IN THE MATTER OF GENERAL ELECTRIC COMPANY

TSCA Appeal No. 92–2a

FINAL DECISION

Decided November 1, 1993

Syllabus

General Electric Company ("GE") appeals an initial decision assessing a $40,000 civil penalty against it under the Toxic Substances Control Act for improperly using and disposing of PCBs. At issue is GE's distillation of PCBs drawn from PCB transformer carcasses being prepared for disposal, and its use of the distillate to flush other drained PCB transformers. U.S. EPA, Region IV, alleged, and the initial decision concluded, that the distillation process is an alternate disposal method requiring EPA approval under 40 C.F.R. § 761.60(e). Because GE lacked the requisite EPA approval, its disposal process violates 40 C.F.R. §§ 761.60(a) and 761.60(b)(1)(i)(B) of the disposal regulations (Count I). Also, GE's use of the distilled liquid to flush other drained PCB transformers violates 40 C.F.R. §§ 761.20(a) and 761.30 of the use regulations (Count II).

Held: The finding of disposal violations alleged in Count I of the complaint is upheld. By distilling the PCB liquids drawn from the transformers, GE violated the PCB disposal regulations governing transformer disposal, 40 C.F.R. § 761.60(b)(1)(i)(B), which require that the entirety of such PCB liquids, not just the PCB component thereof, be incinerated in accordance with § 761.60(a). GE is assessed a penalty of $25,000 for this violation. Count II of the complaint is dismissed. The regulations governing PCB use have no applicability to disposal activities.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.[1]

Opinion of the Board by Judge McCallum:

General Electric Company ("GE") appeals from an initial decision ordering GE to pay a civil penalty of $40,000 for violating section 6(e) of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2605(e), and the rules implementing that section, which are set forth in 40 C.F.R. Part 761. These rules regulate the manufacture, use, and

[1] A fully transcribed oral argument was held on May 19, 1992, before Judges McCallum, Reich and Judge Timothy J. Dowling (Acting). Judge Firestone replaces Judge Dowling.

disposal of polychlorinated biphenyls ("PCBs"), but only the use and disposal regulations are implicated in this proceeding. Specifically, the initial decision concludes that GE's transformer disposal and distillation activities at its Chamblee, Georgia facility violated §§ 761.20(a) and 761.30 of the use regulations, 40 C.F.R. §§ 761.20(a) & 761.30, and § 761.60 of the disposal regulations, 40 C.F.R. § 761.60. For the reasons set forth below, we hold that GE violated the disposal regulations, but did not violate the use regulations. We also hold that a $25,000 civil penalty is warranted for the disposal violation.

BACKGROUND

A. *The Transformer Disposal Process*

GE operates an industrial service center in Chamblee, Georgia, where it prepares PCB transformers and PCB items for disposal for its customers. Prior to the events that gave rise to this case, GE's process for preparing the transformers for disposal consisted of draining the PCB mineral oil dielectric fluid from the transformers, refilling the drained transformers with an oil-based solvent in which PCBs are readily soluble, and allowing the refilled transformer to soak for eighteen hours. GE then drained the PCB-contaminated solvent, a so-called "PCB liquid," from the transformer, and sent the transformer to an approved chemical waste landfill for disposal. The PCB-laden dielectric fluid and the drained PCB-contaminated solvent were incinerated upon their removal from the transformers. None of the foregoing activities is implicated in any charges of wrongdoing against GE.

Plans to change the process were first implemented in September 1986 when GE purchased seven freon distillation units from Quadrex HPS, Inc. for use at various GE facilities, including Chamblee. The distillation method of preparing PCB transformers for disposal employs trichlorotrifluoroethane ("freon") rather than oil as the agent for soaking drained transformers and, according to the initial decision, was put into effect at the Chamblee facility for a period of a few months in 1987. Upon completion of an 18-hour soaking phase under this method, the PCB-contaminated freon was drained from the transformer into a storage tank. The PCB-contaminated freon then entered a distillation still, where heating coils separate the freon from the PCBs as part of a distillation process. The separated "clean" freon was captured for reuse as a soaking agent, whereas the collected PCBs were sent off for incineration. The Presiding Officer found that the distillation process reduced the PCB concentration in the freon to "less than the regulatory threshold of 50 ppm, and,

most likely to less than the practical detection limit of two ppm." Initial Decision at 57.

According to GE, its primary purpose for purchasing these units was to minimize the production of PCB liquids requiring incineration in the process of preparing PCB transformers for disposal, thereby reducing costs to GE and risks to the environment. GE installed these distillation units at its Chamblee facility and at facilities in Cincinnati, Chicago, Cleveland, Philadelphia, Portland (Oregon) and Houston.[2]

Operation of the distillation unit at Chamblee commenced on March 16, 1987. Approximately one month later, a series of communications took place between EPA and GE concerning GE's Cleveland facility but without either party specifically mentioning or acknowledging the situation at the Chamblee facility. Following an inspection of the Cleveland facility,[3] EPA's Chemical Regulation Branch of the Office of Toxic Substances at EPA headquarters in Washington, D.C. informed GE that the separation of PCBs from the solvent is an "alternate" PCB disposal method requiring a permit, and requested a description of GE's use of the distillation unit so that EPA could determine if GE's activities required a permit. GE was not required to have a permit for its former method of disposing of the transformers.

GE responded to EPA's request by letter dated July 9, 1987, and acknowledged that "the position of the EPA that physical separation of PCBs from [the solvent] is an alternate destruction method required to be permitted * * * is well known." GE further noted that before commencing operation of the distillation unit in Cleveland it discussed the matter with EPA Region V personnel, who opined that physical separation of PCBs is an alternate destruction method only when used as an alternative to incineration or other approved disposal methods. According to GE, because GE did not intend to avoid incineration of the PCBs, Region V agreed with GE that a permit was not necessary. Region V's concurrence in this regard is disputed and is not documented in the record, and thus the basis and authority for the Region's statement, if it was made, are completely unknown. In any event, the concurrence, to the extent it

[2] GE is subject to separate enforcement actions arising from its use of the distillation units at these other locations. These proceedings were consolidated in December 1990. GE's motion for a stay of the other proceedings until this case is decided is currently pending before the Presiding Officer.

[3] The Cleveland facility was inspected for compliance with a research and development permit pertaining to PCB residues in transformer carcasses.

existed, did not last long. On October 1, 1987, the Chemical Regulation Branch of the Office of Toxic Substances at EPA headquarters informed GE that based upon GE's description of its activities involving the distillation unit, the freon recovery portion of the process was an alternate method of PCB disposal requiring a permit.

GE stopped using the distillation unit at Chamblee on August 13, 1987 (one-and-one-half months before EPA headquarters issued its October 1 letter stating that a permit was required for the Cleveland facility). GE estimates that between March 16, 1987, and August 13, 1987, it had used the distillation unit 12 times and had flushed 50 transformers, processing approximately 9,600 gallons of fluid. An EPA inspection of the Chamblee facility took place on August 21, 1987 (again, before EPA headquarters had issued its October 1 letter), in response to a report that GE had been using the distillation unit without a permit. The PCB facility supervisor at Chamblee testified that GE had been operating the distillation equipment in the belief that a permit was not required.

B. *The Complaint and Initial Decision*

On May 12, 1989, Region IV issued a Complaint charging GE with violations of the PCB use and disposal regulations at the Chamblee facility. Count I of the Complaint alleges that GE improperly disposed of 10,126 gallons of PCB liquid through a distillation method.[4] The PCB liquid consisted of the material collected from the transformers following the soaking period. According to the complaint, disposal of PCB material at concentrations greater than 50 ppm by any method other than in an approved incinerator, a high efficiency boiler, or a chemical waste landfill is a violation of 40 C.F.R. § 761.60(a), unless authorized by a permit pursuant to 40 C.F.R. § 761.60(e).[5] The latter section makes an exception for alternative methods of destroying PCBs that are equivalent to the authorized incineration techniques. A permit is required for use of an alternative method, and since GE did not have a permit for its distillation process, the Region proposed a $125,000 penalty for the Count I violation.

[4] At the hearing, the 10,126 gallon figure was corrected to reflect GE's approximation of 9,600 gallons of PCB liquid. *See* Initial Decision at 9.

[5] The three specific methods of disposal of PCB liquids at concentrations greater than 50 ppm but less than 500 ppm are detailed in 40 C.F.R. § 761.60(a)(3)(i-iii). These methods of disposal are: in an incinerator in compliance with § 761.70, in a chemical waste landfill in compliance with § 761.75, or in a high efficiency boiler in compliance with § 761.60(a)(3)(iii).

Count II of the Complaint alleges that between March 16, 1987, and August 12, 1987, GE's processing of the same 10,126 gallons of PCB material by the distillation method violated the regulations governing use of PCBs, specifically, 40 C.F.R. § 761.20(a) and § 761.30. According to the complaint, which cites TSCA Compliance Program Policy No. 6–PCB–2 ("Policy 6–PCB–2"), distilling PCB solvents requires a permit, and GE had operated without a permit. The Region proposed a $100,000 penalty for this violation.

GE answered the Complaint and specifically denied that its distillation activities were unlawful. A hearing on the matter was held on March 19 through March 22, 1991, before Administrative Law Judge Spencer T. Nissen (the "Presiding Officer"). In his initial decision of February 7, 1992, the Presiding Officer found that GE had violated both the use and disposal regulations. He concluded that GE had violated § 761.60(a) by distilling the PCB-contaminated freon (the material drained from the transformers after the soaking period) without a permit. He arrived at this conclusion by equating distillation with disposal, and since the method of disposal (distillation) was not specifically authorized in the regulations, GE was not permitted to distill the material without a permit. In other words, without a permit, the only lawful course of conduct open to GE was to dispose of the material by means of incineration in an approved incinerator, chemical waste landfill, or high efficiency boiler.

He rejected GE's argument that because the distillation process did not literally "destroy" PCBs, the permit regulation, 40 C.F.R. § 761.60(e), was inapplicable. GE made this argument because § 761.60(e), only mentions destruction as an alternative method of PCB disposal:

> Any person who is required to incinerate any PCBs and PCB Items under this subpart and who can demonstrate that an alternative method of *destroying* PCBs and PCB Items exists and that this alternative method can achieve a level of performance equivalent to § 761.70 incinerators or high efficiency boilers * * * may submit a written request * * * for an exemption from the incineration requirements of * * * § 761.60. * * * [The Agency may] approve the use of the alternate method if [it] finds that the alternate *disposal* method provides PCB *destruction* equivalent to *disposal* in [an] incinerator or a * * * high efficiency boiler and will not present an unreasonable risk of injury to health or the environment.

40 C.F.R. § 761.60(e) (emphasis added). According to the Presiding Officer, pursuant to Policy 6–PCB–2, the term "destroying" in § 761.60(e) encompasses non-destructive means of PCB disposal. His decision notes that the interpretation embodied in Policy 6–PCB–2 has been employed by EPA to require applications under § 761.60(e) for distillation processes similar to GE's. The Presiding Officer also noted that the PCB regulations define "disposal" as including decontamination—"[d]isposal includes * * * actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs"[6]—and concluded that GE's distillation process was a method of decontamination and therefore a method of disposal subject to the permit requirement.

The Presiding Officer also found GE in violation of the use regulations, 40 C.F.R. §§ 761.20(a) and 761.30, but his theory was slightly different from the one contained in the Region's complaint. The Region, it will be recalled, alleged in Count II that the illegal use consisted of *distilling the 10,126 gallons of PCB liquid,* which GE had collected from the transformers following the soaking period. The Presiding Officer, while not specifically stating that he was differing from the Region, found that the illegal use consisted of *using the freon portion of the distilled 10,126 gallons for the purpose of soaking and flushing other PCB transformers.* He found that the distilled freon, although below the 50 ppm regulatory threshold (as a result of the distillation process), was nevertheless assumed, for regulatory purposes, to contain the concentration of PCBs originally contained in the transformers from which the freon had been drained.[7] Because § 761.30 of the use regulations specifies the only non-totally-enclosed, permissible uses of PCBs (in concentrations greater than 50 ppm), and, further, because flushing transformers that have been designated for disposal is not one of those permissible uses, the Presiding Officer held that GE had violated the regulations governing use of PCBs.[8]

In assessing a penalty for these violations, the Presiding Officer disregarded the 1980 PCB Penalty Policy[9] advocated by the Region because, in his view, the risks underlying the policy's assumptions

[6] 40 C.F.R. § 761.3.

[7] 40 C.F.R. § 761.1(b) provides, in relevant part, that:

> No provision specifying a PCB concentration may be avoided as a result of any dilution, unless otherwise specifically provided.

[8] The Presiding Officer found that the distillation activity was not totally enclosed.

[9] Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act. 45 Fed. Reg. 59770 (Sept. 10, 1980).

(actual or potential harm to humans) were not present in this case, *i.e.,* where the violation resulted from an expansive definition of the term "disposal" and not from any actual or potential discharge of PCBs. Instead, the only risk presented was the threat to Agency control over the regulation of the PCBs. In light of this perceived relatively small risk, and the environmental benefits gained from the use of the distillation method, the Presiding Officer reduced the combined $225,000 proposed civil penalty to $40,000 ($25,000 for Count I and $15,000 for Count II). He rejected GE's argument, based on *Rollins Environmental Services (N.J.) Inc.* v. *EPA,* 937 F.2d 649 (D.C. Cir. 1991), that no penalty should be imposed because GE did not have notice of EPA's interpretation of the regulations requiring a permit for these activities. This appeal followed.

C. *GE's Appeal*

GE maintains that it did not violate the disposal requirements of § 761.60(a) because, as the record shows, it ultimately incinerated all material removed from the transformers that contained PCBs above the 50 ppm threshold. In relevant part, § 761.60(a) says that, with certain exceptions, "PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70." In addition, GE argues that it was not required to have a permit for the distillation unit because the distillation process does not destroy PCBs, and the permit requirement applies only to "alternate method[s] of *destroying* PCBs." 40 C.F.R. § 761.60(e) (emphasis added). GE challenges EPA's interpretation of § 761.60(e) as requiring permits for non-destructive means of disposal, arguing that Policy 6–PCB–2 adopting this interpretation is arbitrary and capricious, and is an invalid rule promulgated without notice and comment. In the alternative, GE argues that Policy 6–PCB–2 states that permits are required only when the alternate methods are used to avoid incineration requirements, and because GE did not avoid any incineration requirements, it acted in accordance with the policy.

GE further argues that the violation of the use regulations found by the Presiding Officer is factually derivative of, and otherwise inseparable from, the disposal violation, and therefore improper as a separate basis of liability. In the alternative, GE asserts that because it was processing PCB transformers for disposal, the disposal regulations are the only source of authority for regulating its activities. Furthermore, if the use regulations do apply to its activities, GE argues, *inter alia,* that the distilled freon contains PCBs below the regulatory threshold of 50 ppm, and that the distillation process is totally enclosed and therefore authorized under the regulations.

Finally, GE maintains that even if liability is found, no penalty should be imposed because the use and disposal violations are one and the same, namely the failure to have a permit, and that, citing *Rollins, supra,* GE did not have notice of EPA's interpretation of the regulations that a permit was required.

ANALYSIS

A. *Regulatory Framework*

The decision by Congress in 1976 to regulate PCBs represented, and in many respects still represents, a unique departure from the manner in which Congress normally enacts environmental legislation. Usually, when Congress enacts pollution control legislation, it does so in broad terms by either focussing on a pollution medium—for example, air, water, and groundwater—or on categories of pollutants—for example, pesticide chemicals, toxic substances, and hazardous wastes. In either instance, it normally delegates the responsibility for identifying the particular pollutants that contaminate the medium, or that comprise the particular pollutant category, to the regulatory agency charged with responsibility for implementing the legislation (most often the Environmental Protection Agency). Congress departed from this pattern when it enacted TSCA, for it specifically singled out PCBs for special attention due to the concern it had over the persistency, ubiquity, and toxicity of PCBs. It imposed a complete ban on further production, processing, use, and distribution of PCBs in other than a totally enclosed manner, except in limited and tightly controlled circumstances, TSCA § 6(e)(2)(A), and directed the Administrator to prescribe regulations for their disposal, TSCA § 6(e)(1)(A). As explained in *In re Briggs & Stratton Corporation,* TSCA Appeal No. 81–1, at 2, n.2 (JO, Feb. 4, 1981):

> PCBs are singled out for special treatment under TSCA because of Congressional concern for the extreme hazards they pose to health and the environment. *See* Legislative History of the Toxic Substances Control Act pp. 212–213, 223–240, 508–509 ([Library of Congress, Environment and Natural Resources Policy Division] 1976). Before the agency may regulate other substances under TSCA, it must first find that their production or use presents or will present an unreasonable risk of injury to health or the environment, TSCA § 6(a). In the case of PCBs, however, Congress declared that regulatory action need not

> be predicated on independent findings of unreasonable risk.[10]

The PCB regulations promulgated by EPA mirror the Congressional concern over this family of chemicals and detail that concern with specific findings regarding their risks:

> [T]he Administrator hereby finds, under the authority of section 12(a)(2) of TSCA, that the manufacture, processing, and distribution in commerce of PCBs at concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States. This finding is based upon the well-documented human health and environmental hazard of PCB exposure, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing, processing, or distribution activities; the potential hazard of PCB exposure posed by the transportation of PCBs and PCB Items within the United States; and the evidence that contamination of the environment by PCBs is spread far beyond the areas where they are used. In addition, the Administrator hereby finds, for purposes of section 6(e)(2)(C) of TSCA, that any exposure of human beings or the environment to PCBs, as measured or detected by any scientifically acceptable analytical method, may be significant, depending on such factors as the quantity of PCBs involved in the exposure, the likelihood of exposure to humans and the environment, and the effect of exposure.

40 C.F.R. § 761.20.

The general ban on the manufacture, processing, use, and distribution of PCBs in other than a totally enclosed manner is only

[10] As further explained in *Briggs & Stratton,* "it is only when an exemption is sought from the restrictions and prohibitions imposed on PCBs pursuant to § 6(e) [of TSCA] that EPA must make findings concerning risks, and in those instances, the findings must clearly indicate that the proposed activity to be carried out pursuant to the exemption 'will not present an unreasonable risk of injury to health or the environment,' TSCA § 6(e)(2)(B)." *Briggs & Stratton, supra,* at 25. It is in part for this reason that the regulations, which exempt PCBs in quantities of less than 50 ppm from the general prohibitions and requirements of the regulations, set forth specific findings of unreasonable risk for PCBs in quantities in excess of 50 ppm. *See* 40 C.F.R. § 761.20.

lifted when the Administrator of EPA authorizes it, by rule, upon a finding that "such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment." TSCA § 6(e)(2)(B).

With this background, it is not surprising to find that the PCB regulations promulgated by EPA are comprehensive in scope, and are intended to establish prohibitions and requirements to carry out the congressional policy of only allowing continued manufacturing, processing, distribution, and use in limited and strictly controlled circumstances. *See generally* 40 C.F.R. Part 761. A violation of either a requirement or a prohibition contained in the regulations constitutes a violation of the Act.[11] Seven broad categories of PCB-related activities are covered by the regulations: manufacturing, processing, distribution in commerce, use, disposal, storage and marking. *See* 40 C.F.R. § 761.1(a). The first four activities (manufacturing, processing, distribution in commerce, and use) are grouped under Subpart B of the regulations; one activity—marking—forms a separate group of its own under Subpart C; and the remaining two (disposal and storage) are combined in Subpart D. *See* 40 C.F.R. Part 761. Knowing exactly which activity is at issue is important since it helps define which regulatory requirements and prohibitions are applicable to particular types of conduct.[12]

GE's appeal raises questions as to which category or categories of activities it was engaging in when it installed and operated the distillation system at its Chamblee facility. Specifically, was GE "using" PCBs when it reintroduced the distilled freon solvent into another drained PCB transformer, or was it merely engaging in an ancillary activity associated with the disposal of the PCB transformers? GE argues that "use and disposal are two separate activities

[11] Section 15 of TSCA states, in pertinent part, that it is "unlawful for any person to (1) fail or refuse to comply with * * * (B) any requirement prescribed by section * * * 2605 [TSCA § 6] of this title, (C) any rule promulgated * * * under section * * * 2605 [TSCA § 6] of this title * * *."

[12] It has been held that the person who engages in the identified activity is subject to the particular prohibitions and requirements pertaining to that activity. *In re City of Detroit, Public Lighting Department et al.*, TSCA Appeal No. 89–5 (CJO, Feb. 6, 1991) (disposal requirements apply to the person who causes the disposal of PCBs); *cf.* 40 C.F.R. § 761.1(b). If a person does not engage in a particular activity, the prohibitions or requirements pertaining to the activity do not apply to that person. *See City of Detroit, supra,* at 15, n.24 ("the disposal requirements apply to manufacturers, users, processors, and storers of PCBs only if such persons dispose of PCBs"); *In re Nello Santacroce & Dominic Fanelli, d/b/a Gilroy Associates,* TSCA Appeal No. 92–6, at 10 (EAB, Mar. 25, 1993) (same).

which are separately regulated [and] once something crosses the line from use to disposal there is no return." GE Brief at 31. GE also argues, in the alternative, that its activity is exempt from the use regulations because (i) the concentration of PCBs in the distilled freon solvent was less than the regulatory threshold of 50 ppm and (ii) the flushing and distillation took place in a totally enclosed manner, and therefore, is exempt from various prohibitions respecting use. The Region's complaint, on the other hand, assumes that GE was engaging in both categories of activities simultaneously (or nearly so), and consequently lodges charges against GE under both Subpart B (manufacturing, processing, etc.) and Subpart D (storage and disposal). Because of the dichotomy in views, it is appropriate to examine the charges against GE in relationship to these two categories and, where necessary, the two categories in relationship to each other.

B. *Disposal Issue*

1.

During the time period at issue GE was preparing PCB transformers for disposal and was therefore subject to the disposal regulations of Subpart D, 40 C.F.R. Part 761. Section 761.60(b)(1) authorizes two basic methods of transformer disposal: incineration in an approved incinerator or disposal in an approved chemical waste landfill.[13] No specific approval is required to implement either choice. Subpart D also makes provision, in § 761.60(e), for alternative methods of "destroying" PCBs and PCB transformers, provided the person proposing a particular alternative method "demonstrate[s] that [the] * * * alternative method can achieve a level of performance equivalent to § 761.70 incinerators or high efficiency boilers as specified in [§§ 761.60(a)(2)(iv) and 761.60(a)(3)(iv)] * * *." Unlike the two basic methods of disposal, selection of an alternative method of disposal requires advance EPA approval; in effect, the applicant must obtain a permit from EPA as a prerequisite to qualifying under § 761.60(e).

GE did not apply for or obtain a permit before it started using its distillation system.[14] As a result, its compliance with Subpart D must be evaluated under the applicable regulations governing disposal without a permit. An examination of those regulations reveals

[13] *See* note 17, *infra,* for text of relevant portions of 40 C.F.R. § 761.60(b)(1).

[14] Although GE has subsequently applied for and obtained a permit, that fact is irrelevant to the liability determination in this proceeding. GE submitted a formal application for approval of all of its distillation units. It did this to avoid controversy, but without conceding that approval was necessary. The application as amended was approved by EPA on November 14, 1989.

that the disposal of PCB transformers in a chemical waste landfill is specifically addressed in the regulations in § 761.60(b)(1)(i)(B), and that the requirements of this section are mandatory.[15] It provides that the transformer must first be "drained of all free flowing liquid, filled with solvent, allowed to stand for 18 hours, and then drained thoroughly." Next, "PCB liquids that are removed [from the transformer] shall be disposed of in accordance with paragraph (a) of this section [§ 761.60]." *Id.* Paragraph (a), in turn, prescribes a choice of three separate methods of disposal for such liquids: incineration in an approved incinerator, disposal in an approved chemical waste landfill, or disposal in an approved high efficiency boiler. 40 C.F.R. § 761.60(a)(3).

There is no dispute that GE's PCB transformers were properly drained before being sent to an approved chemical waste landfill for disposal. In addition, there is no question that the high-concentration PCBs first drained from the transformers were sent directly to an approved incinerator for disposal.[16] The issue of GE's compliance focusses instead on how to interpret GE's handling of the drained PCB-contaminated soaking fluid—referred to as "PCB liquids" in § 761.60(b)(1)(i)(B). This fluid, which consists of the solvent (freon) and the residues of PCBs washed from the previously drained transformer, was not sent directly to an approved incinerator, chemical waste landfill, or high efficiency boiler for disposal. Rather, the fluid was drained from the transformers and put through GE's distillation process during which the freon and PCBs were separated from each other, with the PCBs being sent off for disposal in an approved incinerator and the freon being reused for soaking other PCB transformers.

The term PCB liquids is not defined in the regulations, but there can be little doubt that the natural reading of the term in the context of § 761.60(b)(1)(i)(B)[17] encompasses the mixture of sol-

[15] In its brief, GE acknowledges that its disposal activities were conducted pursuant to § 761.60(b)(1)(i)(B). GE Brief at 28–29, 32, and 34.

[16] PCB mineral oil dielectric fluid drained from PCB transformers must be incinerated in an approved incinerator in accordance with § 761.60(a)(1). The options of disposing of such liquids in a high efficiency boiler or in a chemical waste landfill are not available. *See* 40 C.F.R. § 761.60(a)(3).

[17] The complete text of the regulation provides as follows:

> (b) PCB Articles—(1) Transformers. (i) PCB transformers shall be disposed of in accordance with either of the following:
>
> (A) In an incinerator that complies with § 761.70; or
>
> (B) In a chemical waste landfill which complies with § 761.75;

Continued

vent liquid *and* the PCB fluids rinsed from the transformers, *i.e.*, the whole of what is drained from the transformers at the conclusion of the 18-hour soaking period. To read "PCB liquids" as referring to just one of two components of these liquids suggests an ease of divisibility that has no support in the language of § 761.60(b)(1)(i)(B).[18] Nor does it have any support in physical reality, as evidenced by the necessity of subjecting the liquids to a complex distillation process in order to divide them into their constituent components. Thus, to qualify under § 761.60(b)(1)(i)(B), GE must demonstrate that it incinerated the *mixture* identified as PCB liquids, rather than any single component of the mixture or both components individually over a span of time.

GE argues that all PCBs, including the PCB liquids, were eventually disposed of in an incinerator in accordance with § 761.60. This argument ignores the plain language of § 761.60(b)(1)(i)(B). The fact that the PCB-contaminated component of the mixture may have been immediately incinerated in accordance with § 761.60(a) is irrelevant to whether the *mixture* itself, *i.e.*, the "PCB liquids," was incinerated. The same reasoning applies to the solvent component of the mixture. Thus, even though GE eventually disposed of the solvent component by incineration (after recycling it several times through several soaking operations),[19] that fact is irrelevant to whether the *mixture* itself was incinerated. The duty to incinerate applies to the PCB liquids themselves, as a mixture; no division of the mixture into separate

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> Provided, That the transformer is first drained of all free flowing liquid, filled with solvent, allowed to stand for at least 18 hours, and then drained thoroughly. *PCB liquids that are removed shall be disposed of in accordance with paragraph (a) of this section.* Solvents may include kerosene, xylene, toluene and other solvents in which PCBs are readily soluble. Precautionary measures should be taken, however, that the solvent flushing procedure is conducted in accordance with applicable safety and health standards as required by Federal or State regulations.
>
> (ii) [Reserved]

40 C.F.R. § 761.60(b)(1)(i)(B) (emphasis added).

[18] If there had been an intention on the part of the Agency to require incineration of just the PCB component of the PCB liquids, the thought was left unexpressed, even though it would have been a simple matter to accomplish. For example, rather than directing the disposal of "PCB liquids," the regulation could have simply directed the disposal of "PCBs contained in the solvent."

[19] In the course of the distillation process, approximately 10% of the solvent remains with the PCBs in the still bottom. Thus, after a series of distillation runs, all of the solvent is incinerated with the PCBs. Oral Arg. Tr. at 48.

components is reasonably contemplated by the language of § 761.60(b)(1)(i)(B).

Our reading of the term PCB liquids as referring to the mixture rather than its components means that, as a practical matter, use of a distillation system without special permission, *i.e.*, without a permit, is foreclosed to GE and all others who might wish to employ the same or similar processes for disposing of transformers. That this result flows from a reading of the language of the regulation, rather from any specific concern over the inherent safety of the process, is not particularly unexpected or problematic in view of the fact that techniques for safely separating such mixtures into their constituent parts were evidently either unknown or not sufficiently developed for inclusion in the regulation at the time it was written. *See, e.g.*, Oral Arg. Tr. at 33 (May 19, 1992); EPA App. Brief at 18. In other words, the possibility of being able to safely separate the PCB liquids into PCB and non-PCB components, whereby the decision to dispose of the non-PCB component in an incinerator could be postponed indefinitely (perhaps forever) by GE and other similarly situated persons, was probably a remote consideration, if it existed at all. *Tr.* at 35–36.

Our conclusion that no division of the mixture into components is permissible is reinforced by the fact that those who wrote the regulation knew how to make specific provision for, and authorize, the reuse of the solvent rinsate in appropriate circumstances. In 40 C.F.R. § 761.79, the reuse of solvent used for the decontamination of PCB containers is specifically authorized.[20] There is however, as we know, no such comparable reuse provision respecting the solvent

[20] 40 C.F.R. § 761.79 provides, in relevant part, as follows:

Decontamination

(a) Any PCB Container to be decontaminated shall be decontaminated by flushing the internal surfaces of the container three times with a solvent containing less than 50 ppm PCB. The solubility of PCBs in the solvent must be five percent or more by weight. Each rinse shall use a volume of the normal diluent equal to approximately ten (10) percent of the PCB Container capacity. *The solvent may be reused for decontamination until it contains 50 ppm PCB.* The solvent shall then be disposed of as a PCB in accordance with § 761.60(a). Non-liquid PCBs resulting from the decontamination procedures shall be disposed of in accordance with the provisions of § 761.60(a)(4).

(b) * * *

(Emphasis added.)

flushing procedure for PCB transformers prior to their disposal. Thus, we may presume that had the regulations been intended to allow reuse of GE's solvent in connection with the disposal of its PCB tranformers, they would have contained an explicit authorization to that effect, just as they do with respect to the decontamination of PCB containers. *See* 42 Fed. Reg. 26,524–569 (May 24, 1977) (PCB transformer disposal rules intentionally lack a decontamination rule similar to that for PCB containers "due to limited information on successful decontamination techniques for transformers."). Therefore, we are not inclined to look upon our reading of the term PCB liquids as being overly strict.

Accordingly, in view of the fact that the PCB regulations are written to regulate virtually every aspect of PCBs in a comprehensive manner, we reject an interpretation of § 761.60(b)(1)(i)(B) that would allow GE to separate the PCB liquids into separate components prior to disposal. To comply with the landfill disposal option, it is necessary to dispose of the entirety of the PCB liquids in accordance with the authorized disposal methods specified in § 761.60(a).[21] GE did not do that, at least not directly. Instead, by a series of additional steps, it took an unauthorized detour by sending part of the separated PCB liquids to an incinerator and retaining the remainder for reuse in rinsing additional transformers. As a consequence, GE did not comply with § 761.60(b)(1)(i)(B) and was therefore properly charged with, and found guilty of, violating the disposal regulations. This conclusion is based on the plain language of § 761.60(b)(1)(i)(B); GE's arguments that it did not have fair notice of what the law requires are rejected.

2.

GE's proffered defenses are purely legal in nature and, for the most part, are not even relevant to these charges; they in no way disprove or offset any of the elements that make up a violation of this regulatory requirement. For example, GE contends that the "central issue" of the case is whether it is required to have a permit issued under § 761.60(e).[22] This theory of the case is actually a distraction from the real issue, which is whether GE has satisfied the regulations for disposing of PCB transformers in a chemical waste landfill, of which the disposal procedures for PCB liquids are an integral part. *See* § 761.60(b)(1)(i)(B). A permit is not necessary to comply with the landfill disposal option or, for that matter, with

[21] *See* note 5, *supra.*

[22] GE Brief at 11 (March 9, 1992); Oral Arg. Tr. at 49–50 (May 19, 1992).

any other requirement respecting the disposal of PCBs and PCB Items under Part 761 of the regulations. Indeed, the formal complaint that instituted this enforcement action against GE nowhere alleges that GE is required to have a permit before it can avail itself of the landfill disposal option. There are lawful procedures and processes for GE and others to follow without a permit if they wish to dispose of PCB transformers, including disposal pursuant to the landfill disposal option. To comply, GE and others may simply follow the disposal procedures for PCB transformers and PCB liquids specified in § 761.60(b)(1)(i)(B).[23] A permit, on the other hand, is a regulatory tool that allows EPA to conduct a case-by-case evaluation of alternative disposal techniques prior to their implementation by the permit applicant. If EPA approves the alternative technique, the permit authorizes the permittee to deviate from the regular (non-permit) requirements for disposal that would otherwise be applicable. As such, possession of a permit protects a permittee from charges of noncompliance with regulatory requirements that could otherwise be lodged against it.[24] Without having applied for a permit, however, the protection afforded by a permit is obviously unavailable and, therefore, can have no material bearing on a case in which a non-permittee is charged with such a violation of the regular (non-permit) requirements for disposal. This is the situation in which GE finds itself. Under the circumstances, GE's efforts to convince us that the central issue in the case is whether it is required to have a permit are utterly without force.

Since GE did not have a permit, GE is forced to argue that none is required for it to employ a distillation system in disposing

[23] The Complaint does not specifically mention this section number of the regulations; rather, it refers to the landfill option requirement descriptively, i.e., as a "chemical waste landfill that complies with 40 C.F.R. § 761.75." Complaint at 1 (Count 1, ¶4); Although a Complaint is supposed to contain a reference to "each provision of the Act and the implementing regulations which respondent is alleged to have violated," 40 C.F.R. § 22.14(a)(2), the fundamental purpose of the Complaint is to give the respondent notice of the charges against it. We think that based on the record of this proceeding there is no reasonable basis for doubting that GE received such notice in this case. Indeed, as established in note 15 *supra*, GE acknowledged that its disposal activities were conducted pursuant to § 761.60(b)(1)(i)(B).

[24] The relationship of the permit to the alleged disposal violation is abundantly clear from the complaint, where it cites § 761.60(e), the permitting provision for alternative disposal technologies.

> Disposing of PCBs at concentrations greater than 50 ppm in any manner other than referenced for disposal in a high efficiency boiler, or chemical waste landfill that complies with 40 C.F.R. § 761.75 * * * violates 40 C.F.R. § 761.60(a), *unless authorized at 40 C.F.R. § 761.60(e).*

Complaint at 1 (Count I, ¶4) (emphasis added).

of PCB transformers. In so arguing, however, GE is immediately confronted with the fact that it is unable to cite any regulatory language that specifically authorizes its distillation activities without a permit (for the obvious reason that there is none, as explained previously). To shift attention away from this unpleasant reality, GE has chosen to indulge in yet another effort at distraction, this one consisting of an attempt to shift attention to the details of EPA's permitting policy. Basically, GE contends that (i) EPA's policy respecting permitting is flawed, or (ii) alternatively, use of its distillation system is actually consistent with EPA's policy respecting permitting. It is not necessary, however, to delve into each of the arguments GE musters in support of these two themes. It suffices to discuss the highlights since, as previously explained, permitting is not the issue. Indeed, GE did not have a permit, and the disposal count of the complaint did not charge GE with violating the terms of a permit.[25]

3.

According to GE, EPA's permitting policy misinterprets the disposal regulations and was adopted without appropriate notice and opportunity for comment. Before addressing these contentions directly, it will be helpful to briefly examine the background and scope of the policy, which is embodied in a document referred to as Policy

[25] It is true that the Presiding Officer makes the statement that GE is required to have a permit. Initial Decision at 41. Properly read, however, this statement is simply *dictum* explaining that GE is required to have a permit *if it wishes to employ its distillation process* to dispose of its PCB-filled transformers. As explained in the text, *supra*, no permit is required to dispose of the transformers if GE complies fully with the landfill disposal option specified in § 761.60(b)(1)(i)(B), including disposing of the drained PCB liquids in accordance with § 761.60(a).

As a separate but related matter, the Presiding Officer's analysis of the permit provision, § 761.60(e), is rightly subject to criticism for having indulged in a small, but ultimately immaterial measure of flawed logic to arrive at that conclusion. Specifically, GE explains that the Presiding Officer's analysis proceeded as follows: (i) the regulatory definition of disposal in § 761.3 includes destruction, the term used in § 761.60(e); (ii) the regulatory definition of disposal also includes the term decontamination, such as by distillation; and (iii) therefore, destruction and distillation are equivalent for purposes of § 761.60(e), thus allowing EPA to authorize GE's distillation process under that section even though the section speaks only of alternate methods of *destroying* PCBs. GE correctly points out that simply because the terms destruction and decontamination (distillation) appear in the definition of the term "disposal" in § 761.3 does not mean that the two terms can be equated with each other for purposes of § 761.60(e), which speaks only of alternate methods of *destroying* PCBs. Apart from agreeing that there is a flaw in this logic, we need not carry it to the point of agreeing with GE that § 761.60(e) does not authorize EPA to issue permits for alternate disposal processes, such as GE's, that employ distillation as part of the process leading to the ultimate destruction of PCBs.

6–PCB–2. Specifically, the Policy addresses the following question: "Does the physical separation of PCBs from liquids and solids require EPA approval?" Policy 6–PCB–2 at 1. It concludes that approval is required for "physical separation activities that can be construed to be part of, or an initiation of a disposal activity." It also concludes that no approval is required in a non-disposal context, as when transformers are being serviced, since servicing of in-use transformers is not governed by the disposal regulations.[26] The Policy notes that from 1979 to 1982 the Agency interpreted "disposal" differently than it does now, and physical separation was not considered to be a disposal activity in the absence of any alteration or destruction of PCB molecules.[27] According to the Policy, the previous interpretation had "the potential to create a major avenue for avoiding the PCB disposal requirements." Because of that, "EPA reviewed its interpretation of the PCB regulations regarding physical separation and found that the original PCB rules clearly do not exempt PCB processing activities (including physical separation techniques) from the disposal requirements." The author of the Policy reasoned that "unless an activity [*e.g.*, physical separation] is authorized by the disposal regulations, one must obtain specific approval for the activities * * * in accordance with section 761.60(e) (1982)." Policy at 2. Since this aspect of the Policy comports with the interpretation of the regulations contained in this decision, we obviously find no fault in it and believe that its authors were fully justified in changing the Agency's previous view towards physical separation of liquids and solids in the context of disposal activities.

Absent from Policy 6–PCB–2, however, is any detailed or compelling explanation of how EPA can give its approval under § 761.60(e) for an alternative method of disposing of PCBs which does not involve destruction of PCB molecules. In other words, insofar as an examination of the Policy reveals, the Agency's authority to approve such a method of disposing of PCBs rests on the unstated assumption that physical destruction of the molecules is not an essential element of the approval process under § 761.60(e). GE's attack on Policy 6–PCB–2 can best be understood as a challenge to that unstated as-

[26] Policy 6–PCB–2 states that EPA approval is not required for "activities which process PCBs during [certain] authorized servicing activities." The fact that the answer to the question posed in the Policy varies, depending on the nature of the activity (use versus disposal), is not unsurprising in view of the separate, and sometimes, mutually exclusive, regulatory regimes established in Part 761 for disposal and use activities. *See* text under the heading, "A. Regulatory Framework."

[27] Policy 6–PCB–2 nevertheless provides scant details regarding (i) who was responsible for the adoption of the previous interpretation, (ii) its legal or analytical basis, or (iii) even whether it had ever been reduced to writing.

sumption, even though as explained earlier, an attack on EPA's stance *vis-a-vis* permitting is actually a diversion from the real central issue in the case, namely, did GE comply with the disposal requirements of § 760.60(b)(1)(i)(B), not was GE required to have a permit.

GE claims that authorizing non-destructive distillation technologies pursuant to permits under § 761.60(e) is contrary to the plain language of that provision, which, in its opinion, limits issuance of permits to persons who employ *destructive* technologies. In effect, GE is arguing that the regulations pose a dilemma for the Agency: the Agency must either adopt GE's preferred interpretation, which views distillation as an unregulated adjunct of disposal, or, because the plain language of § 761.60(e) refers only to destructive alternatives, the Agency must recognize that it has no authority under § 761.60(e) to grant permits for non-destructive technologies. *See, e.g.,* GE Brief at 24–25. The first half of the dilemma is obviously contrary to the Agency's current position in this case, whereas the second half is contrary to the Agency's current practice of issuing permits for non-destructive alternative technologies. If the Agency follows either course, therefore, it will have to concede that Policy 6–PCB–2 is in error.

Despite the prominence given by GE to the dilemma and the unstated assumption that underlies Policy 6–PCB–2, the Board does not consider it necessary to plumb the depths of these matters. We reach this conclusion for the reasons previously indicated, namely, the Agency's authority to authorize alternative methods of destroying PCBs and PCB Items under § 761.60(e) has not been shown to have any material bearing on a case in which a non-permittee (GE) is charged with a violation of the non-permit disposal requirements. The regulations are structured to require compliance with the specific disposal methods set forth in the regulations unless a permit is obtained to use an alternative disposal method. GE did not have a permit and therefore whatever doubts it might wish to create or raise regarding the Agency's authority to issue a permit in any specific set of circumstances are irrelevant to the charges brought against GE. Even if we were to assume that the Agency lacks the authority to authorize distillation as an alternative disposal method (for example, because § 761.60(e) might be crafted too narrowly to embrace non-destructive techniques), that would not excuse GE from complying with the regular (non-permit) disposal requirements. It would merely call into question the Agency's authority to excuse others, who have applied for and obtained permits, from the duty

to comply with those requirements. It might also suggest a need for the Agency to amend the alternative disposal regulation. But it most certainly would not legitimize unauthorized disposal methods that are contrary to the regular (non-permit) disposal requirements. Therefore, whether Policy 6–PCB–2 misinterprets the meaning of the term disposal, as GE alleges, and whether it is also a substantive rule adopted without notice and opportunity for comment, or applied arbitrarily, as GE also alleges,[28] is not critical to the analysis of the disposal violations with which GE has been charged in this case.

4.

GE also argues, in the alternative, that its distillation process is consistent with Policy 6–PCB–2 (assuming that it can legally apply to non-destructive technologies), even without a permit. GE Brief at 15–19. Among other things, GE maintains that the Agency is ignoring the language of the Policy when it attempts to subject all physical separation methods that are part of a PCB disposal process to the permit requirements of § 761.60(e). GE points to the following two sentences in Policy 6–PCB–2, and asserts that EPA lays too much emphasis on the second sentence while ignoring the plain meaning of the first:

> The physical separation of PCBs from liquids and solids requires an approval if the use or disposal of these liquids and solids avoids, or is an alternative to, the disposal requirements that would have applied to the original material before separation. An approval is required for physical separation activities that can be construed to be part of, or an initiation of a disposal activity.

Policy 6–PCB–2, at 1. According to GE, when the first sentence is given appropriate weight, no permit is required because its disposal process, including its solvent distillation system, was not used as an alternative to ultimate incineration. In making this argument, however, GE conveniently ignores the fact that the first sentence is not limited in scope to incineration, *i.e.,* it does not say that physical separation requires an approval if the disposal of the PCBs "avoids, or is an alternative to, *incineration.*" Rather, the first sentence plainly speaks of avoidance of *disposal requirements.* In this

[28] GE Brief at 19 et seq. (asserting that Policy 6–PCB–2 is an invalid legislative rule issued without complying with the requirements of the Administrative Procedure Act); *see also id.* at 25 (asserting that Policy 6–PCB–2, as construed by the ALJ, is arbitrary and capricious).

case, the disposal requirements applicable to GE, as previously established, include disposing of the PCB liquids, as a whole, in an approved incinerator, an approved landfill, or an approved high efficiency boiler, in accordance with § 761.60(a)(3). *See* 40 C.F.R. § 761.60(b)(1)(i)(B). There is no authority to dispose of PCB liquids by separating the mixture into its component parts and then using or disposing of the parts individually. Thus, GE's disposal process, "avoids, or is an alternative to, the disposal requirements," and there is no merit to GE's contention that the Policy condones implementation of its process without a permit, merely because all PCBs eventually reach an incinerator where they are destroyed.

GE also maintains that its distillation process is consistent with Policy 6–PCB–2 because it is wrong to assume that its distillation process falls within the definition of disposal. GE Brief at 15. GE's analysis in support of this contention is not easy to discern, *see* GE Brief at 15–19, but we believe it runs along the following lines: Policy 6–PCB–2 does not require approval for the GE distillation process under § 761.60(e) because (i) the process is non-destructive and (ii) avoidance of PCB disposal requirements is neither the intent nor the result of the distillation process. *See* 40 C.F.R. § 761.60(b)(1)(i)(B). Further, because of the foregoing, the distillation process itself is not subject to the disposal requirements set forth in § 761.60(a). We reject this analysis.

What GE is attempting to do by this line of reasoning is to focus exclusively on the distillation phase of its disposal activities so that GE can characterize it to suit its purposes. For example, because no destruction is actually involved in distilling the PCB liquids, that step is supposedly benign and not subject to the disposal regulations. In this manner GE hopes that we will overlook the overall design of its disposal activities and thereby escape regulation. Plainly, however, there is no basis in the regulations for such a divide and conquer strategy. There are at least two bases for rejecting it.

First, as noted above and elsewhere in this decision, the entire process of disposing of PCB transformers in a chemical waste landfill is addressed in a comprehensive manner in the regulations at § 761.60(b), which includes disposing of the drained PCB liquids, as a whole, in an approved incinerator, an approved landfill, or an approved high efficiency boiler, in accordance with § 761.60(a)(3). *See* 40 C.F.R. § 761.60(b)(1)(i)(B). GE did not do that; instead, it distilled the PCB liquids for the purpose of separating the solvent from the PCBs so that it could then dispose of the PCBs and reuse the solvent

to rinse PCB transformers designated for disposal. As explained before, no such division of the PCB liquids is contemplated by the regulations; they must be left intact.

Second, even if division of the PCB liquids were otherwise permissible under the regulations, the process of distilling them is itself a form of disposal when undertaken to remove contaminants. The definition of disposal in § 761.3 includes "actions related to containing, transporting, destroying, degrading, *decontaminating,* or confining PCBs." 40 CFR § 761.3 (emphasis added). The distillation phase of GE's disposal activities clearly fits within this definition of disposal because the objective of the process is to remove contaminating PCBs from the drained PCB liquids (so that the solvent can be reused in other transformers). Therefore, even though we do not believe that it is either appropriate or necessary to separate the distillation phase of GE's disposal activities from the other phases, it can be seen that this phase is also properly characterized as disposal under § 761.60(a).[29] Consequently, there is no merit to GE's assertion that it is wrong to assume that its distillation process falls within the definition of disposal.

Accordingly, for the reasons stated, we conclude that GE violated the disposal requirements, as alleged in Count I of the complaint. We turn next to the use violations alleged in Count II of the complaint.

C. *Use Issue*

GE makes several arguments in defense of the use violations alleged in the complaint. For example, it argues that the activities associated with the alleged use violations (namely, reintroduction of distilled solvent into other transformers) were carried out in a totally enclosed manner and are exempt from the various use require-

[29] At oral argument before the Board, counsel for GE rejected this interpretation on the grounds that, under the definition of disposal, disposal does not occur unless the useful life of the PCBs has been terminated. (The first sentence of the disposal definition in § 761.3 provides that disposal "means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items.") Counsel further contended that the useful life of the distilled PCBs in GE's case did not end in the distillation unit, but rather occurred when the distilled PCBs were incinerated. Tr. at 11 ("[t]here's no ending the useful life here in this distillation unit * * * [it] "occurred * * * in an incinerator."). We reject this argument. The useful life of the PCBs ended, at the very latest, when the transformer owners decided to dispose of the transformers. At that point, the original use for which the PCBs were employed in the transformers came to an end and no further legitimate use of the PCBs was permissible under the law.

ments and prohibitions contained in the regulations. GE Brief at 34 *et seq.* It also contends that the alleged use violations lack any merit because the Agency failed to establish that the PCB content of the reintroduced solvent was at or above regulated levels, whereas the ALJ found that the solvent in fact had "less than the regulatory threshold of 50 ppm, and, most likely * * * less than the practical detection limit of two ppm." *Id.* at 27–28. GE further contends that the alleged use violations are entirely derivative of the alleged disposal violations and therefore does not constitute a separate offense under the law. It is not necessary for us, however, to address all of the foregoing defenses to the alleged use violations, for GE also argues in the alternative that because it was processing PCB transformers for disposal, its activities are regulated only by the disposal regulations. Because we agree with this alternative argument, it effectively renders further discussion of any other aspect of the parties' use arguments moot. Accordingly, the remaining discussion in this part will focus on GE's alternative argument.

In our opinion, the regulations governing PCB use and disposal are intended to be mutually exclusive concepts as they apply to GE and similarly situated persons: PCBs are either in use or they are in some state of disposal, but they are not both simultaneously.[30] As GE explains, "use and disposal are two separate activities which are separately regulated [and] once something crosses the line from use to disposal there is no return." GE Brief at 31. The Region does not respond to this assertion. Nevertheless, the underlying truth of the assertion is borne out by an examination of the disposal regulations, *see generally,* 40 C.F.R. Part 761, Subpart D (Storage and Disposal), which by their terms are not activated until PCBs are removed from service and designated for disposal. Once disposal is undertaken, the PCBs and PCB Items are governed by the disposal regulations. As explained in a prefatory note to the disposal regulations,

> Note: This subpart [Storage and Disposal] does not require removal of PCBs and PCB Items from service

[30] In contrast, some of the other categories of activities covered by 40 CFR Part 761 are not mutually exclusive. For example, the transportation category will apply whenever PCBs are being transported, regardless of whether the PCBs are in use or designated for disposal. *See, e.g.,* Hearing Tr. at I–38. A similar lack of mutual exclusivity applies to the storage regulations. *Id.*

The only explanation in the PCB regulations of the interrelationship of the various subparts of Part 761 of the PCB regulations appears in a brief passage in 40 CFR §761.1(c). Unfortunately, it does not shed any light on the issues raised in this proceeding.

> and disposal earlier than would normally be the case. However, *when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations.* * * * Other subparts are directed to the manufacture, processing, distribution in commerce, and use of PCBs and may result in some cases in disposal at an earlier date than would otherwise occur.

40 C.F.R. § 761.60 (1986) (prefatory note) (emphasis added). Although this language does not, by its terms, explicitly preclude the Subpart B use regulations from coming into play after PCBs and PCB Items have been "removed from service and disposed of," such a possibility seems remote in light of the specific statement in the prefatory note that disposal of such PCBs and PCB Items "must be undertaken in accordance with these regulations," *i.e.,* referring specifically to the *disposal regulations.* In other words, the prefatory note expresses the notion, consistent with the phasing-out of PCBs as contemplated by the enabling legislation, that these potentially hazardous materials are to be eliminated once their permissible uses have ended. As explained by Dr. John Smith, one of the Region's witnesses, "[t]he ultimate objective of the regulations * * * for the allowed uses was to allow use of PCB material for the length of their usefulness as long as that use didn't present a risk. * * * But once those authorized uses ended, they were to be disposed of. Once there was a determination for disposal, there was no going backwards from disposal to use." Tr. at I–31, 32; *see also* 44 Fed. Reg. 31529 (May 31, 1979) ("the intent of the law is for PCB activities to be banned"). In other words, the disposal determination signals that the PCBs are entering a one way street for purposes of further regulatory analysis. Therefore, it would be inconsistent with the governing theme of TSCA § 6(e) to assume that the draftsmen of the regulations contemplated any reactivation of the Subpart B use regulations once the PCBs and PCB Items had been "removed from service and disposed of." The Subpart B use regulations are designed to prescribe prohibitions for the use of PCBs and PCB Items that are legitimately in use prior to their removal from service and disposal. *See generally* 40 CFR Part 761, Subpart B.[31] There is no suggestion anywhere

[31] There is one place in the Subpart B regulations, 40 C.F.R. Part 761, Subpart B (Manufacturing, Processing, Distribution in Commerce, and Use of PCBs and PCB Items), that mentions disposal of PCBs, but it serves to highlight the contrasting treatment of disposal activities compared to nondisposal activities such as manufacturing and use. *See* 40 C.F.R. § 761.20(c). Nondisposal activities are subject to a strict prohibition against processing and distribution *unless* there is a specific exemption

Continued

that the prohibitions contained in these Subpart B regulations should govern illegitimate "uses" of PCBs and PCB Items that have been removed from service and disposed of, i.e., uses that are illegitimate in the sense of being inconsistent with the requirements for disposal in the Subpart D regulations. Rather, such uses become unlawful by reason of their inconsistency with the disposal regulations.

Accordingly, for the reasons stated, we do not believe that the use violations alleged in the complaint, and upheld in the Initial Decision, can be sustained. As discussed above, GE's activities are related solely to disposal.

PENALTY

Count I of the Complaint alleges that between March 16, 1987 and August 13, 1987, GE violated 40 C.F.R. § 761.60(a) by disposing of the PCB-contaminated freon in the distillation unit without a permit. The Region proposed a $125,000 penalty for this violation. Count II of the Complaint alleges that between March 16, 1987 and August 13, 1987, GE violated 40 C.F.R. § 761.20(a) and § 761.30 by using the distilled freon to soak PCB transformers. The Region proposed a $100,000 penalty for this violation.

The Presiding Officer sustained the violations alleged in both counts of the complaint, but he reduced the penalties in each instance. In assessing a penalty for the alleged violations, the Presiding Officer disregarded the 1980 PCB Penalty Policy because the risks underlying its assumptions (actual or potential harm to humans) were not present in this case where, in his view, the violation resulted from an expansive definition of the term "disposal" and not from any actual or potential discharge of PCBs. Instead, according to the Presiding Officer, the only risk presented was the threat to Agency control over the regulation of the PCBs. In light of this relatively small risk, and the environmental benefits gained from the use of the distillation method, the Presiding Officer reduced the civil penalty to $25,000 for Count I and $15,000 for Count II, for a total aggregate penalty amount of $40,000.

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in place or they are otherwise exempted in the regulation. *Id.* Disposal activities in contrast are identified as activities that may be undertaken without any specific exemption. *See* 40 C.F.R. §§ 761.20(c)(2) and (c)(4); 40 C.F.R. § 761.20(c) (disposal activities may be conducted "without an exemption [from a general ban on processing or distributing PCBs], under the conditions specified [in subparagraphs (c)(1)–(6) of § 761.20].") This separate (and special) treatment of disposal activities further serves to emphasize the mutually exclusive relationship of the use and disposal regulations.

Based on our dismissal of Count II of the complaint, the only remaining task before us is to decide what penalty amount is appropriate for the disposal violations in Count I of the Complaint. Since the Region did not appeal the Presiding Officer's reduction of the proposed penalty, our focus is necessarily limited to GE's appeal of the penalty portion of Count I of the complaint.[32]

GE first argues that no penalty should be imposed because no violation occurred. Since we have determined that the violation alleged in Count I should be sustained, we reject this argument as grounds for not imposing a penalty. GE next argues that, even if the violation is sustained, we should nevertheless not impose any penalty, citing several reasons, including the lack of environmental harm and the environmental benefits that are supposedly derived from use of the distillation process. As to these contentions, we believe they were adequately taken into account by the Presiding Officer by reducing the proposed penalty from $125,000 to $25,000. GE also argues that no penalty should be imposed because the regulations do not give sufficient notice that a permit is required before engaging in the distillation activities. GE relies on *Rollins Environmental Services (N.J.) Inc.* v. *EPA*, 937 F.2d 649 (D.C. Cir. 1991), in support of this contention. Although that case upheld an Agency finding that Rollins Environmental Services (NJ), Inc. had violated an Agency regulation, the court nevertheless nullified the Agency's penalty assessment against Rollins on the grounds that the meaning of the regulation was uncertain and therefore failed to provide adequate notice of the regulation's substance. The court appeared to be saying

[32] As noted in the Board's April 20, 1992 order granting oral argument, the Region did not appeal the initial decision despite the significant reduction in the penalty amount. The Board therefore denied the Region's request that the $40,000 penalty assessed by the Presiding Officer be increased to the amount proposed in the Region's complaint, $225,000. The Region requested reconsideration of this order, which the Board denied by order dated May 6, 1992. Two considerations entered into that conclusion. First, unlike the Federal Rules of Appellate Procedure (Rule 4(a)(3)), the Agency's rules do not provide additional time for the filing of a cross-appeal. Second, the Agency's rules do, however, provide in 40 C.F.R. § 22.30(a)(2) that "Reply briefs shall be limited to the scope of the appeal brief." Taken together, these two considerations make clear that the omission from the Agency's rules of a provision similar to the Federal Rules of Appellate Procedure was no accident, and a party desiring to change the judgment contained in initial decision is obligated to file its own appeal to secure such review as of right. As a practical matter, that may mean that a party who is dissatisfied with a small portion of the judgment, but who is otherwise willing to accept the judgment if the other party accepts it, may have to file a protective appeal to preserve its right to contest the portion of the decision that is not to its liking. Otherwise, it will be foreclosed from contesting that, or any other, aspect of a judgment in the event the other party does appeal the decision. *See* Robert L. Stern, Appellate Practice in the United States (2d ed. 1989), at 123–126.

that to assess a penalty under these circumstances would deprive Rollins of due process. *Id.* at 654.

The Presiding Officer rejected the application of *Rollins* to this case and so do we. Our reasons for doing so, however, are based on the discussion previously set forth in this opinion. Specifically, the regulation requiring GE to dispose of the PCB transformers and PCB liquids by one of the methods specified in § 761.60(a) is unambiguous. Even if the Board or a reviewing court subsequently determined that the Agency lacks the authority to authorize distillation as an alternative disposal method (for example, because § 761.60(e) might be crafted too narrowly to embrace non-destructive techniques), we do not believe that such a result is relevant to the penalty determination based on *Rollins*. As previously explained, whenever one wishes to dispose of PCBs the regulations are structured to require compliance with the specific disposal methods set forth in the regulations, unless a permit is obtained to use an alternative disposal method. This structure is the result of a comprehensive regulatory scheme for a special, congressionally-targeted class of chemicals, the ultimate fate of which is its destruction following the useful life of the equipment in which the PCBs are used. The handling of the PCBs and related equipment is intended to be regulated in a comprehensive manner, with no room for deviation from prescribed disposal procedures except under the strict supervision of a pre-approved permit system. Thus, persons handling these materials have a choice of either following the prescribed procedures or obtaining a permit to deviate from them. *There is no third option of improvising without a permit while complying with some but not all of the prescribed procedures.* Thus, when GE elected to dispose of the PCB transformers in an approved chemical waste landfill without a permit, it was required to follow the prescribed procedures for disposal of PCB transformers in a chemical waste landfill. *See* § 761.60(b)(1)(i)(B) (landfill disposal of PCB transformers). In accordance with § 761.60(b)(1)(i)(B), these procedures direct GE to dispose of the PCB liquids as a mixture, in accordance with § 761.60(a), which provides for three methods of disposal, as prescribed in § 761.60(a)(3). GE did not have the option of improvising on these procedures by first distilling the PCB liquids, reusing the non-PCB component of the distillate, and disposing of both components separately and in stages. Without a permit, GE's choices were narrowly limited but, above all, clear. Therefore, even if it were subsequently held that the Agency lacked the authority to authorize a distillation process pursuant to the permit procedures, that result is irrelevant to GE's responsibility to follow the prescribed procedures for disposal of the PCB trans-

formers in a chemical waste landfill in the absence of a permit. Accordingly, there is no basis for applying *Rollins* to the disposal violation committed by GE.

CONCLUSION

For the reasons stated herein, we uphold the disposal violation alleged in Count I of the complaint and dismiss the use violation alleged in Count II of the complaint.[33] GE shall pay a civil penalty in the amount of $25,000 within sixty (60) after receipt of this decision unless otherwise agreed by the parties. Payment shall be made by forwarding a cashiers check or certified check, payable to the Treasurer, United States of America to:

U.S. EPA—Region IV
Regional Hearing Clerk
P.O. Box 100142
Atlanta GA 30384

So ordered.

[33] The findings and conclusions of the Initial Decision are adopted and incorporated in this decision to the extent that they are consistent with this decision.