirement of Section 761.72(a)(3) during 16 burn cycles over 11 randomly selected dates, ranging from March through October 1999. EPS has offered no adequate explanation to answer how barcoded, PCB-contaminated transformers could be improperly disposed of in its scrap metal recovery oven with such regularity.</p>	<p>associate with a single piece of equipment processed during any of these burn cycles. ACTI, the laboratory who prepared the data, provided documentation to show that EPA had misinterpreted and mischaracterized the data ACTI gave EPA in response to the TSCA subpoena. In addition, Keith Reed testified consistent with ACTI, that EPA has misinterpreted and mischaracterized the ACTI data and that EPA had no barcodes form any of the units processed during any of the burn cycles subject to Count III of the EPA Amended Complaint. EPA provided no rebuttal to either the ACTI letter or Reed testimony. The Court erred in ignoring the ACTI letter and Reed testimony.</p>	<p>D:- pg 24 EPS Reply Brief, pg 29-59 EPS Reply Brief Attachment A EAJA Appeal No. 98-1 L&C Services H.E.L.P.E.R., INC. EPCRA Appeal No. 98-3</p>

C





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

MEMO

SUBJECT: Environmental Protection Services (EPS) Inspection

FROM: Bobbie J. Wright, Environmental Scientist
Toxics Programs and Enforcement Branch (3WC33)

TO: Aquanetta L. Dickens, Chief
Toxics Programs and Enforcement Branch (3WC33)

ISSUE: Inspection for Environmental Protection Services, Wheeling, WV

Background

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. EPS was advised to submit a draft of the insurance policy for review, which was received on November 17, 1998 and forwarded to Headquarters for guidance. EPA provided recommendations to EPS's proposed insurance policy in February, 1999. These recommendations were based strictly on the PCB Regulations.

EPS was informed that the policy contains problems that would need to be revised/deleted before EPA could consider accepting such a financial assurance mechanism for closure of a PCB Commercial Storage facility. Based on EPA's review, it is recommended that the existing trust fund remain in place. If EPS is interested in pursuing closure insurance, their broker is required to provide a revised policy based on the provided recommendations.

Based on EPA's second review, EPS's proposed policy still does not comply with the PCB regulations, specifically the requirements for closure in the Storage for Disposal regulations at 40 C.F.R. § 761.65 and the Financial Assurance for Closure regulations at 40 C.F.R. § 264.143. EPA provided additional comments to EPS June 24, 1999.

Reason for Inspection

COMPLAINANT'S
EX. 30

C001019

EPA has expressed serious concerns 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 requirements
2. EPS's compliance with the time requirements for transporting waste off-site

These issues, if they are not "in line" with the PCB Regulations, could be the reason for the rush. EPS would need serious \$\$\$ to move waste into the disposal arena.