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ENVIR. APPEALS BOARD

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

ORIGINAL

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IN RE: : TSCA Appeal No.

ENVIRONMENTAL PROTECTION : 06-01

SERVICES, INC. :

Docket No. TSCA-03-2001-0331 :

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ORAL ARGUMENT

The EPA oral argument, was held pursuant to notice, on Wednesday, December 13, 2006 at 10:30 a.m., Scott C. Fulton, EPA Appeals Board Judge, presiding.

EPA APPEALS BOARD JUDGES:

KATHIE A. STEIN

ANNA L. WOLGAST

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P R O C E E D I N G S

(10:30 a.m.)

JUDGE FULTON: Good morning and welcome.

Argument this morning will proceed in accordance with the Board's Order dated October 4, 2006.

As specified in that Order, each side will have 30 minutes for argument. Environmental Services, Inc., also known as EPS, as the Appellant in this proceeding, will proceed first, and may reserve five minutes of its allotted time for rebuttal, if it wishes.

We received a motion from Region III in this matter, requesting from the Board, assistance in narrowing the issues for purposes of argument. We gave this consideration, but declined to accede to that request, preferring, instead, to leave it to the parties to prioritize their arguments as they saw fit, in the time allowed for argument this morning.

As the parties are aware, a confidential business information claim has been asserted with respect to certain information in the record of this case. It's my understanding that the parties do not

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1 intend to refer to confidential business information
2 during the course of this argument.

3 However, in the event that a question by
4 the Board should call for you, or if you should
5 otherwise find it helpful to refer to confidential
6 business information, please so advise the Board
7 before answering the question. We will then ask you
8 to defer that answer till the end of the hearing, at
9 which time, if necessary, we will close the hearing
10 and clear the courtroom, in order that we may
11 preserve the confidentiality of anything that's
12 alleged to be claimed as confidential business
13 information.

14 We look very much forward to hearing the
15 parties' arguments this morning, and your
16 perspectives on the issues presented to us, and while
17 we will no doubt benefit from your prepared remarks,
18 we trust that you will appreciate that the primary
19 value of oral argument to the Board, is in bringing
20 further clarity to our understanding of the arguments
21 presented in the briefs, and we hope that you'll be
22 indulgent of and responsive to our questions, to the

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1 best of your ability.

2 So, let us begin then by asking counsel to
3 identify themselves for the record, starting with
4 counsel for EPS.

5 MS. HWANG: Good morning, Your Honor,
6 Marian Hwang with Miles & Stockbridge, on behalf of
7 the Appellant, and with me is co-counsel Mr. Edward
8 Kropp, with the firm of Jackson & Kelly.

9 JUDGE FULTON: And my understanding is
10 that you'll both be presenting as part of the
11 argument this morning?

12 MR. KROPP: Correct, Your Honor.

13 JUDGE FULTON: Okay. And for EPA Region
14 III?

15 MS. JAMIESON: Cheryl Jamieson, US EPA
16 Region III. I will be presenting the oral argument.
17 I do have co-counsel available, if necessary.

18 JUDGE FULTON: And your co-counsel?

19 MS. JAMIESON: John Ruggero.

20 JUDGE FULTON: Okay, very good. All
21 right, without further ado, then, Ms. Hwang?

22 MS. HWANG: Good morning, Judges Wolgast,

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1 Fulton, and Stein.

2 May it please the Court, my name is
3 Marian, and, as I said earlier, I, along with co-
4 counsel, Mr. Kropp, do represent the Appellant,
5 Environmental Protection Services, EPS, in this
6 matter.

7 We will be dividing our argument in two:
8 I will be devoting approximately 12 minutes for the
9 defense of selective enforcement, and Mr. Kropp will
10 be devoting another 12 minutes in defense of the
11 substantive matters contained in the Complaint.

12 We will reserve five minutes for rebuttal.

13 JUDGE FULTON: Thank you.

14 MS. HWANG: For the reasons more fully set
15 forth in our brief, we respectfully request that the
16 initial Order be reversed.

17 We know this Court has reviewed the briefs
18 and is familiar with the applicable law, but we would
19 like to take a moment, if we may, to present a few
20 issues and arguments to elucidate the issues and put
21 them in proper perspective for the Court, however, we
22 are at your pleasure and we will be happy to take

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1 questions now or later, as the Court wishes.

2 But if I may, to prevail in this case of
3 selective enforcement, EPS must show, among other
4 factors, that other similarly-situated violators were
5 left untouched.

6 And this case is before the EAB precisely
7 because a similarly-situated violator was left
8 untouched. We are before this Board because of a
9 need for a level playing field and the need for the
10 TSCA PCB regulations set forth at 40 CFR 761, to be
11 applied in a uniform, consistent manner, which we
12 believe has not been done in this case.

13 This is a case about two similar
14 companies, both companies having similar operations,
15 similar equipment, at one point, similar customer
16 bases, providing the same type of services -- PCB
17 waste disposal services.

18 And yet that is where the similarity ends.
19 We have two different regions, Regions II and III,
20 and headquarters, applying, purportedly, the same
21 laws, the same regulations, but reaching vastly
22 different resulting conclusions.

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1 On the one side, you have EPS, the
2 Appellant in this case. It's a small company located
3 in West Virginia, under the jurisdiction of Region
4 III.

5 Over the years, it lost its customer base,
6 utility customers, to a company called G&S.

7 EPS is regulated under Part 761. It has a
8 commercial storage approval permit; it's subject to
9 permit limits and storage limits; it has financial
10 assurances; it has a closure plan; and it's subject
11 to all of the panoply of requirements contained in
12 761.

13 On the other side, you have another
14 similar company, G&S. It's located in New Jersey in
15 Region II. It's a very large company. Today, we
16 believe it is the largest PCB waste disposal company
17 in the United States.

18 For over ten years, EPS has complained
19 about the fact that G&S has been allowed to operate
20 outside of the scope and purview of 761, and, in
21 fact, G&S does not have a commercial storage
22 approval; it's not subject to any limits; no

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1 financial assurances; no closure plan; it is
2 virtually unregulated.

3 And how do we know this? Not only have we
4 mentioned the fact that EPS's customers have, over
5 the years, gone to G&S, but if you look at Exhibit --
6 Plaintiff's Exhibit 401 in the record, Your Honor,
7 here is a brochure from EPS -- I'm sorry, G&S, which
8 states that not only has it grown into the largest
9 oil-filled electrical equipment disposal facility on
10 the East Coast, but that it also provides other
11 services such as onsite dielectric fluid disposal of
12 all PCB levels, and that it also handles electrical
13 equipment disposal and onsite field dismantling.

14 JUDGE STEIN: Let me ask you a question:
15 Assuming that we were to agree with you,
16 hypothetically, that the two companies are treated
17 differently for regulatory purposes, how does that,
18 in and of itself, establish the claim of selective
19 enforcement?

20 Don't you have additional things to prove
21 in the form of bad faith?

22 MS. HWANG: Yes, Your Honor, we do. And

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1 we, in the record, have set forth the various
2 criteria that we believe have been satisfied.

3 We start first with the underlying premise
4 of the dissimilar treatment of two violators, but we
5 also believe, Your Honor, that the bad faith can be
6 demonstrated.

7 We look at and rely on language that is
8 found in the Smithfield Foods case, Your Honor, where
9 Smithfield specifically said EPA, to have selected
10 EPS -- excuse me, Your Honor -- where Smithfield
11 specifically said that the basis for going after and
12 singling out a regulated party such as EPS, has to be
13 also shown that the decision to prosecute, should not
14 be based on unjustifiable standards or other
15 arbitrary classifications.

16 That language is right out of the
17 Smithfield case on page 985, and that is the premise
18 of our bad-faith claim in this matter, Your Honor,
19 that EPA had no justifiable basis or standard and
20 that its prosecution of EPS, was based on an
21 arbitrary classification.

22 And if you would like, Your Honor, I would

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1 be happy to jump to our second question, our second
2 issue in this matter, because I think it will
3 elucidate and respond more fully to your question.

4 JUDGE FULTON: But, before you do that,
5 how do you contend with the language in Smithfield
6 which contemplates action that is taken invidiously
7 or in bad faith?

8 MS. HWANG: Your Honor, in Smithfield at
9 page 985, the Court, in trying to clarify what is bad
10 faith, in almost a direct quote, states -- and I'd be
11 happy to share that language here, Your Honor --

12 (Pause.)

13 -- addresses that very concern in terms
14 of how you define bad faith. And what I find
15 instructive in this language, is that the Court
16 described the discretion of the Agencies to be
17 clearly subject to Constitutional constraints, which
18 must ensure that any decision to prosecute a
19 particular person, is not based on an unjustifiable
20 standard such as race, religion, or other arbitrary
21 classification.

22 And, if you will, the arbitrary

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1 classification concern that we have in this case, is
2 based on the underlying reason for the inspection in
3 the first place.

4 At Complainant's Exhibit 7, this is a
5 internal memo that prepared by EPA, undated. I'll
6 just flip it up a little bit. It's a two-page
7 document appearing on pages -- part of Complaint's
8 Exhibit, 30 pages, 1019 and 1020.

9 But if you look at the underlying reason
10 for inspection, EPA based its underlying inspection,
11 the premise of its underlying inspection, because it
12 had expressed serious concerns regarding EPS's
13 extreme rush to release trust fund dollars -- the
14 extreme rush to release trust fund dollars.

15 The record is clear that EPS had a trust
16 fund, and the trust fund satisfied the specific
17 regulatory requirements of the regulations. The
18 regulations at 761, incorporate the requirements of
19 CFR 264.15(a)(1), which made clear that if you have a
20 trust fund, that trust fund is irrevocable and cannot
21 be terminated and is controlled by the holder of the
22 trust fund. In this case, this would be EPA.

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1 So, for EPA to say that they were
2 concerned about a rush to judgment by EPS to release
3 the trust fund, is illusory; it's pretextual.

4 There was no legal right by EPS to release
5 the trust fund; they couldn't do it, and for EPA to
6 say that they were concerned about an extreme rush to
7 judgment, is just inaccurate, as a matter of law.

8 JUDGE STEIN: Do you have any evidence
9 beyond the face of that document, that suggests that
10 the inspection was a pretext?

11 I mean, it strikes me that on the face of
12 the document, it's not clearly inappropriate for EPA
13 to conduct an inspection of a regulated entity.

14 I guess my question is, is your sole
15 evidence of pretext, found on the face of the
16 document, or do you have any other indicia of bad
17 faith?

18 MS. HWANG: We have -- there is plenty
19 indicia of bad faith, Your Honor. EPS, for over ten
20 years, made efforts to correct the inequity vis a vis
21 G&S, and so, over the years, it had requested
22 meetings with EPA, had met with officials in Region

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1 II, including Mr. Webb, who was the Enforcement
2 Director in Region III, and constantly repeated these
3 themes or the theme of the inequity with respect to
4 G&S.

5 JUDGE WOLGAST: Could I interrupt you for
6 a second there? What I'm struggling with, is that it
7 seems to me that these are two different actions on
8 the part of EPA.

9 I appreciate your comment of the
10 importance of a level playing field, and you allege
11 that Region II has interpreted the same regulations
12 differently than Region III, to your Company's
13 detriment.

14 I understand that argument, but I'm having
15 trouble fitting that disparity in interpretation
16 under the column of selective prosecution.

17 As you say, that goes to EPA's decision to
18 prosecute and whether there was bad faith in their
19 decision to go forward with a prosecution, given the
20 facts that they found on the days of the inspection
21 at issue.

22 MS. HWANG: Your Honor, with respect to

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1 the bad faith, we have a trail of evidence leading
2 from the officials of Region III, who, from the very
3 beginning -- excuse me, from the officials of Region
4 II, who were being, in a way, almost badgered by EPS
5 about EPS's concerns about G&S.

6 Then you have a trail of communications
7 from Region II to Region III, asking -- on one day,
8 an official in Region II made an inquiry about the
9 compliance and enforcement history of G&S -- excuse
10 me, I'm sorry -- making a compliance inquiry of EPS.

11 This is an official in Region II,
12 inquiring about a matter in Region III. You have e-
13 mails from this official in Region II, asking Region
14 III, what is the status of the enforcement; are you
15 going to bring a complaint; are you going to bring an
16 investigation?

17 All of these communications are outlined
18 in our brief, and when you have that level of
19 communication between the parties, and you have the
20 underlying purpose of the investigations, which
21 explicitly say, in EPA's own memos, that the purpose
22 was because of a concern for rush to judgment to

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1 release funds, which could not, as a practical
2 matter, occur. That is incorrect and that's where
3 the bad faith is.

4 If one wanted to be punitive, one could
5 find any number of reasons or rationales to try to go
6 investigation and ultimately find a violation, but
7 here, in the words, of the Agency itself, the
8 underlying premise for that investigation, was
9 clearly false.

10 Moreover, the fact that EPA had
11 information about EPS's request for a change of
12 financial assurance, months and years earlier, before
13 the actual investigations, Region III never put on
14 its own calendar and plans, a schedule to do a
15 routine compliance inspection of EPS. It was
16 something that was done at the last minute, a special
17 request.

18 If I may, Your Honor, what I would like to
19 also -- in that context, Your Honor, I would like to
20 bring to the Court's attention, the evidence which
21 clearly demonstrates that G&S was treated
22 dissimilarly.

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1 We have not only the brochures, but we
2 also have the numerous contracts from the various
3 utilities -- and these are customers of G&S -- that
4 make clear that when these utilities were shipping
5 PCB waste to G&S, they were clearly expressing an
6 intention that this waste be disposed of.

7 And that distinction of disposal, is
8 critical, because, under Section 761.3, if the PCB is
9 brokered for disposal, the receiving facility must be
10 regulated as a commercial storage facility.

11 And we have submitted an ample record
12 covering three days of testimony, 80 exhibits, which
13 make most clear that the contracts and communications
14 between G&S and its customers, were that G&S receive
15 PCB waste for disposal.

16 And, in fact, if one looks at G&S's own
17 letter that it submitted to EPA, G&S admits in its
18 Surplus Evaluation Arrangement -- sorry, there's a
19 shadow here.

20 This is Respondent's Exhibit 243, which
21 indicates that for any PCB over 50, G&S will be
22 disposing of that equipment. G&S will drain all

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1 three liquids and the liquids will be disposed at
2 safety cleaning. The drained PCB-contaminated units
3 will be disposed in our metal --

4 And, further, units testing 500 PPM of PCB
5 and over, will be removed from service and disposed
6 of by us.

7 JUDGE FULTON: Ms. Hwang, I just want to
8 check in on time at this point. Mr. Kropp will be
9 addressing other subjects, I guess, other than
10 selective prosecution. We're running a little bit
11 over on the time set up for selective prosecution,
12 however, I have a few more questions on this topic,
13 so maybe you can wrap up and then we'll see what
14 additional questions the Judges may have on this
15 issue, before turning it over Mr. Kropp.

16 MS. HWANG: Thank you, Your Honor. Just
17 in wrapping up, it is EPS's position that there is no
18 room in this matter for any difference of opinion.
19 The fact that G&S is not regulated and that G&S --
20 and that EPS is regulated, is not merely a matter of
21 a difference of opinion, as expressed in the initial
22 Order.

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1 Either an entity is subject to 761, or
2 they are not. If EPS is subject to 761, then we
3 submit that G&S also must be regulated, and since G&S
4 is not regulated under 761, then EPS must prevail in
5 its selective enforcement defense.

6 Alternatively, if G&S is not subject to
7 761, then the same should apply and be true of EPS.
8 In either case, EPS's claims -- excuse me -- in
9 either case, EPA's claims against EPS must fail.

10 And this case demands national uniformity.
11 The Appellant is only seeking the fair and equal
12 enforcement of the laws in this matter.

13 JUDGE FULTON: Okay. All right, we'll
14 have a few questions for you here, and this time will
15 not be charged to Mr. Kropp, okay?

16 MS. HWANG: Thank you, Your Honor.

17 JUDGE FULTON: First of all, what is your
18 understanding of the current regulatory status of
19 G&S? There are some references in the record to G&S
20 also applying for commercial storage approval.

21 To your knowledge, has that occurred?
22 What is the current regulatory status of G&S?

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1 MS. HWANG: It is my understanding that
2 G&S has never been authorized as a commercial storage
3 approved facility. It did apply many years ago, but,
4 ultimately, it was not issued the approval, and, in
5 part, because of the positions by Region II, to allow
6 G&S to operate under two exceptions.

7 The first and primary exception was under
8 this resale exemption and this surplus arrangement.

9 JUDGE FULTON: Do you dispute that G&S, as
10 part of its business, does engage in the resale of
11 PCB particles?

12 MS. HWANG: We seriously dispute it.
13 Obviously, we are not G&S, but in this day and age,
14 with this market, we're talking about PCB electrical
15 equipment that's outdated.

16 JUDGE FULTON: But it's the under-5-parts-
17 per-million universe, is what they're purporting to
18 resell, right? And so you dispute that they do
19 actually engage in resale?

20 MS. HWANG: G&S is also alleging that they
21 engage in the resale of units above 50, Your Honor.
22 The units above 50 that they receive, are un-

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1 manifested, as we understand it, and are not subject
2 at all to commercial storage.

3 JUDGE FULTON: But, in your view, the
4 resale claim is just simply false; it's not part of
5 their business activity?

6 MS. HWANG: Your Honor, I -- relying on
7 EPA's records, not having firsthand knowledge of G&S,
8 I couldn't say with certainty, that they've never
9 done any resale.

10 JUDGE FULTON: EPS does not maintain that
11 it engages in resale activities? That's not part of
12 EPS's business plan?

13 MS. HWANG: I will defer to my co-counsel,
14 since he will be handling those matters of the
15 Complaint.

16 JUDGE FULTON: Okay, maybe he can address
17 that when he gets up.

18 You mentioned this arbitrary
19 classification concept, and I wanted to understand
20 where, as clearly as you can, where you see that
21 hooking into our case here. Is the arbitrary
22 classification, in your view, the decision to

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1 regulate EPS as a commercial storage facility, or is
2 it the inspection, or is it the invocation of the
3 case, the prosecution itself?

4 Where is the arbitrary classification, in
5 your view?

6 MS. HWANG: The arbitrariness in the
7 classification, is with respect to which facility is
8 going to be regulated under 761, as a commercial
9 storage facility, and what is not.

10 With respect to G&S, where they are, in my
11 client's knowledge and business, G&S is the largest
12 waste disposal facility in the United States, not
13 only the East Coast, but in the United States, and
14 the fact that they are not even being licensed,
15 permitted, or authorized, it would be like you and I,
16 Your Honor, being allowed to drive without a license
17 with our cars, while the rest -- while others may be
18 subject to licenses.

19 And that's where it's an arbitrary
20 standard, in addition to the fact that over the ten
21 and a half years -- 15 years, Your Honor, that EPS
22 has been complaining about this, very specific

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1 argument and advocacy with respect to justifying
2 G&S's operations, have been made by Region II.

3 So you have that arbitrary nature of
4 decisions being made with one set of laws applying to
5 EPS and another set of law applying to G&S.

6 JUDGE FULTON: So when you talk about
7 arbitrary classification, you really are focused on
8 the decision of how to regulate, in the first
9 instance, so decisions made by Region III to regulate
10 EPS as a commercial storage facility, and decisions
11 made by Region II to not regulate G&S, because that
12 activity is not viewed as storage activity.

13 But that's where you see the arbitrariness
14 coming in?

15 MS. HWANG: And, in addition, also, Your
16 Honor, the fact that with respect to G&S, Region II
17 has allowed and accepted certain exemptions in the
18 regulations to apply to G&S, whereas in the case of
19 EPS, where EPS is seeking to legitimately, legally
20 avail itself of certain exemptions in the
21 regulations, the initial Order has denied EPS that
22 ability to operate with those exemptions, which, in

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1 our view, are most clear.

2 And Mr. Kropp will be discussing those,
3 but those relate to the self-implementing rules and
4 the decontamination procedures.

5 JUDGE FULTON: Okay. Do you have any more
6 questions for Ms. Hwang?

7 JUDGE STEIN: I just have one. Given that
8 your fundamental issue is a difference in the
9 regulatory status of the two facilities, and
10 selective prosecution, as I understand it, relates to
11 prosecuting one entity unfairly, I'm wondering how
12 this particular set of circumstances, fits into the
13 selective prosecution rubric, if the arbitrary
14 classification itself, stems from the failure --
15 alleged failure of Region II to regulate, as opposed
16 to the decision on the part of Region III to enforce
17 against a regulated entity.

18 MS. HWANG: Your Honor, what is troubling
19 in this case, is the fact that the regs provide for
20 certain requirements for operations and exceptions
21 and exemptions.

22 And where EPS is trying to operate to the

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1 letter of the regulations, including availing itself
2 of exceptions in the regs, and yet those exceptions
3 are not being recognized by the Agency in its
4 enforcement action in the initial Order, versus the
5 fact that G&S is allowed to operate unfettered, not
6 regulated whatsoever, is most troubling, and because
7 there's this resale surplus arrangement that Region
8 II has fought very adamantly to support.

9 There is a string of e-mail between Region
10 II and Headquarters that indicate the level of
11 advocacy that Region II took to support this surplus
12 arrangement, despite the overwhelming evidence that
13 G&S was receiving PCB waste disposal equipment.

14 JUDGE FULTON: What's the practical impact
15 here? What is the commercial disadvantage that EPS
16 suffers in the midst of this kind of alleged
17 disparity?

18 MS. HWANG: It's devastating, Your Honor.

19 JUDGE FULTON: Can you briefly describe
20 the consequences?

21 MS. HWANG: Yes, Your Honor. Over the
22 past ten and half years, but particularly in the

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1 beginning, most of EPS's utility customers left.

2 JUDGE FULTON: Why, though? I'm
3 interested in understanding why. I understand
4 there's been a shift in the customer base, but why?

5 MS. HWANG: Because sending the electrical
6 equipment, PCB waste equipment to G&S, was less
7 expensive, and there was less -- and I presume --

8 JUDGE FULTON: Why is that?

9 MS. HWANG: Because G&S does not have to
10 incur costs for regulatory compliance, no financial
11 assurances.

12 JUDGE FULTON: What is the cost-producing
13 element of regulatory compliance in this scenario?

14 MS. HWANG: Well, Your Honor --

15 JUDGE FULTON: Is it the financial
16 assurance mechanism, having to maintain that; is that
17 the primary issue?

18 MS. HWANG: Financial assurance --

19 JUDGE FULTON: The other obligations don't
20 seem that -- to carry a big financial payload to
21 them. That's why I'm asking this question. Where is
22 the tension here, from an economic standpoint?

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1 MS. HWANG: Your Honor, if I can speak on
2 behalf of the client, not having the firsthand
3 knowledge of the operations of the business,
4 certainly EPS operates a very carefully regulated
5 operation.

6 All of its equipment coming in, is
7 carefully tagged and identified. There's an
8 elaborate computer system that identifies the
9 equipment.

10 It also engages in an elaborate self-
11 implementing decontamination procedure. It has a
12 furnace.

13 JUDGE FULTON: A lot of those things would
14 probably need to be done anyway, though, right? Are
15 you suggesting that these are activities that are not
16 undertaken at a facility like G&S?

17 MS. HWANG: Your Honor, there's no
18 regulatory oversight. We don't know whether G&S has
19 complied with the burning requirements. They don't
20 have manifests of any of their PCB waste going into
21 the facility.

22 They are just not regulated under 761;

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1 that's the tension.

2 JUDGE FULTON: The burning requirements
3 would only apply, if G&S were regulated as a
4 commercial storage facility? Or is it because it's a
5 scrap metal furnace, would those requirements apply
6 in equal force there?

7 MS. HWANG: I will defer to counsel on
8 that, Your Honor.

9 JUDGE FULTON: Okay.

10 MS. HWANG: I don't want to --

11 JUDGE FULTON: One last question: I
12 addition to just contending with a sort of
13 challenging legal standard for selective prosecution,
14 we're in an appellate setting here.

15 You've had the opportunity to present this
16 case very fully below. Many witnesses have been
17 called and have testified, and we have an
18 Administrative Law Judge's decision that really turns
19 on his sense of the veracity of the witnesses that
20 were heard on this issue.

21 This Board has repeatedly, over the years,
22 observed that we would ordinarily defer to the

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1 conclusions of the trial judge on questions relating
2 to the credibility of the witnesses or findings that
3 derive from credibility assessments.

4 How would you suggest that we contend with
5 that kind of legal dynamic in a case like this?

6 MS. HWANG: Two things, Your Honor:
7 First, the main issue that we have discussed this
8 morning before the EAB, relates to the body of
9 evidence in which G&S has been accepting PCB waste
10 for disposal.

11 And that was a large portion of EPS's
12 case. That body of evidence, the contracts, even
13 some of the information that had been provided by
14 CID's investigator, John Dillon, none of that was
15 addressed in the initial Order.

16 Secondly, Your Honor, if you review the
17 testimony from the witnesses -- and I'm sure that in
18 our briefs, and Mr. Kropp will be able to amplify on
19 that -- the witnesses' testimony, in our view, is not
20 credible.

21 There were inconsistencies, there were
22 areas where witnesses admitted that they were not

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1 knowledgeable about certain areas of the regulations
2 and requirements. There are instances where
3 regulatory standards such as when is PCB waste, for
4 purposes of PCB disposal -- we have testimony from
5 Region II, from Ann Finnegan, saying that it's not
6 waste until it's actually tested, whereas EPA's own
7 expert, John Smith, in his testimony, indicated that
8 it's waste, regardless of when you test it.

9 So if you balance out the conflicting
10 testimony between witnesses, and you take even EPA's
11 own testimony from its expert, its own expert, vis a
12 vis -- and compare that with Region II's own
13 investigator, who was adopting the exemptions
14 applying to G&S, you have to accept the fact that Mr.
15 Smith's testimony, in our view, is more credible.

16 JUDGE FULTON: Okay, thank you, Ms. Hwang.

17 MS. HWANG: Thank you, Your Honor. Mr.
18 Kropp, we had a few carryover questions for you.

19 One was this question of resale, whether
20 EPS engages in any resale activity. What's your
21 understanding of that?

22 MR. KROPP: EPS does not engage in any

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1 resale activity, Your Honor, and to talk about the
2 economic disparity, I do know that in the early to
3 mid-'90s, when EPS discovered that it was losing its
4 customer base to G&S, it called some of its former
5 customers and said, why are you switching?

6 And the answer was, they pay us for the
7 transformers and you charge us to come get them.

8 JUDGE FULTON: And the reason that you
9 charge and that they pay, is?

10 MR. KROPP: The reason that we charge and
11 they pay, is because we use a hazardous waste
12 transporter; we fill out all the paperwork; we keep
13 all the documentation. They can get any trucking
14 company they want to, to put any unit on a
15 transformer carrier and bring it into their facility,
16 and nobody knows what happens to it after that.

17 JUDGE FULTON: Is that primary rub, the
18 cost of transportation between the generating
19 facility and --

20 MR. KROPP: That and the several hundred
21 thousand dollars worth of trust funds and --

22 JUDGE FULTON: Setting aside that capital

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1 that might otherwise be used?

2 MR. KROPP: Yes, and the activities and
3 documentation that must be undertaken. For example,
4 both of these companies have the same scrap metal
5 furnace.

6 EPS is required to document all of its
7 burns, all of its days. That's why we're here, is
8 because they did keep those documents.

9 But our understanding is that if you go to
10 G&S and ask for that same documentation, they don't
11 have it.

12 JUDGE FULTON: Now, are they subject to
13 the same regulatory provision regarding temperature
14 maintenance during burns.

15 MR. KROPP: Justice Fulton, as far as we
16 know, their furnace is the same kind of furnace; it's
17 a two-chamber furnace; it does the same thing that
18 EPS's does. It just --

19 JUDGE FULTON: It's not subject to the
20 regulation, the EPA regulation at all?

21 MR. KROPP: I've never seen any
22 documentation from EPA saying they've inspected that

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1 furnace under 761.7(2)(a). I don't think that
2 there's anything in the record.

3 JUDGE FULTON: Okay, thank you. You may
4 proceed.

5 MR. KROPP: One of the other issues on
6 Count One, is that the commercial storage definition
7 applies to people who store PCB wastes generated by
8 others, or that was removed from service and brokered
9 for disposal.

10 That implies that if I own the piece of
11 equipment and I happen to be a PCB commercial storer,
12 my maximum storage capacities -- and in this case,
13 we're talking about Count One of the Complaint
14 alleging a violation of the maximum storage capacity,
15 and putting aside what that limit is for a second,
16 the fact that I have a piece of equipment in my PCB
17 storage area, if it's owned by myself, the commercial
18 maximum storage capacities don't apply.

19 If, on the other hand, it was generated by
20 somebody else, or I was out servicing it and picked
21 it up and brought it back to my facility for
22 processing, then the MSCs do apply.

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1 In both Count One and Count Two of this
2 Complaint, the PCB inspectors, when they inspected
3 the EPS facility, simply walked in the door, said,
4 show me your facility. EPS did that, and they added
5 up the number of boxes and added up the weights and
6 said, boy, that's more than 5,000 pounds; you're in
7 violation.

8 EPS's own witnesses, including Charlene
9 Kremer, who was the PCB Coordinator who initiated the
10 inspections to begin with, testified on September
11 10th of 2003, that the regulations don't apply to
12 equipment that is owned, agreed with that
13 interpretation and agreed that if I don't know who
14 owns the equipment, then I can't do an inventory, if
15 there's commingled equipment in the facility.

16 And, at EPS, we've maintained all along
17 that there was commingled equipment. In fact, the
18 EPS contract, when it picks up equipment at any
19 facility, says that EPS becomes the owner of the
20 equipment upon taking possession.

21 So have a contract that says we're the
22 owner. In addition, we do the testing of all the

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1 equipment when it comes in the door. That's another
2 part of the definition, and we have a letter of
3 guidance from EPA Region II.

4 EPS, having had this issue with Region II
5 and their handling of G&S, sent them a letter and
6 said, if I bring the equipment in the door and if I
7 test it and make the determination that it's a waste,
8 because now I know it's above 50 parts per million
9 and can't be resold, who is the generator of the
10 waste?

11 Region II sent a letter in September of
12 2000, and said that the person who does the testing
13 and makes the determination, is the generator. If
14 I'm the generator, again, the maximum storage
15 capacities in the commercial storage approval, don't
16 apply to that piece of equipment.

17 JUDGE WOLGAST: The Region has argued that
18 the owner of the equipment is inconsistent with the
19 President of EPS's testimony about the nature of the
20 cradle-to-grave services provided by EPS, as well as
21 the way the manifests were documented.

22 What record evidence would you point to,

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1 to refute those allegations?

2 MR. KROPP: Well, the record is that EPS
3 uses -- and, forgive me, Your Honor; there are 13,000
4 pages in the record, I think, or 14,000 and I don't
5 have a page citation for you, and I'll be glad to get
6 that for you -- but the record does talk about the
7 fact that while EPS does use hazardous waste
8 manifests, as required by 761.207, 8, 9 and 10, and
9 G&S doesn't do that, by the way, that waste, once
10 it's brought onsite, can be re-manifested.

11 It's another paperwork hassle, and EPS
12 doesn't do that, but it could. So, while it is a
13 cradle-to-grave effort, clearly, for equipment that
14 is tested and found to be greater than 50 parts per
15 million, it can't be resold. Obviously, that's
16 cradle-to-grave.

17 And EPS could sell equipment that's under
18 50. It chooses not to do that.

19 JUDGE WOLGAST: What activities at EPS
20 were the subject of the Company's desire to get an
21 authorization as a commercial storer?

22 MR. KROPP: EPS elected to file the

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1 notification as a commercial storer, out of an
2 abundance of caution and in compliance with all the
3 regulatory programs.

4 The testimony in trial is replete with
5 testimony from EPA witnesses, multiple EPA witnesses,
6 that a facility can have multiple roles. It can be a
7 transport facility; it can be a commercial storer; it
8 can be a disposer, and EPS, in the early '90s, when
9 it made the initial decision to get the commercial
10 storage approval, did so because it didn't know how
11 its business was going to grow.

12 So, in an effort to comply with all of
13 Part 761, it make the notification that it was a
14 commercial storer.

15 JUDGE WOLGAST: So, on the days that are
16 in question in this proceeding, what is EPS's
17 position on whether or not they had activities that
18 fell under the rubric of commercial storer?

19 MR. KROPP: EPS's position is that there
20 may have been some of the equipment that was
21 commercially stored; more importantly -- and when I
22 began my argument, I talked about putting aside what

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1 is the maximum storage capacity -- Part 761.65(g)(9)
2 was promulgated on June 29th of 1998, under what's
3 known as the PCB Mega-rule. That was the financial
4 assurance mechanism.

5 EPS did file a financial assurance, the
6 trust fund, and it filed a closure plan. In July of
7 1999, EPS recognized that its trust fund had grown
8 substantially since it first deposited it, and,
9 therefore, the trust fund would cover disposal of
10 significantly greater volumes of waste.

11 If you read 761.65(b)(9), it talks about
12 when you modify the financial assurance plan, you
13 notify the Administrator. EPS sent a notification to
14 Region III in July of 1999. That notification said
15 we have enough money in our trust fund now to cover
16 100,000 pounds of material.

17 The regulation nowhere uses the word,
18 "approval," although EPA, the Region's position is,
19 well, that has to be approved by the Region, for a
20 number of reasons. But the point is -- and this gets
21 into the fair warning argument that we have made
22 under the GE case -- EPA never responded to that July

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1 1999 notification.

2 It did two inspections. It filed a
3 Complaint, and the week before the hearing started in
4 2003, it sent a letter to EPS, saying, oh, by the
5 way, we reject your 1999 notification.

6 JUDGE WOLGAST: But even assuming that a
7 financial assurance requirement could alter the
8 requirements for when someone does and doesn't have
9 to have approval as a commercial storer, here, your
10 authorization itself, that you obtained from Region
11 III, I thought, specifically said that any
12 modification required the approval of the Regional
13 Administrator.

14 MR. KROPP: The question there is a matter
15 of interpretation. There isn't a definition of what
16 is a modification.

17 In this case, there was not any physical
18 modification of the EPS facility at all. They
19 designed the original facility sufficiently large
20 enough to contain the amount of weight of materials
21 for which they notified in July of 1999, so there was
22 no physical change. There was simply just more stuff

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1 there.

2 So our position is that the 761.65(g)(9)
3 notification only required a notification. That
4 financial assurance doesn't dictate whether you need
5 a storage approval; it's the fact that we made the
6 notification and we had the approval in-hand, but the
7 limit in that was for 5,000 pounds.

8 JUDGE WOLGAST: But just to understand
9 your argument, you're saying that as to the wording
10 in the approval, any departure from the conditions of
11 approval, wouldn't include a large increase in the
12 amount of PCB waste stored at the facility?

13 MR. KROPP: Well, we read the regulation
14 on its face, and it didn't say anything about
15 approval; it says that when you change the financial
16 assurance mechanism, you've got to notify the
17 Regional Administrator, and that's what we did;
18 that's what the regulation says.

19 JUDGE FULTON: But the regulation, even if
20 it's ambiguous in terms of the approval process for
21 this kind of change, does say rather unambiguously
22 that the RA has the authority to include, quote, such

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1 other conditions as may be necessary in the Regional
2 Administrator's view. Why should we not look at this
3 condition, this requirement to seek written
4 authorization, written into the authorization
5 document itself, as just that, a condition that the
6 Regional Administrator determined is necessary, and
7 why doesn't that fill this gap?

8 MR. KROPP: Justice Fulton, I believe that
9 it might, had EPA responded and said, well, wait a
10 minute; you can't do that. We reserve the right and
11 have the authority and we would concede that the
12 regulation says that they have the authority to amend
13 the conditions, but they didn't do that.

14 Moreover, after EPS notified EPA under
15 761.65(g)(9) of its intent to increase its MSC to
16 100,000 pounds, EPS requested approval to receive
17 98,000 of PCB waste from a site for a job it was
18 doing.

19 EPA Region III initially denied the
20 approval, pointing out the MSC in the 1998 storage
21 approval. EPS then called Charlene Kremer -- and
22 testimony is in the record -- and said, what about

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1 the fact that we've notified you, we sent you a
2 notification, and we can receive up to 100,000
3 pounds?

4 EPS heard nothing more from EPA, except
5 that its name suddenly appeared on an approved list
6 for this 98,000 pounds.

7 Now, if I sent the notification in, I got
8 nothing back, my next contact from EPA is, you can't
9 accept this 98,000 pounds of PCB waste because of
10 your MSC, and I call them up and say, hey, I notified
11 you and raised my limit to 100,000 pounds, I get
12 nothing back, other than my name appears on an
13 approved list, and that waste is allowed to come into
14 my facility, I think I have the right to believe that
15 my 1999 notification was acceptable and was accepted
16 by EPA. Didn't hear back from them until a week
17 before this trial started in 2003, to the contrary.

18 JUDGE WOLGAST: Is the 98,000 pounds, the
19 CRCLA waste?

20 MR. KROPP: Yes, PCB waste.

21 JUDGE FULTON: And that's in the record,
22 that documentation?

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1 MR. KROPP: It is, Your Honor.

2 JUDGE STEIN: You mentioned that you take
3 some of the waste -- that you accept, comes within
4 the terms of this commercial storage approval, and
5 you also have other kinds of waste.

6 What obligation, if any, does your company
7 have to segregate those two categories of waste, in
8 order to be able to prove that it's in compliance
9 with the terms of its permit?

10 MR. KROPP: Justice Stein, the Company
11 does keep documentation regarding every single piece
12 of equipment that comes into the shop. Now, I'm not
13 aware of any regulatory obligation that says we have
14 to segregate it and we have to account for it.

15 However, we are absolutely able to do
16 that, if an inspector walks in the door and says,
17 tell me which one of these pieces of equipment you
18 own, and tell me which one of these pieces are
19 subject to your MSC? We could do that.

20 EPA inspectors, in this case, never asked
21 the question; they never asked who owns the
22 equipment, and they never asked whether any of the

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1 other exceptions to Part 761.65 applied.

2 JUDGE STEIN: But didn't they send you a
3 written request that the Company then responded to,
4 as to how many transformers and capacitors it had
5 onsite?

6 MR. KROPP: They did send a written
7 request and we did send -- and that's the key
8 question, Your Honor -- they said, how many
9 transformers do you have onsite? We answered and
10 said we've got this many transformers onsite, but
11 they didn't say, and are you the owner and were they
12 -- were any of them decontaminated under 761.79 self-
13 implementing decontamination processes, for which a
14 commercial storage approval is not required; they
15 never asked those questions.

16 JUDGE FULTON: So you contend, then, that
17 with respect to so-called PCB transformers, those
18 that contain PCBs over 500 parts per million, that
19 some of those transformers on the site, are owned by
20 EPS?

21 MR. KROPP: I do, Your Honor. The
22 contract says that they are.

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1 JUDGE FULTON: But these are contracts
2 that also have a manifest arrangement where the
3 generator -- you're disassociating the idea of
4 generation from the idea of ownership. Is that what
5 you need to do in order to draw that conclusion?

6 MR. KROPP: I think that the manifest and
7 the question of who signs as the generator, is signed
8 by the generator, out of an abundance of caution,
9 because there's no longer any requirement -- never
10 was a requirement -- to test materials, equipment,
11 before you shipped it.

12 However, with the passage of the Mega-
13 rule, what was formerly known as the Assumption Rule,
14 which meant that you could handle a piece of
15 equipment as if it was less than 50, until you knew
16 differently. You could handle it as if it were
17 unregulated.

18 That Assumption Rule was deleted in the
19 Mega-rule in 1998, so, now while there is no
20 obligation to test the equipment, as Dr. Smith so
21 eloquently put it in his testimony, it is what it is.

22 If it's above 50 and you handle it, and

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1 you transport it, once you get it to its destination
2 and test it, and, at that point, discover it's
3 greater than 50, it's the same as having had a
4 speeding violation. That waste, that piece of
5 equipment, should have, under 761.207, been required
6 to be transported using a hazardous waste manifest.

7 So, out of an abundance of caution, in
8 this scheme, we transport all pieces of equipment,
9 because it's untested, as is if it is PCB-
10 contaminated equipment, have the owner at the time,
11 until we pick it up, sign as the generator, in case
12 it turns out that when we test it, it's regulated and
13 needed to be transported under a hazardous waste
14 manifest.

15 We could, at the time we make that
16 decision, either re-manifest it. For example, if
17 it's greater than 500 and we're transporting it for
18 disposal, we could and have the option, and Ms.
19 Kremer testified on September 10th of 03, that that,
20 indeed, could be done, it could be re-manifested, if
21 we chose to do that, to ship that greater-than-500
22 unit off for disposal at another location.

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1 JUDGE WOLGAST: Could I ask just a point
2 of clarification? Putting aside the ownership issue
3 for a second, when you sent EPA the list of
4 transformers in the diked area on the facility on
5 certain dates alleged in Count One and Count Two,
6 what do you purport that that list represented?

7 MR. KROPP: In the list for Count One -- I
8 don't recall the list being sent for Count Two,
9 because Count Two only involves one bank of
10 capacitors, but the list for Count One, we answered
11 exactly the question that EPA asked us. EPA said,
12 give us a list of the transformers that were in --
13 and the weights -- that were in your storage area on
14 the date of the first inspection.

15 JUDGE WOLGAST: The PCB transformers?

16 MR. KROPP: I believe -- and I'm not
17 clear, Your Honor. I don't know whether it was only
18 PCB transformers or whether they simply said, give us
19 a list of the transformers.

20 But the important issue is that they
21 didn't ask the ultimate disposition, and they didn't
22 ask who owns those transformers, as they sit there.

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1 JUDGE WOLGAST: Well, going back to your
2 argument that different activities -- I mean, you're
3 arguing that different activities can fall under
4 different regulatory regimes.

5 MR. KROPP: That's correct.

6 JUDGE FULTON: As opposed to there is one
7 overarching umbrella of what, generically, does this
8 company do, so what regulatory provision does it fall
9 into?

10 MR. KROPP: Correct, Your Honor. And
11 that's supported by EPA witness testimony.

12 JUDGE WOLGAST: But now back to the
13 transformers in the diked area, regardless of what
14 subsequently happens, if it's decontaminated and put
15 in the scrap oven, at that time, could the
16 transformers in the diked area, if they're PCB
17 transformers, not be subject to commercial storage
18 requirements?

19 MR. KROPP: Absolutely, that's our point.
20 If we own that piece of equipment, then the
21 definition of commercial storer does not apply to
22 that piece of equipment. It's our equipment.

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1 JUDGE WOLGAST: But that's premised on
2 your ownership argument. I'm saying, putting that
3 aside for a moment --

4 MR. KROPP: Okay.

5 JUDGE WOLGAST: The transformers in the
6 diked area, you're not -- I mean, I'm trying to draw
7 the distinction between the transformers, as they sit
8 there, and their ultimate disposition, which may be
9 that they are decontaminated as they go to the scrap
10 oven, but as they sit there in the diked area, as the
11 inspector saw them?

12 MR. KROPP: Our position is that in order
13 to do an accurate inventory of that equipment, they
14 would need to have asked EPS, are you going to
15 decontaminate this transformer under the 761.79?

16 And they knew of the existence of 761.79.
17 Their inspection report says, EPS is using the new
18 self-implementing decontamination.

19 They didn't ask that question, but, yes,
20 that exemption absolutely ought to apply as that unit
21 is sitting waiting to be decontaminated.

22 JUDGE WOLGAST: But why, if it's not

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1 presently decontaminated? I mean, I understand your
2 point, you know, as to the activity, the subsequent
3 activity --

4 MR. KROPP: Sure.

5 JUDGE WOLGAST: -- but now, just focusing
6 on, as they sit there in storage, some of which for
7 over two months, as I understand it --

8 MR. KROPP: Sure, but you can store that
9 kind of equipment under the regulations, for up to a
10 year, and you will note, even in the record, there
11 was nothing that was stored there more than three
12 months.

13 EPS operates on a continuous basis. They
14 burn multiple burns per day in their scrap metal
15 recovery oven, and equipment comes in all the time,
16 24 hours a day. They don't -- at that time, they
17 weren't running a midnight shift in all cases, but
18 they could have, but the equipment comes in the door
19 all the time.

20 It is stored in the storage area, and then
21 as the workers come in and do their processing, it's
22 removed from the storage area, so that on any given

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1 day, as you look at the storage area, some of the
2 equipment is owned by EPS, some of it is going to be
3 decontaminated under 761.79, and some of it, as it
4 turns out to be greater-than-500-PCB equipment, would
5 be processed for transportation for disposal.

6 At the time, EPS couldn't dispose of
7 greater-than-500 parts-per-million equipment and so
8 it would repackage stuff, and so the 761.20 exemption
9 applied there, and that's what we argue applies to
10 the capacitors in Count Two.

11 JUDGE WOLGAST: What categories of
12 transformers do you own?

13 MR. KROPP: We can own anything. Anything
14 that comes in the door, we could own. Our contract
15 says that no matter what it is, at the time we pick
16 it up in the field and it's not been tested, but we
17 pick it up, the contract says we become the owner at
18 that point.

19 We do the testing when it comes in the
20 door. And if you look at the September 12th 2000
21 letter from Region II, in which Region II says that
22 Headquarters and Region III concurred in, if we own

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1 it and we test it and we make the decision as to the
2 ultimate disposition, then we are the generator.

3 JUDGE FULTON: So you don't commercially
4 store anything, then?

5 MR. KROPP: It's -- we can make an
6 argument, yes, that we do not need a commercial
7 storage approval at all, and that we do not
8 commercially store any piece of equipment.

9 JUDGE FULTON: Have you sought acceptance
10 of that view from Region III?

11 MR. KROPP: I think that's why we're here,
12 Your Honor.

13 JUDGE FULTON: Well, I don't think that's
14 actually why we're here. Have you challenged your
15 regulatory status with Region III? I understand that
16 you're challenging G&S's regulatory status, but what
17 -- if your view is that you really don't need a
18 commercial storage authorization at all, then how has
19 that view been advanced with the Region?

20 MR. KROPP: I think the question is that
21 we have chosen not to challenge that, because of the
22 fear of then expense of this kind of litigation. I

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1 mean, we've been at this for four years, and, you
2 know, a half million to a million dollars worth of
3 legal fees, and EPS can operate, using the commercial
4 storage approval.

5 It had already, the commercial storage
6 approval, so there's no reason to say, okay, we want
7 our trust fund money back and we don't want the
8 commercial storage approval.

9 We have just gone ahead and said, okay, we
10 recognize that here are the rules that we play by,
11 and we're going to continue to do business that way.
12 It's in the best interest of us and our customers.

13 JUDGE FULTON: This ownership theory of
14 yours, just to make sure that I understand how it
15 works in this particular scenario, had the Region III
16 inspectors asked, they would have been told that all
17 of the PCB transformers in the area that they
18 inspected, were owned by EPS and where, therefore,
19 not subject to the commercial storage requirements.

20 MR. KROPP: I can't make that statement,
21 Your Honor. What I can say is that, yes, it's
22 possible that they could have been told that.

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1 And I don't know the circumstances of all
2 of the units that were in the storage area on that
3 day. They could have also been told, we own these,
4 but these, we don't own. But the Company had that
5 documentation and was never asked for it.

6 JUDGE FULTON: Basically, the contracts
7 undergirded each of these contracts.

8 MR. KROPP: Sure.

9 JUDGE STEIN: But isn't it reasonable to
10 expect that in response to EPA's letter, which was
11 clearly designed to determine whether or not the
12 Company was in compliance with the terms of its
13 permit, that if the Company felt that they owned all
14 or some portion of these transformers, that that
15 information would have been set forth in the letter?
16 Why isn't it reasonable for EPA to assume that that
17 would have been spelled out, if that was the
18 Company's --

19 MR. KROPP: Your Honor, this is the first
20 enforcement action that this Company has had in its
21 history. There have been some letters that have gone
22 back and forth, but even when EPA did its

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1 inspections, it didn't do any kind of a debriefing
2 and say, you know, we think we've got a problem with
3 this.

4 I apologize, but my client advises that
5 the record does indicate which equipment was in
6 commercial storage, so, apparently, some of it was
7 and some of it was not. I apologize for the
8 misstatement.

9 JUDGE WOLGAST: I wanted to understand,
10 and just to follow up on your argument about
11 decontaminated materials and going back to 40 CFR
12 761.20, which basically prohibits the processing and
13 distribution in commerce, of PCBs, unless they fall
14 under certain exemptions --

15 MR. KROPP: Yes.

16 JUDGE WOLGAST: -- one of which is (5),
17 Decontaminated Materials.

18 So, just to understand your argument, as I
19 hear you, you're saying that if the inspector had
20 asked and had been told that certain transformers
21 were destined for decontamination, and further in the
22 scrap metal oven, that as to those transformers, they

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1 would then fall under Subsection (5) and would not be
2 the basis of a commercial storage requirement?

3 MR. KROPP: That's our argument, Your
4 Honor, on Count One.

5 JUDGE WOLGAST: Right.

6 MR. KROPP: On Count Two, it's
7 761.20(c)(2)(i).

8 JUDGE WOLGAST: Right.

9 MR. KROPP: And, in that instance, those
10 capacitors were shipped from a company called AEP,
11 and they were assumed not to be PCB capacitors. Once
12 they arrived, they were tested and found to be
13 greater than 500. They were pure PCB capacitors, and
14 they had to be physically dismantled, and in this
15 case, in the initial decision, Keith Reed, the
16 President, talked about the amount of labor and the
17 time that was done, and in the initial decision, the
18 tribunal below simply said, well, the capacitors were
19 there for the maximum ten days allowed under that
20 exemption, and it doesn't matter, because EPS clearly
21 intended to store them when they got them.

22 Well, there's no intent requirement set

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1 forth in that exemption. If you have it there less
2 than ten days, you're not subject to the commercial
3 storage approval requirements.

4 And, in this case, those capacitors
5 arrived, and, ten days later, were shipped off for
6 disposal. Accordingly, we don't believe they should
7 be subject to the MSCs in that permit.

8 JUDGE WOLGAST: And who do you contend has
9 the burden of proof on Count One and Count Two, to
10 prove that you fall within these exemptions or not?

11 MR. KROPP: I think that EPA has the
12 burden of proving that a piece of equipment falls
13 within the maximum storage capacity. And they could
14 have done that.

15 EPS had the documentation to do that, but
16 it was never provided an opportunity to give that
17 documentation for those counts under these
18 exemptions.

19 I'm being told I need to wrap up, so I'll
20 just -- if I might only say, regarding Count Three,
21 we don't believe that the record substantiates any of
22 the data that was used, and, in fact, if you read the

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1 September 10th cross examination of EPA witness Scott
2 Rice, you will see that the laboratory data that EPA
3 used --

4 First of all, they had no verifiable data
5 when they brought the Complaint. During the course
6 of the hearing, they subpoenaed the laboratory and
7 got data that they thought was accurate data, and
8 that represented the lab results.

9 It didn't. They thought they had EPS bar
10 codes. They didn't have EPS bar codes that identify
11 each piece of equipment, and yet the penalty and all
12 of the initial decision is predicated on the fact
13 that that ATCI lab data was accurate data, and we
14 believe the record supports a conclusion that that is
15 not the case.

16 In closing, I will just say that we would
17 request that the initial decision be reversed on all
18 counts, or if you find that EPA's interpretation of
19 the regulations is permissible, that the penalty be
20 stricken, because of the lack of fair notice and fair
21 warning under the GE Doctrine. Thank you.

22 JUDGE FULTON: Thank you, Mr. Kropp. Ms.

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1 Jamieson?

2 MS. JAMIESON: Good morning, Your Honors
3 and counsel for Appellant. I'm Cheryl Jamieson of
4 Region III, and I'd like to present an overview of
5 Region III's case, and then discuss several important
6 issues.

7 First of all, the initial decision holds
8 that Appellant violated two types of PCB
9 requirements: One is violations of the commercial
10 storage approval by storing too much PCB waste, and
11 the second is the failure to adhere to the scrap
12 metal oven recovery time and temperature requirements
13 under 761.72(a)(3), by burning PCB-contaminated
14 electrical equipment, too short of a time.

15 That is what the case came down to in
16 three Counts. As alleged by the Region in Counts One
17 and Two, the storage of the PCB electrical equipment
18 exceeded the limits in its TSCA storage approval,
19 which was issued by the Regional Administrator in
20 1998.

21 If you commercially store for disposal,
22 over 500 gallons or more of PCB waste, you are

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1 subject to the approval authority of the EPA Regional
2 Administrators.

3 In this case, that is what the Appellant's
4 business engages in. The quantity of PCB waste
5 equipment and oil that can be stored -- the storage
6 limitations are important, because the quantity of
7 waste that can be stored, is directly linked to the
8 closure plan and the financial assurance that the
9 company has to provide.

10 The financial assurance being adequate,
11 would prevent the abandonment of PCB waste and the
12 cleanups that might be necessitated to be paid for by
13 taxpayers.

14 As alleged in Count Three, Appellant
15 operates a scrap metal recovery oven to burn PCB-
16 contaminated electrical equipment; that is, items
17 from 50 to 499 parts per million of PCB.

18 The inspectors went to the facility and
19 reviewed only what I am going to term a snapshot of
20 Appellant's oven operating data for three random
21 weeks selected in 1999.

22 That evidence showed that the Appellant

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1 failed to meet the regulatory time and temperature
2 standards when burning the PCB-contaminated
3 electrical equipment on 16 occasions during those
4 three weeks.

5 Why is that time and temperature
6 requirement standard important under 72(a)(3)? It's
7 important because the time and temperature standard
8 is what ensures the adequate decontamination of the
9 scrap metal before it's sent out into commerce for
10 recycling.

11 And as Dr. John Smith testified, from the
12 Office of Prevention, Pesticides and Toxic Substances
13 and the Presiding Officer quoted with approval, "The
14 Regulation assures PCBs on metal surfaces are
15 sufficiently volatilized in the primary chamber."

16 Even though there may be small amounts on
17 the metal surfaces to start, if the temperatures are
18 insufficient to volatilize and destroy the PCBs,
19 there may be products of incomplete combustion on
20 those surfaces, going out into interstate commerce,
21 which persons can be exposed to.

22 As to all three Counts in our Complaint,

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1 there's ample evidence in the record fully supporting
2 the Presiding Officer's findings.

3 In addition, as noted by the Appellant,
4 they brought a selective enforcement defense. The
5 Presiding Officer also found that the Appellant
6 failed to meet that high burden to sustain that
7 defense.

8 Now, I'd like to discuss some of the
9 issues raised on our prima facie case for Counts One,
10 Two, and perhaps Three.

11 JUDGE WOLGAST: Could you begin by
12 describing what you believe has to be included in the
13 Government's Count One prima facie case?

14 MS. JAMIESON: Yes.

15 JUDGE FULTON: At some point, I'd like to
16 hear your explanation of why a request for a change
17 in the financial assurance mechanism, necessarily
18 raised a concern in Region III's mind about the
19 quantity of waste being stored.

20 MS. JAMIESON: Yes.

21 In regard to our prima facie case, what we
22 had to prove, was that Respondent was subject to the

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1 TSCA commercial storage approval at the time we
2 conducted the inspections; that there were PCB
3 transformers in storage at that time; and that the
4 weights of those PCB transformers exceeded their
5 commercial storage limitation of 5,000 pounds.

6 The transcript will show, at Volume I, at
7 page 240 to 251, that Inspector McPhilliamy entered
8 the facility with Inspector Rice, attempted to make a
9 count of the crowded PCB transformers that were in
10 storage, and did make a count which was slightly off
11 the list that was then provided to the Agency by the
12 Appellant, when, at the completion of the inspection,
13 the inspectors asked for a list of PCB transformers
14 in storage.

15 And you will see that in the transcript,
16 at the section that I highlighted. I'd also like to
17 show the response to the November inspection.

18 JUDGE WOLGAST: Just to clarify what you
19 just said, what you were -- what the inspectors
20 believe that they were asking for, was PCB
21 transformers.

22 MS. JAMIESON: Yes.

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1 JUDGE WOLGAST: If, in fact, the list
2 contained both PCB transformers, that is,
3 transformers that contained over 500 PPM of PCB, as
4 well as PCB-contaminated transformers, that,
5 presumably, wouldn't be helpful in establishing your
6 exceedance of the pound limit, would it?

7 MS. JAMIESON: No, it would not. But I'd
8 like to show you two of the exhibits that were
9 supplied to us, that show that the concentrations of
10 the items in storage, units in storage, were grater
11 than 500 parts per million, if I may.

12 Here is the response to -- can you hear me
13 without the microphone?

14 JUDGE WOLGAST: Yes.

15 MS. JAMIESON: Here is the response to
16 Inspector McPhilliamy's November request, dated on
17 the date of the inspection, given contemporaneously
18 with the inspection.

19 PCB units in storage, 11/22/1999. It was
20 actually faxed, I believe, to our office.

21 Here is the list of the items in storage.
22 Transformers are designated by T for transformer on

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1 the item list; or PAD for pad-mounted transformer, or
2 POLE for pole-mounted transformer.

3 JUDGE FULTON: If you could just swing
4 your mike around in your direction?

5 MS. JAMIESON: Sorry.

6 JUDGE FULTON: That way, the Court
7 Reporter will be able to hear you.

8 MS. JAMIESON: Sorry. Shall I repeat
9 that?

10 You will see items listed as Transformers,
11 with a T; PADS for pad-mounted transformers; POLES
12 for pole-mounted transformers.

13 You will then see a bar code, which is
14 part of the Appellant's system for identifying
15 materials that he receives for disposal, the cradle-
16 to-grave system that he engages in and tells his
17 customers that he engages in.

18 You will then see receipt date, then RFS
19 Date. What does that indicate? The date the
20 transformer was removed from storage, the manifest
21 number upon which the item was received from the
22 generator, to the commercial storer, in this case,

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1 EPS, and then you see PPM level, parts per million.

2 You will see that the starred items are
3 the items in the Complaint. I have more lists, but I
4 think this sufficiently illustrates the PCB
5 concentrations, in all instances being over 500 parts
6 per million.

7 JUDGE FULTON: For the November 2nd
8 inspection?

9 MS. JAMIESON: For the November.

10 JUDGE FULTON: What about the July
11 inspection?

12 JUDGE WOLGAST: I'm sorry, before we leave
13 this, what's that exhibit number?

14 MS. JAMIESON: That is Exhibit 12, CX-12,
15 Your Honor.

16 In regard to the July inspection, a
17 similar situation took place. The inspectors went
18 in, they asked to see the PCB transformers in
19 storage. That is in the transcript, and their
20 credibility was upheld by the Presiding Officer.

21 They were given a list. In this case, PCB
22 unit weights, July 15, 1999, and the bar code numbers

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1 indicating Respondent's cradle-to-grave disposal
2 system, and the weights of the transformers.

3 In regard to the concentrations --

4 (Pause.)

5 I'm sorry, Your Honor, I misplaced one of
6 my exhibits.

7 (Pause.)

8 This is a picture, a photograph taken by
9 Scott McPhilliamy on July 15, 1999, of the area that
10 they were taken to when they asked to see PCB
11 transformers in storage. You will note the yellow
12 labels are the designations PCB transformers -- are
13 transformers, that is, over 500 parts per million.

14 JUDGE FULTON: How many do you see in the
15 photograph? Or how many can be discerned from the
16 photograph?

17 MS. JAMIESON: They are difficult to be
18 discerned, because of the way they're being stored.
19 The Inspectors counted approximately 32 when they
20 went through, but there were actually 36, so they
21 were close in their count.

22 JUDGE FULTON: Did the units, the PCB

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1 units, in the reference in the list by that name, PCB
2 units, weights -- must we view this list as being
3 limited to the transformers, or could this pertain to
4 other PCB articles in that storage area?

5 MS. JAMIESON: I believe you should view
6 the list as being limited to PCB transformers,
7 because that is the testimony of the inspectors in
8 the record.

9 JUDGE FULTON: Because that's what was
10 requested?

11 MS. JAMIESON: It's what was requested;
12 that is what was viewed; that was what the list was
13 provided for, although it's not as descriptive as the
14 November list.

15 In addition to the evidence that we're
16 putting forward, this Appellant applied to be a
17 commercial storer of PCB waste, in CX-1. He then
18 told the Agency he wanted 5,000 pounds maximum
19 storage for those transformers. He was given that
20 amount.

21 He got the approval in CX-2, with the
22 amount, and the bar codes that you see listed in

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1 July, indicate that cradle-to-grave disposal system
2 that he engages in, receiving waste, on manifests,
3 from generators, to commercially store such waste for
4 disposal.

5 JUDGE WOLGAST: On the testimony of the
6 inspector about the request for the number and
7 weights of PCB transformers, was that an oral
8 request, or was that ever reduced to writing?

9 MS. JAMIESON: Those requests were oral,
10 and they were made at the inspections, and the
11 material lists were faxed, I believe, faxed to the
12 Wheeling office.

13 JUDGE WOLGAST: And when EPA received the
14 bar code numbers and the corresponding list of
15 weights, at that time or at any subsequent time, was
16 there a request to clarify PCB concentrations of
17 those units?

18 MS. JAMIESON: The concentrations were
19 given in the November list, so there was no question
20 to clarify them. And the labels --

21 JUDGE WOLGAST: But the November list
22 covers?

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1 MS. JAMIESON: One of the storage
2 violations in Count One.

3 JUDGE WOLGAST: Right. But I'm talking
4 about July.

5 MS. JAMIESON: The July list, the
6 inspectors did not -- the issues was not raised with
7 them and they did not request to say who owned them.
8 They had no reason to believe that these items were
9 not shipped to EPS by the generators. That is the
10 business that Appellant is engaged in, and the
11 Presiding Officer found that to be reasonable.

12 JUDGE WOLGAST: But just to understand,
13 you're saying that they never requested
14 concentrations of the units.

15 MS. JAMIESON: In July.

16 JUDGE WOLGAST: In July.

17 MS. JAMIESON: That is correct.

18 JUDGE WOLGAST: Or as to the units in
19 question in July, at any time; at no time did they
20 ask for those?

21 MS. JAMIESON: At no time.

22 JUDGE FULTON: Although your position is

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1 that the request was framed as a request for
2 information regarding PCB transformers.

3 MS. JAMIESON: Yes.

4 JUDGE FULTON: Which, by definition, would
5 be over 500 parts per million?

6 MS. JAMIESON: Yes, that is correct, and
7 that is the information we believe we received, the
8 Agency believed it received.

9 JUDGE FULTON: What do you think of this
10 ownership theory that Mr. Kropp was talking about
11 earlier? Had Inspector McPhilliamy, had he asked
12 about ownership, he might very well have been told
13 that a substantial proportion of these transformers,
14 were owned by EPS. What do you make of that?

15 MS. JAMIESON: I don't accept that the
16 ownership is the designation for deciding who the
17 generator is. It's not the dispositive decision on
18 who the generator is.

19 The generator is defined as those who --
20 person whose act or process produces PCBs regulated
21 for disposal under Subpart (d) of this Part, or first
22 causes PCBs or items to be subject to the disposal

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1 requirement of Subpart (d), which is Storage and
2 Disposal, or who has physical control over the PCBs
3 when a decision is made that the use of the PCBs has
4 been terminated, and, therefore, subject to disposal.

5 And you will find in the record, testimony
6 by Respondent's President, that his cradle-to-grave
7 system is that his customers are generators,
8 primarily electrical utility companies who generate
9 the waste that Respondent then is paid to dispose of,
10 and engages in commercial storage to dispose at his
11 facility, or, in the case of transformers, may be
12 engaging in other activities with them, such as the
13 claim of decontamination under 79(c), or sending the
14 items to safety clean for disposal, because the scrap
15 metal oven cannot accommodate items from 500 parts
16 per million or over.

17 JUDGE FULTON: Does the idea of ownership
18 have importance outside the related concept of
19 generator, or do generator and owner go hand-in-hand
20 here under these regulations?

21 MS. JAMIESON: I believe that the
22 generator, since it's the person who first -- I don't

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1 believe that the owner designation applies here. I
2 mean, am I not understanding?

3 JUDGE FULTON: Because the owner is the
4 generator, is what you're saying?

5 MS. JAMIESON: In this case, the owner --
6 the person who first made the decision to dispose of
7 it, was the generator, and, if you will, call, under
8 lay person's terms, the owner, when he made that
9 decision.

10 JUDGE FULTON: So that leaves an
11 enterprise like EPS, as being something other than
12 that, at least, in your view?

13 MS. JAMIESON: In our view, they are the
14 commercial storer, as they applied to be, and are
15 permitted to be.

16 JUDGE STEIN: Do the regulations anywhere
17 define the term, "ownership," or "owner"?

18 (Pause.)

19 MS. JAMIESON: Not to my knowledge, but
20 I'm viewing 761.3.

21 JUDGE STEIN: Are you familiar, in your
22 experience as a Region III enforcement attorney, with

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1 anyone else who has asserted that they are
2 unregulated by virtue of this ownership exemption, or
3 is this the first time, to your knowledge, you've
4 encountered this?

5 MS. JAMIESON: This is the first case in
6 which I've encountered it. It's come up, as well,
7 when we get to selective prosecution with G&S. It
8 may come up again.

9 JUDGE STEIN: Is there any guidance that
10 you're aware of, that's been issued as to what
11 "ownership" means?

12 MS. JAMIESON: Not --

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

22 MS. JAMIESON: I'm not aware of that, Your

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1 Honor, that there is a guidance.

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

6 MS. JAMIESON: I'd be happy to submit a
7 brief on it, Your Honor, if I find that I've missed
8 it somehow.

9 In regard to Count Two, I'd like to move
10 on to the capacitors and our prima facie case for
11 those. Here, Appellant is arguing that they were --
12 again, they're not a commercial storer for this
13 waste; once again, they are other than that.

14 In this case, they're a transfer facility
15 with regard to that waste, or they're processing it
16 under 20(c) with regard to that waste, but they're
17 not commercially storing.

18 That is not what the evidence in the
19 record shows.

20 (Pause.)

21 JUDGE STEIN: Which exhibit is this that
22 you're putting up?

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1 MS. JAMIESON: I'd like to present Exhibit
2 CX-10. CX-10 is a manifest which shows that
3 capacitors that EPS had onsite on July -- excuse me -
4 - they were removed from service on June 23, 1999,
5 and received by the Respondent sometime shortly
6 thereafter.

7 This shows 26,000 pounds of PCB equipment,
8 in this case, capacitors, were being stored by the
9 Appellant on the date sometime after June 23rd, 1999,
10 when the generator removed them from service.

11 In this case, the record evidence will
12 show Respondent Exhibit 515, which is the incoming
13 manifest, which I don't have in front of me, but
14 which is in your record, which shows the generator
15 was American Electric Power, and the destination
16 facility was Environmental Protection Services.

17 The evidence of testimony will show that
18 when the capacitors were received at the facility,
19 they were broken down to be disposed of in
20 Respondent's scrap metal oven.

21 At some point in time during this date
22 from the incoming manifest to the outgoing manifest,

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1 someone determined that perhaps they should be
2 tested.

3 Samples were taken of the capacitors, sent
4 out for sampling results, and it was found that the
5 PCB concentrations were 500,000 parts per million.

6 At that point, the Appellant then
7 consolidated or put together the equipment for
8 offsite disposal, because it could not be burned in
9 the scrap metal oven.

10 What the Region argued and the Judge held,
11 is that they were not operating as a transfer
12 facility in regards to the capacitors, because, under
13 761.3 and 761.65(d)(f), one who is transferring, must
14 hold the waste during the normal course of
15 transportation.

16 The tearing down of a huge bank of
17 capacitors to dispose, the sampling of those, and
18 then the subsequent activities in sending them off,
19 did not indicate that Respondent was holding these
20 items in the normal course of transportation.

21 Similarly, in regard to the processing
22 exemption that Appellant advances, they were being

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1 processed, apparently, during a one-day time period,
2 if you agree that they were being processed. They
3 were being torn down during a one-day time period of
4 eight to nine hours, when they were actually onsite
5 11 days.

6 We contend that the processing and tearing
7 down was to facilitate disposal, and not to
8 facilitate transportation, because that is what the
9 testimony shows.

10 This is important, because it's the
11 Region's position that one day of processing, does
12 not give the Appellant the right to store
13 indefinitely in violation of its storage approval.

14 JUDGE FULTON: Well, this really sort of -
15 - "indefinitely" is sort of a big-sounding word for
16 the period of time we're talking about here.

17 MS. JAMIESON: Well, he would be limited
18 to a year. You are correct, he would be limited to a
19 year.

20 JUDGE FULTON: But in this particular
21 circumstance, he only had the material on hand for
22 ten or 11 days, right?

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1 MS. JAMIESON: Yes, but the definition
2 keys on, they must be held during the normal course
3 of transportation.

4 JUDGE FULTON: That's the transfer
5 facility argument, okay. What about the processing
6 for disposal exemption?

7 MS. JAMIESON: We contend that the
8 processing under 20(c)(2)(i) does not apply to this
9 activity that he engaged in -- excuse me, that
10 Appellant engaged in, because the tearing down of
11 capacitors -- and the Judge found this to be so --
12 was to facilitate disposal in the scrap metal oven
13 and not to facilitate transportation.

14 JUDGE FULTON: Okay. You make a statement
15 in your brief at page 43, that reads: "The processing
16 for disposal exemption is designed for facilities
17 that do not otherwise require a TSCA commercial
18 storage approval, and not for persons who are
19 operating commercial storage facilities under a TSCA
20 storage approval."

21 MS. JAMIESON: Because storage, if you
22 will, storage and processing are two distinct

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1 activities, so that the processing exemption only
2 applies to the processing itself; it doesn't apply to
3 engaging in the storage activity.

4 JUDGE FULTON: I understand, but I would
5 assume that some period of storage is inevitably part
6 of processing. I mean, you have the material while
7 you're processing it, and I guess that's storage
8 during processing, right?

9 MS. JAMIESON: In this particular case,
10 they're storing -- they have a limit, a permit limit
11 in place for the storage of such items, of 1,000
12 pounds. Here, we have 26,000 pounds.

13 JUDGE FULTON: But that assumes that
14 they're operating under the authorization. Their
15 argument is that for this particular transaction,
16 they were operating outside their authorization; they
17 really weren't -- they were entitled to regulatory
18 exception here.

19 And your statement in your brief comes
20 awfully close to suggesting that if you are a
21 commercial storage facility, you really are not able
22 to undertake activities outside the realm of

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1 commercial storage, without those being swept into
2 the storage process, as well.

3 MS. JAMIESON: Our position is that
4 transfer -- this Appellant could act -- we conceded
5 in the case and in our brief, that Appellant could
6 act as a transfer facility, with respect to certain
7 materials.

8 JUDGE FULTON: What about as a processing
9 facility, as a facility that processes materials for
10 disposal?

11 MS. JAMIESON: If that were truly what
12 they were engaging in, then I would have to state
13 that they probably could function as a processor,
14 but, in this case, that's not the activities they
15 were engaging in.

16 JUDGE WOLGAST: Let me see if I
17 understand that argument. I had understood from what
18 you said earlier, that you didn't believe, or it was
19 EPA's position that 761.20(c)(i) processing
20 activities exemption, didn't apply because it wasn't
21 associated with -- because those processing
22 activities, if they were processing activities, the

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1 breaking down of the capacitors, weren't associated
2 with and facilitating storage or transportation,
3 that, instead, they were associated with and
4 facilitated disposal in the scrap metal oven.

5 MS. JAMIESON: That was one of our
6 arguments. We also looked at the examples of
7 processing, in the preamble, and we stated that we
8 did -- that the Agency looked at the examples of
9 processing in the preamble, and did not equate the
10 activities that the Appellant was engaged in, with
11 those examples in the preamble.

12 JUDGE STEIN: I was hoping that before you
13 conclude, you could address both Judge Fulton's
14 earlier question about the purpose for the
15 inspection, and, if I've missed it, pardon me, but
16 also the selective prosecution issue.

17 MS. JAMIESON: Yes.

18 JUDGE STEIN: Whether or not this
19 technically fits within the bounds of selective
20 prosecution, which I think we all know, is a fairly
21 difficult hurdle, I nonetheless find myself troubled
22 that we're here talking in great detail about the

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1 extent to which a company that has sought a permit
2 and attempted to comply with the permit, whether on
3 any particular given day, they, in fact, complied, in
4 toto, with their permit, whereas we have information
5 -- obviously a case not before us -- about a somewhat
6 similarly-situated company, perhaps not identical --
7 we don't have that record fully before us -- which,
8 if we're to believe what we're being told, is
9 completely outside the system.

10 And whether or not that rises to the level
11 of selective prosecution, I'm not sure, but it is
12 nonetheless troubling, and I'd like to hear what the
13 Region has to say about that.

14 MS. JAMIESON: What Region II found in
15 regard to G&S, as an entity, a business entity, is
16 not what the Appellant is representing. And you will
17 find in the record, that these are two distinct
18 business models.

19 While we did not have G&S in front of us,
20 it's true, as a party to the litigation, there was
21 evidence in the record that was put on by Region II,
22 who were witnesses, who were found to be highly

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1 credible by the ALJ, Ann Finnegan and her supervisor,
2 Dan Kraft, that G&S, although a commercial storer,
3 does not require an approval, because it's limited to
4 the storage of 500 gallons of liquid or non-liquid of
5 PCBs at regulated levels at any time.

6 That's in the transcript at Volume XII at
7 144.

8 JUDGE FULTON: Does that mean that --

9 MS. JAMIESON: Also, in the definition of
10 the commercial storer at 761.3, you will find the
11 limitation in that definition, which I thought was an
12 odd place to put it, but it's there.

13 JUDGE FULTON: So, is the -- in Region
14 II's view, as you understand it and as represented in
15 the proceeding below, G&S is a commercial storer,
16 albeit a de minimis one?

17 MS. JAMIESON: That is my understanding.
18 And then there were the activities in which they're
19 engaging in, have a difference from the very obvious
20 activities that the Appellant is engaging in.

21 For example, Region II found that G&S
22 purchases surplus lots of equipment, and they are

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1 sent to the facility on a bill of lading, and the
2 decision on whether or not to dispose or service such
3 equipment, is made after the purchase.

4 In fact, G&S, the testimony, I believe,
5 states, G&S purchases the surplus equipment. That is
6 not the case with the Appellant today.

7 In contrast, EPS applied to Region III to
8 be a commercial storer of PCB waste at quantities far
9 greater than 500 gallons. In fact, PCB transformers
10 and capacitors are only two of the types of material
11 that the Appellant in engages in storing in.

12 It's a commercial storage approval. They
13 were the ones in violation. But there's oil, there's
14 contaminated electrical equipment, there's standards
15 for at least eight to ten different types of
16 electrical equipment representing thousands of
17 pounds.

18 The record is clear that the equipment was
19 waste before it arrives at EPS. How is that clear?

20 Well, if you look at CBI Exhibit 64, which
21 I'm not going to speak to in detail, but just
22 reference the exhibit, you will find manifests and

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1 certificates of disposal from generators of all
2 types, and the certificates of disposal are issued by
3 the Appellant.

4 In addition, on the manifests, EPS is
5 listed as a destination facility.

6 And I would like to go back to one point
7 in regard to the transfer. EPS was never listed as a
8 transporter on the manifest when it came in, only as
9 a destination facility.

10 There are two lines for transporters, and
11 EPS was not listed as a transporter, if it was,
12 indeed, really transferring the material or intending
13 to. It did not list itself as a transporter, rather,
14 as a destination facility.

15 JUDGE STEIN: I want to continue to go
16 back to the selective prosecution issue.

17 MS. JAMIESON: Right.

18 JUDGE STEIN: I find myself very troubled
19 by this. It may well be that there are logical
20 explanations for why one company is regulated and one
21 company is not.

22 Obviously, that's in the record and we can

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1 take a look at that. There's also some evidence that
2 Region V has a somewhat different view.

3 Perhaps you could address this, but the
4 notion that we have potentially three different
5 regions doing potentially three different things, is
6 of great concern, and it may be that what we're asked
7 to resolve here, is selective prosecution.

8 But there are plenty of court cases out
9 there of the Agency doing different things to
10 different people, and it continues to trouble me a
11 great deal.

12 MS. JAMIESON: I understand, Your Honor,
13 but let's look at the record. First of all, G&S was
14 not left untouched.

15 G&S was the subject of four or five civil
16 inspections between 1998 and 2003, and also the
17 subject of a criminal investigation by Region II's
18 Criminal Investigation Division.

19 The Region's position is that that's not
20 leaving a facility untouched. In addition, G&S was
21 issued a Complaint, which is also in the record, by
22 Region II, for two different types of violations,

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1 which I don't have in my memory at this time, but I
2 would be happy to brief and find them in the record
3 for you afterwards.

4 Based -- Region V came into -- why did
5 Region V come into Region II's facility in the first
6 place? That's highly unusual.

7 Why? Because Appellant went to Region
8 II's high-level officials and made accusations
9 against a PCB inspector, that that person was
10 accepting favors from G&S Technologies, without any
11 evidence -- cancelled checks, videotapes,
12 documentation, testimony of any other person.

13 The allegations were made. That person
14 was removed from the case, so Region II could
15 investigate that allegation. And in order to see
16 whether or not Region II was correct in its analysis,
17 they invited Region V into their region to do an
18 inspection of the same facility.

19 Region V raised several issues, and one of
20 them is, aren't they really a commercial storer that
21 requires an approval, as you are troubled by. And
22 the Region described the activities and the operation

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1 that they found G&S to be engaged in, went to
2 Headquarters to seek guidance, and received guidance
3 that G&S was operating within the commercial storage
4 realm, but did not require an approval.

5 JUDGE FULTON: What document is that?
6 Where do we find the Headquarters affirmation --

7 MS. JAMIESON: You will find --

8 JUDGE FULTON: -- of Region II's response
9 to the Region V inspection?

10 MS. JAMIESON: There's testimony in the
11 record by Ann Finnegan, that will describe the entire
12 scenario, and I'm not certain at this exact moment,
13 whether or not there was a series of e-mails
14 recording this conversation which took place or this
15 dialogue which took place between Region II and
16 Headquarters.

17 I'm not sure if that's documented. I can
18 find that out and point it out to you at a later
19 date. The testimony was clear, though.

20 JUDGE FULTON: Other than the proof
21 adduced in this case, is there -- has anything been
22 done at the Headquarters level, to resolve this

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1 apparent difference of view between two Regional
2 Offices, for the sake of the regulated community?

3 In other words, has anything been
4 expressed to the regulated community in terms of
5 guidance or policy on this point?

6 MS. JAMIESON: I do not recall that there
7 is a policy or guidance on what occurred in this
8 factual scenario. It's a fairly unique factual
9 scenario.

10 JUDGE FULTON: All right, are we left with
11 the view -- I understand that this was an inspection
12 report; it wasn't a determination of the Program
13 Manager in Region V, necessarily, but are we to be
14 left with the sense here that if G&S was operating in
15 the Chicago area, instead of where they are, that
16 they would be treated as a commercial storer?

17 MS. JAMIESON: That is not the evidence
18 that Region II found, and if you look at the Judge's
19 opinion where he goes through the entire Region V
20 inspection, point-by-point, and then states, what did
21 Region II state or do in regard to these various
22 allegations, you will find that the Judge was

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1 satisfied that Region II conducted their very
2 reasonable and over-broad investigation of this
3 company to reach the conclusions that they did.

4 JUDGE FULTON: And the Headquarters
5 reaction to the Region II analysis, accepted the
6 purchase for resale idea as the vehicle for treating
7 this as an unregulated entity, or did they also
8 accept the under 500 gallons of PCB liquids onsite at
9 any time, as a legitimate premise for non-
10 regulation?

11 MS. JAMIESON: Their dialogue discussed
12 the purchase of surplus lots of equipment, I believe,
13 and not the second point that you raised.

14 There are two types of things that were
15 found in the record, that G&S engages in, albeit, as
16 I stated, not a party.

17 They purchase electrical equipment in
18 lots. They receive drained electrical PCB-
19 contaminated equipment, which is not subject to
20 commercial storage approval requirements.

21 The record testimony shows that they also
22 purchased PCB surplus equipment, but that if it was

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1 PCB, it was received on the decision that they would
2 just buy it and decide, are we going to service it,
3 are we going to repair it, or, in the event that we
4 can't do such a thing, would we dispose of it?

5 In that respect, the Region and
6 Headquarters agreed that, in those instances, G&S is
7 a generator and not the commercial storer.

8 JUDGE FULTON: So, in Region III's view,
9 you don't see these as irreconcilable regulatory
10 scenarios?

11 MS. JAMIESON: We do not view it -- well,
12 our case was about a commercial storer with an
13 approval, and Region II's case, is an issue as to
14 whether or not, as the Appellant claims, they
15 required an approval.

16 JUDGE FULTON: No, I understand that, but
17 the --

18 MS. JAMIESON: I missed your question, I'm
19 sorry.

20 JUDGE FULTON: Well, it's an impossible
21 question, I suppose, which is, if G&S were in Region
22 III, would the Region be comfortable regulating EPS

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1 but not G&S?

2 MS. JAMIESON: If I were to review all the
3 evidence that Ann Finnegan testified that she
4 reviewed -- the bills of lading, the fact that she
5 called Dusquene Power and Light and found out that
6 they misfiled something on a manifest instead of a
7 bill of lading, going in and out of that facility, I
8 may conclude -- excuse me -- the Region might
9 conclude the same thing as Region II.

10 The Region would have to examine the facts
11 and examine exactly what is occurring. But the Judge
12 was satisfied at the lower level, with Region II's
13 investigation and analysis of what occurred.

14 JUDGE FULTON: Did Region III consult with
15 Headquarters during the process of issuing a
16 commercial storage authorization to EPS?

17 MS. JAMIESON: I do not believe that they
18 consulted in regard to the issuance of the commercial
19 storage permit. What they did consult about, was, as
20 came up earlier in the Appellant's positions,
21 Appellant's position is that they were -- why were we
22 in such concern about their financial assurance

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1 change, if you recall?

2 JUDGE FULTON: Yes.

3 MS. JAMIESON: And our -- the Region's
4 position was, we consulted with Headquarters on that
5 issue, because financial assurance didn't just cover
6 Respondent's facility in Wheeling, West Virginia.

7 As to financial -- excuse me -- its
8 financial assurance also covers two mobile TSCA
9 treatment rigs, which go out into the country and
10 decontaminate waste, so they were tied together, so
11 we had to consult and they were -- excuse me, the
12 record will show, they were trying -- the company was
13 attempting to substitute an insurance policy for the
14 closure fund, and the record will show that Ms.
15 Kremer found, and, perhaps, Headquarters, that there
16 were problems with the terms of the insurance policy
17 that they were seeking to acquire and the insurance
18 policy could not be accepted in lieu of the closure
19 fund.

20 While all that was going on, in September
21 of 1998, we did our inspection in July -- authorized
22 an inspection which occurred in July of '99, and then

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1 all the sequence of events occurred, which both sides
2 have fully articulated here today.

3 JUDGE FULTON: Now, you know, it's sort of
4 accepted without question by the ALJ, and you also
5 offer this idea in your brief, that because of this
6 inquiry from EPS regarding changing their financial
7 assurance mechanism, that led to a concern that they
8 may be operating over capacity.

9 MS. JAMIESON: Yes.

10 JUDGE FULTON: Can you explain why one
11 thought flows from the other?

12 MS. JAMIESON: The person who wrote the
13 memo at the time that I discovered the memo in the
14 course of this case, no longer is at the Agency, but
15 the PCB Coordinator who went -- who was in the
16 position at the time we issued the Complaint,
17 reviewed that memorandum with me, and I believe
18 there's testimony that the Agency was concerned that
19 they would not have enough financial assurance for
20 whatever they were storing or that waste might have
21 been going in and out of the facility at quantities
22 larger than what they were financially assured for.

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1 The concern was, why did they want to have
2 over \$200,000 of cash in a hurry, and what other --
3 if Ms. Bobby Wright could have been in the case,
4 perhaps we could have more enlightenment on that, but
5 she was gone from the Agency.

6 JUDGE FULTON: Okay.

7 MS. JAMIESON: And, in conclusion, I would
8 like to say a word about the bar code numbers in
9 Count Three. Appellant claims that the serial
10 numbers in the ACTI lab data, do not match the bar
11 codes that were burned in the oven in Exhibit 16-C --
12 excuse me, Exhibits 16-A, B, and C, which will show
13 lists of bar codes that were burned at the various
14 times of violation, when the time and temperature was
15 run too short. The minimum temperature was failed to
16 be maintained for the full two and a half hours.

17 And if you will read -- find in my brief,
18 at Section -- I believe it is 3-D, a complete
19 explanation as to why there were so -- the Region and
20 Judge accepted that the numbers matched, the six-
21 digit numbers in the lab data matches the six-digit
22 bar code numbers of the items burned in the scrap

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1 metal recovery oven. Thank you.

2 JUDGE FULTON: Any other questions?

3 (No response.)

4 JUDGE FULTON: Thank you, Ms. Jamieson.

5 MS. JAMIESON: You're welcome.

6 JUDGE FULTON: Ms. Hwang?

7 MS. HWANG: Your Honor, Mr. Kropp will be
8 doing rebuttal.

9 JUDGE FULTON: Okay.

10 MR. KROPP: Your Honors, if you agree with
11 respect to Count One, with what Ms. Jamieson just
12 told you about who is the generator, then you
13 absolutely cannot come to any other conclusion but
14 the fact that G&S, which says it's the generator, has
15 to be regulated, and must need a commercial storage
16 approval.

17 Justice Stein, you asked if anybody else
18 is using the ownership argument? Absolutely. That's
19 how G&S is escaping its commercial storage
20 obligations.

21 JUDGE WOLGAST: Could I ask you a question
22 about that argument? I'm looking at your brief at

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1 pages 18 and 19, about the ownership argument.

2 MR. KROPP: Yes.

3 JUDGE STEIN: And you rely on the
4 definition section at 761.3, and looking at the
5 terms, and, particularly, the terms you highlight
6 there, I'm not understanding how ownership alone,
7 exempts you from commercial -- being categorized as a
8 commercial storer.

9 I thought you would also have to show that
10 some -- that the waste that was received, was not
11 generated by the utility; it was generated, in fact,
12 by EPS.

13 MR. KROPP: Well, I think that's another
14 unclear part of the definition, because a commercial
15 storer is someone who stores PCB waste generated by
16 others, and then there's a "or," and it says "wastes
17 removed while servicing and brokered for disposal."

18 EPS doesn't remove any equipment from --
19 doesn't service any equipment. It simply picks the
20 equipment up.

21 So I don't know whether the "and" is
22 disjunctive between those two, and whether the "or"

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1 simply -- where the "or" goes and how you interpret
2 it, but I read that to say that if I am the
3 generator, if I own it, I make the decision, I do the
4 testing, and I'm the owner, then the commercial
5 storage approval requirement does not apply. I am
6 not a commercial storer of that waste.

7 JUDGE WOLGAST: Again, I'm focusing -- I
8 understand you're saying that you don't qualify under
9 the disjunctive, "or that was removed while servicing
10 the equipment owned by others," but just looking at
11 the first part of the definition, even if you're an
12 owner -- I mean, obviously, the definition says you
13 can be an owner and be a commercial storer, because
14 that's the way the definition begins.

15 MR. KROPP: Of the facility. Yes, we do
16 own and operate the facility.

17 JUDGE WOLGAST: Okay.

18 MR. KROPP: But in order to be a
19 commercial storer of PCB items, you must also engage
20 in the storage activities involving either PCB waste
21 generated by others, or that was removed while
22 servicing, and EPS doesn't do any servicing of the

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1 equipment.

2 JUDGE WOLGAST: And you allege that you
3 weren't engaged in storage activities of PCB waste
4 generated by the utilities referenced in the case?

5 MR. KROPP: Right, because our contract
6 says that we become the owner when we take possession
7 of the equipment.

8 JUDGE WOLGAST: But how does the fact that
9 -- let's assume that you do become the owner, just
10 for purposes of argument.

11 MR. KROPP: Okay.

12 JUDGE WOLGAST: How does that then mean
13 that the utility is suddenly not the generator?

14 MR. KROPP: If I own the equipment and I
15 do the testing -- and I can refer you to a September
16 12, 2000 letter from Region II that says this -- if I
17 do the testing, I own the equipment, and I make the
18 decision that the equipment is waste at that point,
19 they I am the generator.

20 That September 2000 letter deals with the
21 question of who is the generator of PCB wastes.

22 JUDGE STEIN: Aren't you just defining, by

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1 contract, these obligations to a different party? I
2 mean, how can your contract sort of override a
3 regulatory definition of what a generator is?

4 MR. KROPP: Well, the regulatory
5 definition of the generator, is the person who makes
6 the determination.

7 JUDGE STEIN: Whose process produces
8 material.

9 MR. KROPP: Yes, right. So, if the
10 equipment is usable equipment, and I pick it up, and
11 I don't know the PCB content -- and, by the way, that
12 was another issue that was raised, is that for G&S,
13 they buy surplus equipment, while the regulations
14 prohibit the buying and selling of PCB equipment. If
15 it's greater than 500, you can't do that.

16 And they're avoiding their commercial
17 storage obligation, because they don't store more
18 than 500 gallons of liquid at one time. Transformers
19 come through the door that, themselves, individually,
20 contain more than 500 gallons, and this company is
21 the largest disposer, according to the evidence that
22 was presented, on the whole East Coast, and, we

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1 believe, now in the whole United States. How can
2 Region II possibly, unless they're wearing a
3 blindfold when they walk into the facility, look at
4 those transformers and say, oh, well, there must not
5 be greater than 500 gallons, so you don't need a
6 commercial storage permit here?

7 JUDGE STEIN: I want to go back to the
8 definition of generator and just walk through it to
9 be sure I understand your argument.

10 MR. KROPP: Okay.

11 JUDGE STEIN: As I'm reading in 761.3, a
12 generator of PCB waste means any person whose act or
13 process produces PCBs that are regulated for
14 disposal, or whose act first causes PCBs or PCB items
15 to become subject to the disposal requirements.

16 MR. KROPP: Correct.

17 JUDGE STEIN: But didn't those things al
18 occur before they got to your facility?

19 MR. KROPP: They may have, Your Honor. I
20 think that at the time of these inspections -- and,
21 again, I think what we're dealing with, is an
22 absolutely unclear definition.

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1 I mean, that's why we have Region V
2 concluding -- and I think, Justice Fulton, you're
3 absolutely right -- if G&S had been in Region V, I
4 think they would have had to have had a commercial
5 storage approval facility, and to have -- in this
6 initial decision, the tribunal below found Ms.
7 Finnegan's testimony to be credible when she
8 concludes that, as a result of Region V's inspection
9 of G&S, she's not sure that Region V understands how
10 to interpret the regulations.

11 Well, if Region V doesn't understand how
12 to do it and Region II is interpreting one way and
13 now we have Region III saying something else, how can
14 there possibly be fair warning about the actual
15 implementation of these definitions?

16 I agree with you that it's absolutely
17 unclear.

18 JUDGE STEIN: Well, I'm not sure that I
19 was suggesting -- that particular definition looks
20 very much to me like the RCRA definition of
21 generator, of someone whose act or process makes it
22 subject to the regulation.

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1 MR. KROPP: And I think some of those were
2 borrowed.

3 JUDGE STEIN: I think the issue of, you
4 know, Region V, Region III, Region II, in your fair-
5 notice issue, you know, is a somewhat separate issue.
6 But I was looking at this generator definition for
7 purposes of this commercial storage definition, and
8 I'm not convinced that, by contract, that whatever
9 your contract terms are, can override the regulatory
10 definition.

11 MR. KROPP: And if you conclude that,
12 that's the way G&S operates. They have a contract
13 under which they buy supposedly surplus equipment,
14 but they don't even know the PCB concentration of it
15 when they buy it.

16 So, if we have a problem at EPS and you
17 decide that that interpretation is the way things
18 need to go against EPS, how can the Agency explain
19 the lack of enforcement for commercial storage
20 approval against G&S? I'm out of time. I thank you
21 for your time.

22 JUDGE FULTON: All right, any final

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1 questions?

2 (No response.)

3 JUDGE FULTON: Okay, we have one small
4 loose end. There was this thought about the Region
5 possibly submitting something to us on this question
6 of Agency guidance on the definition of "ownership."

7 If there is anything to be submitted on
8 that, can you please file it?

9 MS. JAMIESON: Yes, Your Honor.

10 JUDGE FULTON: Let's file it by -- let's
11 have it filed by the end of the first week of
12 January, January 5th, and in the event that a
13 response is warranted -- I don't know that there will
14 be, but you're certainly free to file a response, and
15 that response would be due a week later, the 12th of
16 January.

17 MR. KROPP: Thank you, Your Honor.

18 JUDGE FULTON: Okay, well, thank you very
19 much for the energy invested in this morning's
20 argument. We very much appreciated the learning that
21 came from both the briefs, but also the opportunity
22 to, as well, be together this morning. We

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1 appreciate your patience with our questions. We
2 understand fully, the gravity of the matter, and
3 certainly take away from this, some additional
4 thoughts that will factor into our deliberations in
5 this case. Thank you.

6 THE CLERK: All rise.

7 (Whereupon, at 12:40 p.m., the oral
8 argument was concluded.)
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