IN RE ENVIRONMENTAL PROTECTION SERVICES, INC.

TSCA Appeal No. 06-01

FINAL DECISION AND ORDER

Decided February 15, 2008

Syllabus

Appellant Environmental Protection Services, Inc. ("EPS") contests an Initial Decision by Administrative Law Judge Carl C. Charneski ("ALJ") in which the ALJ determined, as alleged by U.S. EPA Region 3 (the "Region"), that EPS had violated section 15 of the Toxic Substances Control Act, 15 U.S.C. § 2614, by failing to comply with implementing regulations governing the storage, distribution, and disposal of polychlorinated biphenyls ("PCBs") at its facility in Wheeling, West Virginia ("Facility").

The regulations central to this proceeding are the PCB storage and disposal regulations at part 761, subpart D, of Title 40 of the Code of Federal Regulations. These regulations, require, among other things, that "commercial storers" of PCB wastes receive approval to store PCB wastes generated by others, and impose maximum storage capacities ("MSCs") on the amount of waste stored. The regulations also specify disposal methods based on the types and concentrations of PCBs and PCB-containing waste equipment, such as transformers and capacitors. Specifically, the PCB regulations allow burning of drained "PCB-contaminated" transformers (containing PCB concentrations greater than or equal to 50 parts per million ("ppm") but less than 500 ppm) in scrap metal recovery ovens ("SMROs"). The regulations also require commercial storers of PCBs to maintain financial assurance calibrated to the amount of PCB waste they store, as reflected by their MSCs.

This administrative action arises from EPS's storage and disposal of used electrical equipment the company receives from utility companies. EPS disposes of drained PCB-contaminated electrical equipment (50 ppm – 499 ppm) in an on-site SMRO. In 1993, in accordance with the PCB regulations, the Region approved EPS's application authorizing it to serve as a "commercial storer" of PCB waste, and, in 1998, approved the company's application for a five-year renewal of its "commercial storer" status. EPA's approval imposed on EPS an MSC of 5,000 pounds for PCB transformers and 1,000 pounds for PCB capacitors.

Following inspections of the Facility on July 15 and November 2, 1999, the Region, on June 29, 2001, filed a three-count administrative complaint against EPS. The Region was subsequently allowed to twice amend the complaint (the April 23, 2003 complaint is hereafter referred to as the "Second Amended Complaint."). The Region's Second Amended Complaint alleged that EPS violated the PCB regulations, as set forth below:

- Count I: EPS, on July 15, 1999, and November 2, 1999, stored PCB transformers at its Facility in excess of the applicable 5,000-pound MSC for PCB transformers, in violation of 40 C.F.R. § 761.65.

- Count II: EPS, on July 9, 1999, stored PCB capacitors in excess of the applicable 1,000-pound MSC for PCB capacitors, in violation of 40 C.F.R. § 761.65(d); and

- Count III: EPS failed to adhere to the time and temperature parameters of 40 C.F.R. § 761.72(a)(3) while burning PCB-contaminated transformers in its SMRO on eleven occasions in March, September, and October, 1999.

The Region proposed a penalty of $386,100 against EPS, but subsequently reduced the proposed penalty to $151,800. Following a series of evidentiary hearings, the ALJ, on March 18, 2006, issued an Initial Decision in which he found EPS liable on all three counts in the Second Amended Complaint and imposed the $151,800 penalty proposed by the Region.

On May 12, 2006, EPS filed an appeal in which it challenged numerous aspects of the ALJ's liability finding and penalty assessment. EPS's chief arguments on appeal were as follows:

Regarding Counts I and II:

(1) The Region failed to establish a prima facie case that EPS violated the applicable MSCs for transformers and capacitors;

(2) EPS complied with its MSC limits for PCB transformers because it notified the Region by letter that it would be raising its MSCs to accommodate its storage of PCB transformers;

(3) The financial assurance instrument that EPS posted for its commercial storage approval was sufficient to cover the cost of closing EPS's Facility;

(4) EPS was exempt from the requirement to obtain commercial storage approval for the transformers and capacitors pursuant to 40 C.F.R. § 761.20(c)(2) because EPS was processing the electrical equipment to "facilitate * * * transportation for disposal;"

(5) EPS acted as a "transfer facility" with respect to the PCB capacitors in question and thus was exempt from the commercial storage approval requirement pursuant to 40 C.F.R. § 761.3; and

(6) The Region failed to provide the company with "fair notice" regarding how the Region would apply the 5,000-pound MSC for PCB transformers against EPS and how it would interpret the regulatory exemption at 40 C.F.R. § 761.20(c)(2).

Regarding Count III:

(1) By producing PCB concentration data on transformers shortly before the start of the hearing and by not clearly identifying which transformers were improperly burned in EPS's SMRO, and on what dates and at what times, the Region deprived EPS of its Constitutional due process right to receive proper notice of the basis for the administrative action that the Region filed against EPS;

(2) The Region failed to establish a prima facie case for liability because the Region misrepresented PCB concentration data that the Region obtained by subpoena from EPS's testing laboratory;

(3) EPA failed to give EPS "fair warning" of its interpretation that the PCB regulations require SMRO operators to satisfy required temperature parameters *continuously* over 2.5 hours during a burn cycle, rather than allowing operators to satisfy the temperature parameters for a *total* duration of 2.5 hours, regardless of continuity.

EPS also asserted, as an affirmative defense to liability on the three counts, that EPA engaged in selective enforcement against the company by singling EPS out for enforcement while ignoring the actions of a similarly situated competitor in Region 2 – and that the Region, by taking enforcement against EPS, invidiously and unconstitutionally retaliated against EPS for complaining about EPA's lack of enforcement against the competitor.

Finally, EPS opposes the ALJ's imposition of a $ 151,800 penalty against the company as lacking a factual foundation.

Held: As described below, the Board affirms the ALJ's liability findings and penalty assessment, except those related to the July 19, 1999 violation charged under Count I. Specifically, the Board concludes as follows:

Counts I and II

(1) The ALJ correctly found that the Region had established a prima facie case that EPS met the definitional test for a "commercial storer" because EPS was engaged in "storage activities involving * * * PCB waste generated by others." The Board bases its conclusion on such factors as the nature of EPS's business operations, the company's public statements regarding its business, and EPS's utility clients' self-identification as waste "generators" on waste manifests sent to EPS. Taking such considerations into account, EPS is appropriately viewed as a "commercial storer" pursuant to the PCB regulations.

(2) The ALJ erred by finding that the Region had established a prima facie case under Count I that EPS exceeded its MSC of 5,000 pounds for commercially stored PCB transformers on July 15, 1999. The documentary evidence the Region received from EPS regarding equipment stored by EPS on this date did not establish with sufficient specificity that the stored items constituted "PCB transformers" subject to the applicable MSC. However, the Board finds that the Region did adduce sufficient documentary information to identify commercially stored PCB transformers exceeding the applicable 5,000 pound MSC on November 2, 1999. With regard to Count II, the Board agrees with the ALJ that the Region's evidence was sufficient to establish a prima facie case that EPS was commercially storing PCB capacitors in excess of the applicable 1,000-pound MSC.

(3) The ALJ correctly rejected EPS's argument, with respect to Count I, that EPS unilaterally effected an upward revision of its MSC by notifying the Region by mail that it intended to raise its MSC for PCB transformers to 100,000 pounds. A change in MSC is appropriately viewed as a change in a facility's operating plan, and, as such, requires the Region's approval in accordance with the PCB regulations' coverage of commercial storers at 40 C.F.R.§ 761.65. Moreover, EPS's argument in favor of unilateral revision of the MSC contravenes the terms of EPS's commercial storage approval.

(4) The ALJ correctly determined that the alleged sufficiency of EPS's financial assurance was irrelevant to whether EPS exceeded its MSC pursuant to Counts I and II. The PCB regulations contain no mechanism that would allow a commercial storer of PCB waste to unilaterally raise its MSC due to an increase in the value of its closure trust fund.

(5) The Board upholds the ALJ's determination, with respect to Counts I and II, that EPS failed to meet its burden of showing that it satisfied the conditions of 40 C.F.R. § 761.20(c)(2) for an exemption from commercial storage approval requirements, including MSCs. The language in section 761.20(c)(2) exempting "processing activities which are primarily associated with and facilitate storage or transportation for disposal" applies to a restricted set of activities preparatory to storage but not to regulated storage or transportation themselves. With respect to Count I, EPS failed to satisfy the exemption because it did not demonstrate that it engaged in any processing of the subject PCB transformers independent of actual storage. With regard to Count II, EPS failed to demonstrate that it processed the subject PCB capacitors to facilitate their off-site *transportation* and thereby came within the coverage of the exemption. Instead, the evidence in the record indicates that EPS was handling the subject PCB capacitors to facilitate their on-site disposal in the company's SMRO.

(6) The Board upholds the ALJ's determination that EPS failed to demonstrate that its activities fell within the "transfer facility" exemption from commercial storage approval with respect to the PCB capacitors under Count II. The record indicates that EPS handled the capacitors to facilitate on-site disposal, not transportation, and, as such, did not satisfy the definitional test of "transfer facility," which includes "loading docks" and "parking areas" that "hold the waste during the normal course of transportation."

(7) The Board affirms the ALJ's rejection of EPS's argument that the Region did not provide EPS with "fair warning" regarding EPA's interpretation of the section 761.20(c)(2) regulatory exemption. The relevant regulatory language, together with explanations in the preamble to the final rule promulgating the exception, were sufficiently clear to have informed EPS with "ascertainable certainty" of the exception's scope. As such, EPS had "fair warning" of EPA's interpretation of section 761.20(c)(2) in a manner satisfying Constitutional due process.

In summary, with the exception of the Count I charge alleging the EPS exceeded its 5,000 pound MSC on July 15, 1999 – on which the Board reverses the ALJ's finding – the Board otherwise affirms the ALJ's liability findings under Counts I and II.

Count III

(1) The Board rejects EPS's argument that the Region failed to accord the company adequate notice of the factual basis for the Count III SMRO burning violations as required by the Consolidated Rules of Procedure ("CROP"), 40 C.F.R. pt. 22, governing this proceeding, and Constitutional due process. The CROP's directive to "include in its administrative complaint" a "concise statement of the factual basis for each violation alleged" did not obligate the Region to reference detailed and immutable evidence of illegal SMRO burning in its complaint. Consistent with Board case law adopting the liberal pleading policies of the Federal Rules of Civil Procedure, the Board finds the Second Amended Complaint "fairly informed" EPS of the Count III claims against it. The Board also finds that the Region satisfied due process re-

quirements in this case. Specifically, the Region, during the discovery period, sufficiently alerted EPS to the nature and source of PCB concentration data and other evidence that the Region intended to use to prove Count III, and despite the late production of PCB concentration evidence, EPS was able to confront this evidence during the evidentiary hearing. Moreover, EPS failed to support its due process claims by showing that it suffered "prejudice" as a result any alleged inadequate notice provided by the Region.

(2) The Board affirms the ALJ's finding that the Region established a prima facie case that EPS violated 40 C.F.R. § 761.72(a)(3) by burning PCB-contaminated transformers without adhering to the provision's time and temperature burn parameters during dates in March, September, and October 1999. The ALJ correctly found that the PCB concentration data EPA presented at the evidentiary hearing, obtained by subpoena from EPS's testing laboratory, constituted persuasive evidence that EPS burned PCB-contaminated transformers during times that EPS did not meet section 761.72(a)(3)'s burn parameters. The Board agrees with the ALJ that the striking correlation between EPS barcode numbers and EPS's laboratory's serial numbers warranted the Region's reliance on the latter numbers to identify individual PCB-contaminated items that EPS burned in noncompliance with the SMRO burn parameters.

(3) The Board affirms the ALJ's rejection of EPS's argument that it did not receive fair warning from EPA regarding the latter's interpretation of section 761.72(a)(3) to require continuous burning of electrical equipment in SMROs at a minimum temperature of 537 degrees Celsius (999 Fahrenheit) for two and one-half hours. Relevant language in the preamble to the final rule promulgating section 761.72(a)(3) was sufficient to allow EPS to identify with "ascertainable certainty" that EPS was required to satisfy the SMRO burn parameters on a "continuous basis."

Affirmative Defense of Selective Prosecution

The Board affirms the ALJ's determination that EPS failed to sustain its burden of proving that EPA engaged in selective enforcement against EPS, either under a theory of traditional selective enforcement or "vindictive" enforcement. The Board accords deference to the ALJ's factual determination based on witness testimony that appropriate considerations motivated the Region's enforcement action and that the Region's asserted grounds for inspecting EPS and bringing the instant enforcement action were not motivated by retaliation.

Penalty

The Board rules that, except for the July 15, 1999 charge under Count I, with respect to which the Board has determined that the ALJ erroneously found EPS to be liable, EPS has shown no abuse of discretion or clear error in the ALJ's penalty assessment, which was properly informed by EPA's PCB Penalty Policy. EPS is therefore ordered to pay a final penalty of **$133,100**, which the Board calculates by subtracting the penalty amount associated with the reversed portion of Count I -$18,700 – from the ALJ's overall penalty assessment of $151,800.

Before Environmental Appeals Judges Scott C. Fulton, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

On June 29, 2001, the U.S. Environmental Protection Agency Region 3 (the "Region") filed an administrative action in which it alleged that Appellant Environmental Protection Services, Inc. ("EPS") violated section 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, by failing to comply with TSCA implementing regulations governing the storage, distribution, and disposal of polychlorinated biphenyls ("PCBs"), which have been determined to be highly toxic under TSCA and its implementing regulations. *See, e.g., In re Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1270-71 (D.C. Cir. 1980); 63 Fed. Reg. 35,384, 35,385 (June 29, 1998). These implementing regulations are found at part 761 of Title 40 of the Code of Federal Regulations. *See* 40 C.F.R. pt. 761 (Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions). Subpart D of part 761 contains regulations governing the storage and disposal of PCB wastes. The Region originally sought a $386,100 penalty against EPS but later reduced its proposed penalty to $151,800.

Following a series of administrative hearings, Administrative Law Judge Carl C. Charneski ("ALJ") issued an Initial Decision on March 7, 2006, in which he determined that EPS had violated TSCA as alleged by the Region. The ALJ imposed upon EPS the $151,800 penalty proposed by the Region.

On April 10, 2006, EPS filed a timely Notice of Appeal and on May 12, 2006, filed an appeal brief contesting its TSCA liability on all counts and challenging the ALJ's penalty assessment.

As described below, the Environmental Appeals Board ("Board") upholds the ALJ's liability finding and penalty assessment except in relation to one of the violations alleged by the Region. With respect to that violation, we reverse the ALJ and reduce the ALJ's penalty assessment by $18,700. As a result, we impose a final penalty of $133,100 upon EPS.

II. *BACKGROUND*

A. *Legislative and Regulatory Background*

PCBs[1] are chemically stable, fire resistant compounds that have been used since the 1920s in numerous industrial applications, including electrical equipment (*e.g.*, transformers, capacitors[2]) and plasticizers, adhesives, and textile coatings. The same chemical stability that makes PCBs so valuable in industrial applications makes them extremely persistent in the environment (i.e., they resist biological degradation), and PCBs tend to bioaccumulate in the fatty tissues of humans and other animals. *See Dow Chem. Co. v. Costle*, 484 F.Supp 101, 102 (D. Del. 1980). PCBs are classified as probable human carcinogens, and PCBs have also been linked to a wide variety of noncarcinogenic illnesses in humans, particularly affecting the skin, eyes, and nervous system. *See id*. at 101; *Envtl. Def. Fund Inc. v. EPA*, 636 F.2d 1267, 1270 (D.C. Cir. 1980); Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 15,384, 35,385 (June 29, 1998).

In recognition of PCBs' high toxicity, Congress, in adopting TSCA in 1976, barred, subject to limited exemptions, the manufacture, processing or distribution in commerce of PCBs. In particular, TSCA imposed the following ban on these activities:

> (i) no person may manufacture any [PCBs] after two years after January 1, 1977, and
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> (ii) no person may process or distribute in commerce any [PCBs] after two and one-half years after such date.

TSCA § 6(e)(3)(A)(I), (ii), 15 U.S.C. § 2605(e)(3)(A)(I), (ii). TSCA section 6(e) does not, however, ban per se the *use* of PCBs. First, TSCA imposes no restrictions on the use of totally enclosed PCBs articles, which includes using PCBs in transformers.[3] Such uses are allowed to continue indefinitely through the useful

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[1] The PCB regulations define PCB and PCBs as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance." 40 C.F.R. § 761.3.

[2] "A transformer is an electrical device that is used to change the voltage of an alternating electrical current power supply to a higher or lower voltage." *Dollar Elec. Co. v. Syndevco, Inc.*, 688 F.2d 429 (6th Cir. 1982). The PCB regulations define "capacitor" as "a device for accumulating and holding a charge of electricity and consisting of conducting surfaces separated by a dielectric." 40 C.F.R. § 761.3.

[3] TSCA generally prohibits *non-totally enclosed use*s of PCBs. TSCA provides, in relevant part, that "effective one year after January 1, 1977, no person may * * * use any [PCBs] in any manner other than in a totally enclosed manner." TSCA § 6(e)(2)(A), 15 U.S.C. § 2605(e)(2)(A).
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life of the transformer. *See* Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 44 Fed. Reg. 31,514, 31,530 (1979) (stating that "EPA considers the use of transformers as use in a totally enclosed manner" and that "the use of PCBs in transformers may continue indefinitely"). Also, the Agency may authorize for indefinite periods of time "non-totally enclosed uses" of PCBs such as the servicing of PCB-contaminated transformers. *See* 40 C.F.R.§ 761.30(a);[4] *see also* 44 Fed. Reg. at 31,531 (1979) (describing authorized non-totally enclosed uses of PCBs).

Once the useful life of PCBs terminates, a complex regulatory program governs the disposal of PCBs, as well as associated activities such as pre-disposal storage and the movement and transportation of PCB wastes. Disposal requirements are found primarily in subpart D of the PCB regulations. *See* 40 C.F.R. subpt. D (Storage and Disposal). The PCB regulations, among other things, impose comprehensive recordkeeping requirements on those persons handling PCB waste, including waste storage and disposal facilities. These recordkeeping requirements are found primarily in subparts J and K of the PCB regulations. *See* 40 C.F.R. subpts. J (General Records and Reports) and K (PCB Waste Disposal Records and Reports).[5]

(continued)
TSCA defines "totally enclosed manner" as "any manner which will ensure that any exposure of human beings or the environment to a [PCB] will be insignificant as determined by the Administrator by rule." TSCA § 6(e)(2)(c); 15 U.S.C. § 2605(e)(2)(c).

[4] Section 761.30 of the PCB regulations describes numerous non-enclosed use activities that may be authorized pursuant to TSCA § 6(e)(2)(B). *See* 40 C.F.R. § 761.30. In relevant part, this section provides, subject to enumerated conditions, that "PCBs at any concentration may be used in transformers (other than in railroad locomotives and self-propelled railroad cars) and may be used for purposes of servicing including rebuilding these transformers for the remainder of their useful lives * * *." *Id.* § 761.30(a).

[5] The PCB regulations governing waste disposal and recordkeeping are authorized by the following language in TSCA § 6(e), 15 U.S.C. § 2605(e).

> (1) Within six months after January 1, 1977, the Administrator shall promulgate rules to-
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> > (A) prescribe methods for the disposal of polychlorinated biphenyls, and
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> > (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instruction with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

TSCA § 6(e)(1)(A), (B), 15 U.S.C. § 2605(e)(1)(A), (B).

1. *Disposal Methods*

Subpart D allows various methods for disposing of PCB wastes. These methods include the following: incineration (§ 761.70); burning in high-efficiency boilers (§ 761.71); burning in scrap metal recovery ovens and smelters (§ 761.72); and disposal in chemical waste landfill (§ 761.75). The waste type and its PCB concentration determine the form of disposal allowed and the degree of oversight that EPA exercises over it.

With regard to waste type, the PCB regulations establish a detailed classification system for PCB wastes, including the broad categories designated "PCB Item," "PCB Article," "PCB remediation waste," "bulk product waste," and "liquid PCBs."[6] Of these, the most directly relevant classification for purposes of the instant case are "PCB Item" and "PCB Article," which the PCB regulations define as follows:

> *PCB Item* means any PCB Article, PCB Article Container, PCB Container, PCB Equipment, or anything that deliberately or unintentionally contains or has as a part of it any PCB or PCBs.

40 C.F.R. § 761.3.

> *PCB Article* means any manufactured article, other than a PCB Container,[7] that contains PCBs and whose surfaces(s) has been in direct contact with PCBs. "PCB Article" includes *capacitors, transformers,* electric motors, pumps, pipes, and any other manufactured item (1) which is formed to a specific shape or design during manufacture, (2) which has end use function(s) dependent in whole or in part upon its shape or design during end use, and (3) which has either no change of chemical composition during its end use or only those changes of composition which have no commercial purpose separate from that of the PCB Article.

40 C.F.R. § 761.3 (emphasis added).

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[6] The PCB regulations define "liquid PCBs" as "a homogenous flowable material containing PCBs and no more than 0.5 percent by weight non-dissolved material." 40 C.F.R. § 761.3.

[7] The PCB regulations define "PCB Container" as "any package, can, bottle, bag, barrel, drum, tank, or other device that contains PCBs or PCB Articles and whose surface(s) has been in direct contact with PCBs." 40 C.F.R. § 761.3.

Across the various types of PCB articles, PCB concentration range dictates the specific disposal method allowed. *See generally* 40 C.F.R. § 761. 60. In particular, the PCB regulations establish a two-tiered system of PCB-concentration ranges: a lower range of equal to or greater than ("ǂ") 50 parts per million ("ppm") PCBs but less than ("<") 500 ppm PCBs, and a higher range of ǂ 500 ppm PCBs.[8] The regulations designate transformers and capacitors containing ǂ 500 ppm PCBs as "PCB transformers" or "PCB capacitors"; those containing ǂ 50 ppm but <500 ppm PCBs are designated as "PCB-contaminated" transformers and "PCB-contaminated" capacitors.[9] *See* 40 C.F.R. § 761.3 (Definitions).

For PCB transformers, the PCB regulations contemplate high temperature incineration, *see* 40 C.F.R. § 761.70, or placement in a chemical waste landfill,[10] *see id* § 761.75, as disposal methods. *See id.* § 761.60(b)(1), (2). For PCB capacitors weighing ǂ 3 pounds, the PCB regulations, except under limited circumstances, prescribe disposal by incineration. *See* 40 C.F.R. § 761.60(b).[11] Both incineration and chemical landfill disposal require an EPA permit. *See id.* §§ 761.70, 761.75.

By contrast, the regulations allow more flexible disposal options for the lower-PCB concentration "PCB-contaminated" transformers and "PCB-contaminated" capacitors. For example, PCB-contaminated transformers, in addition to being incinerated, may be disposed, after the transformers are drained of liquid, by burning the transformers in a scrap metal recovery oven or by placing them in a municipal solid waste facility or non-municipal non-hazardous waste facility. *See* 40 C.F.R. § 761.60(b)(6)(ii)(A). Burning in a scrap metal recovery oven requires a state or EPA Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-91, compliant permit, *see* 40 C.F.R. § 761.72(a), while placement in a waste facility requires a state permit under state law. *See* 40 C.F.R.

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[8] The PCB regulations do not generally apply to wastes that contain less than 50 ppm PCBs, which the regulations designate as "excluded PCB products." 40 C.F.R.§ 761.3; *see also* 40 C.F.R. § 761.60(b)(4), (b)(6).

[9] The PCB regulations define "PCB-Contaminated Electrical Equipment" as "any electrical equipment including * * * transformers [and] capacitors * * * that contains PCBs at concentrations of 50 ppm and <500 ppm in the contaminating fluid." *See* 40 C.F.R. § 761.3.

[10] PCB transformers may be placed in a chemical waste landfill if "all free-flowing liquid is removed from the transformer, the transformer is filled with a solvent, the transformer is allowed to stand for at least 18 continuous hours, and then the solvent is thoroughly removed." 40 C.F.R. § 761.60(b)(1)(B). The drained liquids must then be incinerated or decontaminated as prescribed in the PCB regulations. *Id.*

[11] Small PCB capacitors weighing less than 3 pounds may generally be disposed of as municipal solid waste. *See* 40 C.F.R. § 761.60(b)(2)(ii).

§ 761.609(b)(6)(B)(2).[12] The PCB regulations allow PCBcontaminated capacitors weighing greater than or equal to 3 pounds also to be disposed by these methods. *See id.* § 761.60(b)(4).

The PCB regulations contain specific requirements for scrap metal recovery ovens ("SMROs"), which are used to facilitate recovery of scrap metals for smelting. These provide that before any equipment is placed in such an oven, "all free-flowing liquid" be removed from it. *See* 40 C.F.R. § 761.72(a)(2). Also, all SMROs must contain a primary chamber (where PCB equipment is processed) and a secondary chamber (where exhaust from the primary chamber is treated). *See id.* Furthermore, the regulations require SMROs to reach and maintain certain temperatures to ensure volatilization and destruction of PCBs. For example, the regulations mandate that "[t]he primary chamber shall operate at a temperature between 537 [degrees Celsius ("˚C") – 999 degrees Fahrenheit ("˚F")] and 650 ˚C [1,202 ˚F] for a minimum of 2½ hours and reach a minimum temperature of 650 C (1,202 F) once during each heating cycle or batch treatment of unheated liquid-free equipment." *Id.* § 761.72(a)(3). Also, operators of SMROs must continuously record temperature and other parameters during operations to assure regulatory compliance. *See id.* § 761.72(a)(6).

2. *General Exemptions*

In addition, the PCB regulations, at section 761.79 ("Decontamination standards and procedures"), contain a set of provisions that allow persons handling PCBs to exempt themselves *entirely* from disposal approval requirements by following a set of "decontamination" standards or procedures for removing PCBs from certain materials. *See* 40 C.F.R. § 761.79(a).[13] These materials include, among others, "water, organic liquids, non-porous surfaces[14] (including scrap metal from disassembled electrical equipment), concrete, and non-porous surfaces covered with a porous surface, such as paint or coating on metal." *Id.*

With respect to storage prior to disposal, PCB regulations generally require that storers of PCB waste dispose of PCB waste "within 1-year from the date it was determined to be PCB waste and the decision was made to dispose of it." 40 C.F.R. § 761.65(a)(1). The regulations explain that "the date of removal from service for disposal" is generally the key reference point for determining when the

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[12] Drained PCB-contaminated equipment was unregulated by EPA before 1998. *See* Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35,384, 35,403 (June 29, 1998).

[13] Section 761 of the PCB regulations provides that "[d]econtamination in accordance with [40 C.F.R. § 761.79] does not require a disposal approval under subpart D of this part." 40 C.F.R. § 761.79(a)(4).

[14] The PCB regulations define "non-porous surface" as a "smooth, unpainted solid surface that limits penetration of liquid containing PCBs beyond the immediate surface." 40 C.F.R. § 761.3.

one-year time frame for disposal begins.[15] *Id.* The regulations further mandate that owners or operators of facilities used for storing PCB waste properly construct and site them to ensure containment of PCBs and segregate them from the outside environment. *See* 40 C.F.R. § 761.65(b)(1).

3. *PCB Waste Storage Facilities*

Although EPA had prescribed standards for storing PCB wastes in 1979, it was not until 1989 that EPA promulgated a system for overseeing and approving PCB waste storage facilities. *See* Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities, 54 Fed. Reg. 52,716 (Dec. 21, 1989). In particular, the Agency instituted a program whereby it, for the first time, would review storage plans submitted by commercial storers of PCB wastes and issue storage approvals to commercial storers.

The Agency's adoption of the 1989 regulations followed Congressional hearings that identified the lack of such a system as a gap in the PCB regulatory program. These regulations, effective in 1990, require a subset of PCB storers, identified as "commercial storers" of PCBs, to apply to the Agency for storage approval. *See* 40 C.F.R. § 761.65(d). The regulations define "commercial storer" as "the owner or operator of each facility that is subject to the PCB storage unit standards of [40 C.F.R.] § 761.65(b)(1) or (c)(7)[16] or meets the alternative storage criteria of § 761.65(b)(2),[17] and who engages in storage activities involving either PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal." 40 C.F.R. § 761.3.

In turn, the PCB regulations define a "generator of PCB waste" as follows:

> [A]ny person whose act or process produces PCBs that are regulated for disposal under subpart D of [part 761], or whose act first causes PCBs or PCB Items to become subject to the disposal requirements of subpart D of this part, or who has physical control over the PCBs when a decision is made that the use of the PCBs has been termi-

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[15] The regulations allow storers of PCB waste to apply for an extension of the one-year limitation on storage prior to disposal under certain conditions. *See* 40 C.F.R. § 761.65(a)(2).

[16] Section 761.65(c)(7) of the PCB regulations addresses storage requirements for "stationary storage containers for liquid PCBs," which are not relevant to the instant case. See 40 C.F.R. § 761.65(c)(7).

[17] Section 761.65(b)(2) of the PCB regulations addresses a number of limited circumstances in which owners and operators of facilities that store PCB wastes do not have to meet the general storage requirements at 40 C.F.R. § 761.65(b)(1). *See* 40 C.F.R. § 761.65(b)(2).

> nated and therefore is subject to the disposal requirements of subpart D of this part.

40 C.F.R. § 761.3.

Commercial storers of PCB waste must obtain final written approval from EPA before storing PCB wastes. *See* 40 C.F.R. § 761.65(d).[18] In order to obtain such approval, the commercial storage facility must satisfy a number of conditions that include, in relevant part, the following:

> (1) The facility possesses the "capacity to handle the quantity of PCB waste which the owner or operator of the facility has estimated will be the maximum quantity of PCB waste that will be handled at any one time at the facility";
>
> (2) The owner or operator has developed a written closure plan for the facility that is deemed acceptable by EPA; and
>
> (3) The owner or operator has demonstrated financial assurance to ensure facility closure as prescribed in the regulations.

See 40 C.F.R. § 761.65(d)(2).

EPA's final written approval of the owner or operator's application to engage in commercial storage of PCB wastes must include, among other things, a determination that the applicant has satisfied the above conditions. In addition, the final approval must include a condition imposing a maximum PCB storage capacity ("MSC") that the facility "shall not exceed during its PCB waste storage operations." 40 C.F.R. § 761.65(d)(4)(iii). The PCB regulations specify that "the [MSC] * * * shall not be greater than the estimated maximum inventory of PCB waste included in the owner's or operator's application for final approval." *Id.*

a. *Financial Assurance for Commercial Storers*

The PCB regulations on financial assurance specify that "[a] commercial storer of PCB waste shall establish financial assurance for closure for each PCB storage facility that he owns or operates." 40 C.F.R. § 761.65(g)(1). Furthermore,

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[18] The PCB regulations provide that in most cases the Regional Administrator for the EPA region in which the storage facility is located provides the final approval for a facility to engage in commercial storage of PCB wastes. *See* 40 C.F.R. § 761.65(d)(2).

the regulations provide that a commercial storer of PCB wastes "shall have a detailed estimate, in current dollars, of the cost of closing the facility in accordance with its approved closure plan." 40 C.F.R. § 761.65(f)(1). The detailed estimate must "equal the cost of final closure at the point in the PCB storage facility's active life when the extent and manner of PCB storage operations would make closure the most expensive." *Id.* § 761.65(f)(1)(I). Furthermore, this estimate must be based on the cost of the owner or operator hiring a third party to close the facility and reflect "the market costs for off-site commercial disposal of the facility's *maximum estimated inventory of PCB wastes.*" *Id.* § 761.65(f)(1)(ii), (iii) (emphasis added). In effect, the PCB regulations require that a commercial storer post a financial assurance amount that is calibrated to the storage facility's MSCs.[19]

The regulations allow commercial storers to choose among several forms of financial assurance. These include a closure trust fund, a surety bond guaranteeing payment into a closure trust fund, a surety bond guaranteeing performance of closure, a closure letter of credit, closure insurance, and a financial test and corporate guarantee for closure. 40 C.F.R. § 761.65.

b. *Exceptions to Storage Requirements*

The PCB regulations also set forth a limited number of exceptions to the general requirement for PCB commercial storage approval. Specifically, these provisions are found at 40 C.F.R. § 761.20, which is entitled "[p]rohibitions and exceptions." This subsection lists, among other things, specific activities that are prohibited in accordance with TSCA's bar on the manufacture, processing and distribution in commerce of PCBs as well as certain exceptions to those prohibitions. *See* 40 C.F.R. § 761.20. In 1998, the Agency added language to section 761.20 detailing conditions pursuant to which persons could distribute in commerce and process PCBs and PCB Items at concentrations 50 ppm without the need for an exemption from TSCA prohibitions. *See* 40 C.F.R. § 761.20(c)(2).[20] In particular, the regulations provide that "processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval." *Id.*

As we will discuss, it is noteworthy that this provision does not except transportation and storage activities themselves, but rather processing activities that *facilitate* transportation and storage. Accordingly, we do not regard this pro-

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[19] The PCB regulations provide that "[a] modification to a facility storing PCB waste that increases the [MSC] indicated in the permit requires that a new financial assurance mechanism be established or an existing one be amended." 40 C.F.R. § 761.65(g)(9).

[20] *See* Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. at 35,392, 35,439-40 (June 29, 1998).

vision as excepting otherwise regulated storage (and transportation) activities but as relating to a subset of collateral and separable activities in the nature of preparation for storage (and transportation). It also bears noting that the provision that follows this one – section 761.20(c)(2)(ii) – makes it clear that processing activities that are primarily associated with treatment *and disposal* are in any case ordinarily regulated. As we will discuss, given the nature of EPS's operations, the activities of concern here are integral, rather than collateral, to the process of storage, and are likewise elements of an overall process that has disposal as its ultimate and essential objective.

Another exception for PCB storage relates to "transfer facilities" where the period of storage during transfer operations is limited. 40 C.F.R. § 761.65(d)(5). The PCB regulations define a "transfer facility" in the following manner:

> *Transfer facility* means any transportation-related facility including loading docks, parking areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB waste, rather than for actual transport activities. Storage areas for PCB waste at transfer facilities are subject to the storage facility standards of § 761.65, but such storage areas are exempt from the approval requirements of § 761.65(d) and the record-keeping requirements of § 761.180 [*see infra*], unless the same PCB waste is stored there for a period of more than 10 consecutive days between destinations.

40 C.F.R. § 761.3. In other words, storage areas at transfer facilities are exempt from having to obtain Agency commercial storage approval unless the period of storage of PCB waste at the transfer facility exceeds ten days between destinations.

Here again, on its face, this exception appears to relate to a subset of collateral and separable activities associated with aggregation, staging, and preparation for transportation, rather than to excepting otherwise regulated activities, such as storage in preparation for disposal. We discuss this exception further in the sections below. *See infra* Part III.A.2.b.

4. *Manifests and Certificates of Disposal*

The PCB regulations also establish, at subpart K, a manifest system designed to track the movement of PCB wastes between waste generators, transport-

ers, commercial storers, and disposers.[21] (The manifest system is described in 40 C.F.R. §§ 761.207-.209). EPA adopted the manifesting system in 1989, modeling it after the hazardous waste tracking system in subtitle C of RCRA, 42 U.S.C. §§ 6921-39e. *See* Polychlorinated Biphenyls: Notification and Manifesting for PCB Waste Activities, 54 Fed. Reg. 52,716 (Dec. 21, 1989). In accordance with these provisions, generators who "relinquish" control of PCB wastes by transporting or arranging to transport them offsite for storage or disposal must prepare a manifest. 40 C.F.R. § 761.207(a). On the manifest, the generator must indicate such information as the weight of PCB wastes, their type (e.g, bulk wastes, transformers, etc.), and the date the wastes were removed from service for disposal. *Id.* The generator must also designate on the manifest the offsite commercial storage or disposal facility to which the waste will be transported. *Id.* The regulations provide that a manifest form must accompany each shipment of PCB wastes and must consist of at a minimum the number of copies required to provide the generator, the initial transporter, each subsequent transporter, and the owner or operator of the designated commercial storage or disposal facility with one legible copy each for their records, and one additional copy to be returned to the generator by the owner or operator of the first designated commercial storage or disposal facility. *Id.* § 761.207(I). The generator, transporter(s), and the designated commercial storage or disposal facility, must, in turn, sign the manifest form as the waste shipment proceeds. *See* 40 C.F.R. § 761.208. Furthermore, the PCB regulations provide that when a commercial storage or disposal facility initiates an off-site shipment of PCB waste, "the owner or operator of the commercial storage or disposal facility shall comply with the manifest requirements that apply to generators of PCB waste." *Id.* § 761.208(c)(3). In sum, the manifest provides EPA with a tool for tracking "cradle to grave" the movement of PCB wastes from generation to final disposal.

Another important part of the PCB waste tracking system is the "Certificate of Disposal" on which disposal facilities must certify the fact of disposal for each shipment of manifested PCB waste they receive. *See id.* § 761.218(a). The disposal facility is then required to send the completed Certificate of Disposal to the generator identified on the waste manifest.[22]

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[21] Generally speaking, PCB wastes containing PCB concentrations below 50 ppm do not have to be manifested. *See* 40 C.F.R. § 761.208(b)(1)(i).

[22] On the Certificate of Disposal, the disposal facility must indicate the identity of the disposal facility, the manifest number of the waste shipment, as well as the date and manner of disposal. See 40 C.F.R. § 761.218(a). The disposal facility must also send the Certificate of Disposal to the generator indicated on the manifest "within 30 days of the date that disposal of each item of PCB waste identified on the manifest was completed unless the generator and the disposer contractually agree to another time frame." *Id.* § 761.218(b).

5. *General Recordkeeping Requirements*

Finally, the PCB regulations at subpart J impose numerous general recordkeeping requirements on owners and operators of facilities handling PCBs and PCB Items. *See* 40 C.F.R. § 761.180. These recordkeeping requirements apply to generators of PCB wastes, waste transporters, commercial storage facilities, and waste disposal facilities. For example, owners and operators of disposal and commercial storage facilities must keep annual records including waste manifests, *see supra*, certificates of disposal, and records of cleanups and inspections. *See* 40 C.F.R. § 761.180(b)(1). Such facilities must also prepare annual document logs that include the following: the manifest numbers for manifests received or generated by a facility; the weight, numbers, serial (or other identifying) number of PCB Items received; and the dates PCB Items are designated for disposal, received by the facility, sent offsite, and disposed of. *See id*. § 761.180(b)(2).

B. *Factual Background*

Since 1989, EPS has operated a facility in Wheeling, West Virginia ("Facility") that stores and disposes of electrical equipment (such as transformers and capacitors) and other types of waste containing PCBs. Complainant's Hearing Exhibit ("CX") 1. As described by EPS's president, Keith Reed, EPS's primary clients are utility companies. ALJ Hearing Transcript ("Tr.") at 13 (Volume ("Vol.") VI).[23] EPS's routine practice is to dispatch its fleet of trucks to clients' facilities, pick up the PCB wastes, and bring them to the Facility for storage or disposal. EPS receives a fee in return for providing this service. CXs 1, 2, 5, 6; Tr. at 220 (Vol I).

The company's onsite waste handling activities consist principally of the following: decontaminating electrical equipment according to 40 C.F.R. § 761.79; storing PCB waste, prior to disposal, in a roofed and walled containment area; and disposing of wastes in its SMRO. In addition, the company engages in offsite material handling, which includes shipping to outside treatment facilities those

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[23] The dates of the evidentiary hearing before the ALJ and the corresponding hearing transcript volumes in which the hearing are recorded are as follows: June 17-20, 2003 (Tr. Vols. I-IV); August 18-22, 2003 (Tr. Vols. V-IX); September 8-11, 2003 (Tr. Vols. X-XIII); and June 29-30, 2004 (Vol. XIV (David Dillon testimony)). In addition, separate transcripts have been prepared by the court reporter for portions of the hearing related to information claimed as Confidential Business Information ("CBI") by Analytical ChemTech International, Inc. ("ACTI") (a sampling laboratory used by EPS) and covered by the ALJ's Protective Order. *See infra* note 29. Citations to these CBI transcripts are noted as "CBI Tr." in the text of this decision. In addition to the CBI transcripts, the Board's decision cites to other CBI documents in the record (hearing exhibits, as well as portions of the Initial Decision and briefs). The Board's citations to CBI documents, however, do not themselves disclose CBI. The Board has maintained the documents claimed as CBI under seal during the pendency of this matter and, as necessary, reviewed the documents *in camera*. The Board has handled the documents as CBI in accordance with the procedures of 40 C.F.R. pt. 2, subpt. B.

PCB wastes that the company cannot process in its SMRO and sending to smelters the scrap metal it processes in its SMRO. *See* CXs 1, 2, 56. To track the movement of waste at its Facility, EPS employs a tracking system whereby it affixes a six-digit barcode label to each PCB item when EPS receives it from a customer. *Id.* From that point forward, the barcode allows EPS to track the movement of individual pieces of waste PCB equipment through the Facility until the item is disposed onsite or sent offsite. *See* CX 56.

During his testimony at the evidentiary hearing below, Keith Reed described the method EPS uses to manage PCB waste it receives at its Facility as follows. *See* Tr. at 260-68. After unloading the electrical equipment in its indoor storage area, the company takes samples from "filled" equipment (i.e., containing PCB fluids) and sends the samples to a laboratory for analysis. CX 59.[24] EPS then drains the equipment containing between 50 ppm and 500 ppm PCBs and places the equipment in a "staging area" in preparation for burning in the SMRO.[25] For equipment containing greater than 500 ppm PCBs, EPS applies a "self-implementing" decontamination process in accordance with 40 C.F.R. § 761.79(c). This process involves rinsing electric equipment such as transformers in mineral oil dielectric fluid to reduce PCB concentration to levels that can permissibly be burned in the SMRO. *See* Tr. at 260-68 (Vol. VIII).

EPS's SMRO is designed to destroy PCBs. The oven is limited by law to burning drained PCB materials with a PCB concentration between 50 ppm and 499 ppm. As described by the Region's inspector Scott McPhilliamy, the purpose of the SMRO "is to burn off any residual oils or any combustible materials associated with the transformer's internal components." Tr. at 58 (Vol II). In addition to the federal regulatory requirements for SMROs described previously, EPS's SMRO is subject to a permit issued by the State of West Virginia Division of Environmental Protection pursuant to the State's Air Pollution Control Law. *See* CX 26 (Permit to Construct, Modify or Relocate a Stationary Source of Air Pollutants). The permit, among other things, requires EPS to adhere to the time and temperature requirements spelled out at 40 C.F.R. § 761.72. *Id.*

During the evidentiary hearing, EPS's scrap metal operator, Chuck Frederick Ernest, described the Facility's procedures for burning drained PCB-contaminated transformers in its SMRO. *See* Tr. at 205-27 (Vol. I).

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[24] As indicated by the testimony of Scott Reed, EPS's Vice-President, the vast bulk of electrical equipment EPS receives from its utility customers has not been previously tested for PCB concentration. According to Scott Reed, EPS – through its outside testing laboratory – carries out 99% of the PCB testing of units received at the Facility. Tr. at 54 (Vol V).

[25] EPS uses drained oil containing less than 50 ppm as fuel for its SMRO, while it stores drained oil containing 50 ppm in a PCB storage tank and then sends this oil offsite for incineration and detoxification. *See* CX 59.

Mr. Ernest explained how the workers first disassemble the transformers, separating the outer "can" or "carcass" from inner coils and bushings. *Id*. at 211-15 (Vol. I). The workers load the scrap parts onto a cart, and then direct the cart into the primary oven chamber for burning. *Id.* Before each burn cycle, the furnace supervisor manually records the barcode numbers of the different transformers to be burned. *Id.; see also* Tr. at 108 (Vol. II). Moreover, during each burn cycle, a computer tabulates parameters such as oxygen, temperature, and carbon monoxide at five-minute intervals. Tr. at 211-15 (Vo. I); Tr. at 109 (Vol. II). Following burning, scrap transformers are allowed to cool. EPS workers then further disassemble and separate the scrap into metal type (copper, aluminum, and case steel), which they send to approved smelters for smelting. *See* CX 59.

On December 28, 1992, the company first applied to the Regional Administrator for approval as a commercial storer of PCB waste, *see* CX 1, and received such approval from the Region on November 10, 1993. Under the terms of its commercial storage approval, the company received authorization for an MSC, *see supra* Part II.A.3., of 5,000 pounds of PCB transformers and 1,000 pounds of PCB capacitors at any one time. *See* CX 2(TSCA Approval to Commercially Store Polychlorinated Biphenyls (PCBs)). Furthermore, the Region approved EPS's closure plan for disposing of its PCB waste inventory. *See* CXs 1, 2; 40 C.F.R. § 761.65(d)(2). Consistent with the PCB regulations, EPS prepared a closure cost estimate calibrated to its MSCs for PCB transformers and capacitors. *See* CXs 1, 2; 40 C.F.R. § 761.65(f)(1). In 1993, the company established a trust fund to provide financial assurance for closure of the Facility in accordance with 40 C.F.R. § 761.65(g). *See* Respondent EPS's Hearing Exhibit ("RX") 509.

On April 9, 1998, EPS submitted an application for a five-year renewal of its TSCA Storage Approval. In its application, EPS incorporated the information on maximum storage from its original 1992 application, indicating that EPS had not changed its work practices, operation, PCB storage, or any other procedures described in the original permit. *See* CXs, 2, 66. Therefore, EPS's proposed MSCs remained as before – 5,000 pounds for PCB transformers and 1,000 pounds for PCB capacitors. Therefore, when the Region renewed EPS's storage approval for five years on September 29, 1998, the new approval retained these MSC levels. *See* CX 2.

In September 1998, EPS applied to change its financial assurance mechanism for its Facility from a trust fund mechanism to insurance. *See* CX 1. This request, according to Ms. Creamer, the Region's PCB Coordinator, prompted the Region to undertake an investigation of EPS in consultation with EPA Headquar-

ters. *See* Tr. at 21 (Vol. XII); CX 60.[26] The Region ultimately rejected EPS's request for a change of financial assurance mechanism, explaining that the EPS's current financial assurance policy contained "problems" that needed to be addressed and recommending that the "existing trust fund remain in place." *Id.*

The Region subsequently carried out two inspections of EPS's Facility, which took place on July 15, 1999, and November 2, 1999.

1. *July 15, 1999 Inspection*

On July 15, 1999, inspectors Scott McPhilliamy and Scott Rice from the Region's Wheeling, West Virginia field office visited the Facility. Mr. McPhilliamy testified that he observed approximately 32 transformers in the PCB transformer storage area and that the transformers appeared to be non-leaking. Tr. at 243-46 (Vol. I). Mr. McPhilliamy also took pictures of the transformer storage area. *Id*. at 243-44. Mr. McPhilliamy recounted that because the transformers were tightly packed, making them difficult to count, he sought and obtained from the company information on the number of PCB transformers in storage and their weights. CXs 9, 56. According to Mr. McPhilliamy, in response to his request for information about the number and weight of PCB transformers EPS had in storage on the date of the inspection, EPS subsequently [July 21, 1999] faxed him a list of 36 "PCB units." Tr. at 50 (Vol. I). The inspectors added the weights of these "units," which are identified on the fax by 6-digit barcode, and determined that their weights totaled 10,898 pounds. *See* Tr. at 247-56 (Vol I); CX 9.

During their July 15 inspection, the inspectors did not observe capacitors (which were also the subject of the company's 1998 storage approval), apparently because there were no capacitors in storage on that date. From a hazardous waste manifest EPS provided to the Region, the Region learned, however, that EPS, on June 29, 1999, had received a shipment of 229 electric capacitors from a utility, American Electric Power. The manifest indicated that on July 9, 1999, EPS was storing 26,367 pounds of PCB capacitors at its Facility. CX 7; Tr at 253 (Vol 1); Tr. at 45, 48 (Vol. IX); RX 515. The Region confirmed this capacitor total through a phone call to EPS. Tr. at 254 (Vol. 1).

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[26] As Charlene Creamer, the Region's PCB Coordinator testified, the Region decided to inspect EPS's Facility in order to (1) determine the Facility's storage capacity, and (2) check on whether the Facility's financial assurance mechanism was the correct one. *See* Tr. at 13-19 (Vol. XII). In an undated intra-office memo referring to EPS's request, Bobbie Wright, Environmental Scientist with the Toxics Programs and Enforcement Branch, Region 3, expressed concern that a compliance issue might have prompted EPS to request a change in its financial assurance mechanism, and she recommended an inspection of the Facility to determine the company's compliance with its MSC and "time requirements for transporting waste off-site." *See* CX 7, Att. 1.

In his testimony, EPS President Keith Reed characterized these capacitors as being "wired up, interconnected, and mounted" on an aluminum frame, together forming a "gigantic rack" or "bank." Tr. at 45, 67 (Vol. IX). According to Mr. Reed, this capacitor bank, upon arrival at EPS's Facility, was unloaded by cranes, and then dismantled into individual capacitors. Then, he related, because the capacitors "were not labeled PCB capacitors or non-PCB capacitors," the company "eventually" undertook a gas chromotography test of one of the samples. *Id*. at 46 (Vol. IX). The test revealed that capacitors contained "pure PCBs," or "askeral," meaning that they had PCB concentrations between 400,000 ppm and 600,000 ppm. *See id*. at 47 (Vol. IX); Tr. at 207, 266 (Vol. VIII). Because the PCB concentration of the capacitors exceeded the concentration level EPS was authorized to burn in its SMRO, the company decided to ship the capacitors off-site to a TSCA-approved disposal facility. *See* Tr. at 46-47 (Vol. IX).

2. *November 2, 1999 Inspection*

On November 2, 1999, the Region carried out a second inspection at EPS's Facility, *see* Tr. at 97 (Vol. II) and Tr. 265-67 (Vol. I), during which inspectors Rice and McPhilliamy compared EPS's transformer storage versus the allowable MSC and examined the operation of the Facility's SMRO. During their visual inspection of the Facility's storage area, the inspectors counted 34 intact, non-leaking transformers, which were packed closely together. That day, the inspectors received from EPS a faxed list of items bearing a cover sheet stating "PCB units in storage 11-2-99." CX 11. The list provided, for each PCB unit, identifying information including bar code number, serial number, weight, and PCB concentration. From this list, the Region calculated that on November 2, 1999, EPS was storing 16 PCB transformers totaling 15,330 pounds. *See* Tr. at 265 (Vol. I); CX 11, Att. 3.

In addition, the inspectors examined the records that EPS compiled on the operation of its SMRO. The inspectors requested from EPS information regarding the operation of the SMRO during three one-week periods randomly selected by EPA.[27] *See* Tr. at 268-70 (Vol I); Tr. at 108 (Vol. II); *see also* CX 11. The Region received the materials from EPS shortly after the November 2, 1999 inspection. *See* CX 11. These materials consisted of computer-generated data sheets ("EPS Furnace Operating Measurement Levels"), which recorded at five-minute intervals the following oven parameters: temperature in Fahrenheit of the primary chamber and secondary chamber ("afterburner"), oxygen level, and carbon monoxide level. CX 14. In addition, the Region received a 7-day chart that recorded primary chamber and afterburner temperatures. CX 16A. EPS also provided the Region with "Transformer Furnace Data" sheets on which the oven operators

[27] The Region requested materials from EPS for the following time periods in 1999: March 22-26, September 26-October 2, and October 24-31.

manually recorded the six-digit barcode numbers of the PCB equipment to be burned prior to each burn cycle.[28] *See* Tr. at 219-24 (Vol. I); CXs 16A, 16B, 16C; Tr. at 101 (Vol II). According to the inspection report, the company's SMRO did not reach the time and temperature levels prescribed by the PCB regulations during 51 of 76 reported burn cycles. *See* CX 11.

3. *August and September 2000 Meetings between the Region and EPS*

On August 30, 2000, Inspector McPhilliamy met with EPS staff at the Facility to discuss the Region's findings from the November 2, 1999 inspection. Tr. at 18 (Vol. II). At the meeting, Mr. McPhilliamy indicated that the EPS SMRO had only reached the regulatory burn levels for PCB-contaminated articles in 25 of 76 oven cycles. *See* CX 14, at 3; Tr. at 18 (Vol. II). According to the Region, EPS Vice-President Scott Reed indicated to the inspectors that during the time the oven cycles did not reach time and temperature standards for regulated PCB materials, EPS was burning unregulated materials. *See* CX 14. As the Region further recounted, EPS agreed to provide EPA with records of the contents of the SMRO for the cycles during which EPA claimed the oven was not in compliance with regulations as well as SMRO records for the more recent period August 21-25, 2000. In a followup meeting between the Region and Vice-President Reed approximately one week later, Reed provided records related to August 21-25, 2000, but did not provide the requested information on the contents of the subject burn cycles, explaining that collecting such information was "very time-consuming." *Id.* The Region related, however, that Reed "acknowledged the fact that the oven did not always operate in compliance with 40 C.F.R. § 761.72(a)(3)" and that "as many as one-third of the burns noted by EPA review had included regulated items during periods the required time/temperature was not achieved." *Id.* Although the Region was not able to obtain concrete evidence on the contents of the transformers during the subject burn cycles on this occasion, the Region, after the filing of its administrative action against EPS, obtained more extensive information on this matter through discovery and issuance of a subpoena to a testing laboratory used by EPS.[29] As described below, the Region

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[28] As explained byan EPS operator at the evidentiary hearing, the "Transformer Furnace Data" sheets served as "backup" recordkeeping, since the oven operator's practice was to enter into the computer the bar code numbers of the individual pieces of equipment to be burned. Tr. at 221 (Vol. I).

[29] Records concerning EPS's burning of transformers in its SMRO were a focus of consider able contention during the proceedings below. The Region, after filing its initial complaint, sought to obtain through discovery more precise records on the PCB concentration of the transformers burned by EPS, while EPS claimed it had previously provided the information or that the information was unavailable. On April 25, 2002, the Region filed a motion for discovery seeking several items of information, including "the PCB concentration claimed by the generator and/or determined through direct analysis" for the transformers identified by bar code in the Transformer Data Sheets that EPS

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largely relied upon the subpoenaed laboratory information to support the allegation in the Complaint that on several days during the randomly selected weeks in 1999, EPS burned PCB-contaminated transformers in its SMRO while failing to adhere to time and temperature parameters prescribed by the PCB regulations.

C. *Procedural Background*

As indicated above, the Region initiated the proceedings in this matter by filing, on June 29, 2001, an administrative complaint in which the Region alleged the company had violated TSCA and the PCB regulations in connection with its commercial storage and burning of electrical equipment containing PCBs. The Region's Complaint initiated a protracted period of administrative litigation, which continued through the conclusion of the evidentiary hearing in 2004. During this period, the parties filed numerous motions in which they sought and opposed discovery of new evidence[30] and attempted to dispose of legal issues through summary disposition. This section provides only a summary of the significant record of proceedings below.[31]

(continued)
had provided to the Region for the three randomly selected weeks in 1999. Motion for Limited Prehearing Discovery Through Complainant's Request for the Production of Documents and Request for Depositions. In an order issued March 5, 2003, the ALJ directed EPS to provide, among other things, the bulk of the information requested by the Region in its Motion for Discovery, including the above-referenced PCB concentration data, within 30 days of the date of his discovery order. *See* Order on Complainant's Discovery Order Motion ("Discovery Order"). In a motion filed April 16, 2003, the Region sought sanctions against EPS, claiming that the EPS had not complied with the ALJ's discovery order. *See* Complainant's Expedited Motion for Sanctions, the Issuance of Default Order, and the Drawing of an Adverse Inference (Apr. 16, 2003). In an order issued June 3, 2003, the ALJ determined that EPS had complied with some portions of the Discovery Order but had not complied with other portions, including the order to provide PCB concentration data related to the oven burns. *See* Order on EPA's Motion for Sanctions (June 3, 2003). The ALJ ordered EPS, among other things, to furnish to the Region by July 6, 2003, the PCB concentration data requested by the Region or to "advise [the Region] as to where it might find this data in the material already provided." *Id.* The ALJ also decided to defer to the upcoming evidentiary hearing discussion on what sanctions might be appropriate to impose on EPS in light of its noncompliance with his discovery order. *Id.* Eventually, shortly before the start of the evidentiary hearing, the Region used EPA's subpoena authority under TSCA section 11, 15 U.S.C. § 2610(c), to obtain from ACTI,a sampling laboratory used by EPS, PCB concentration data that ACTI had reported to EPS during calendar year 1999. *See* RX 377. The Region received the ACTI information on June 4, 2003, and then sought to supplement the record by motion. *See* CX 44 (CBI); Motion to Supplement Complainant's Prehearing Exchange (June 12, 2003). The ALJ, during the evidentiary hearing, ruled that the Region could enter the ACTI data into evidence during the hearing under a protective order after redaction of all customer-related information. *See* Tr. at 174 (Vol II). During the proceedings, the Region treated the ACTI information as TSCA CBI pursuant to a CBI claim by ACTI.

[30] These motions addressed, in part, the Region's request for discovery of the PCB concentration of transformers that EPS burned in its SMRO during 1999. *See supra* note 29.

[31] The reader is directed to the ALJ's Initial Decision and the parties' briefs on appeal for a more complete exposition of the proceedings below.

In its Answer to the Region's Complaint, filed August 14, 2001, EPS denied the Region's allegations, raised several affirmative defenses, and challenged the proposed penalty as improperly applied, excessive, and arbitrary and capricious. After an interlude of unsuccessful alternative dispute resolution, the case was assigned to ALJ Charneski. On October 25, 2001, the ALJ issued an order setting forth prehearing exchange procedures.

With leave of the ALJ, the Region filed a First Amended Complaint on January 29, 2002. EPS filed an Answer to the First Amended Complaint on February 11, 2002. The Region and EPS submitted their initial prehearing exchanges on April 17, and 18, 2002, respectively. The parties thereafter attempted to settle this matter through negotiation but their efforts did not succeed. With the ALJ's permission, on April 23, 2003, the Region filed a Second Amended Complaint in this matter to correct a typographical error. *See* Second Amended Complaint.[32] On August 28, 2003, EPS filed an Amended Answer.

In its Second Amended Complaint, the Region charged that EPS violated TSCA section 15(1), 15 U.S.C. § 2614(1),[33] by failing to comply with the PCB regulations, as described in the three counts, below:

- Count I: EPS on both July 15, 1999, and November 2, 1999, stored PCB transformers at the Facility in excess of the 5,000-pound MSC for transformers in EPS's TSCA PCB Commercial Storage Approval, in violation of 40 C.F.R. § 761.65(d);

- Count II: EPS, on July 9, 1999, stored PCB capacitors in excess of its 1,000 pound MSC for capacitors in EPS's TSCA PCB Commercial Storage Approval, in violation of 40 C.F.R. § 761.65(d); and

- Count III: EPS failed to adhere to the time and temperature requirements of 40 C.F.R. § 761.72(a)(3) while burning PCB-contaminated transformers in its SMRO on eleven occasions in March, September, and October, 1999.[34]

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[32] In its Second Amended Complaint, the Region changed the phrase "PCB transformers" in Count III (Scrap metal charge) to "PCB-contaminated transformers." EPS did not file a formal answer to the Second Amended Complaint, but instead indicated that its response to the First Amended Complaint would serve as its answer.

[33] TSCA section 15(1) provides, in relevant part, that "[i]t shall be unlawful for any person to fail or refuse to comply with * * * any requirement prescribed by section 2604 or 2605 of [TSCA] * * * [or] any rule promulgated or order issued under section 2604 or 2605 [of TSCA]." TSCA § 15(1); 15 U.S.C. § 2614(1).

[34] As Scott Rice stated in his testimony, the Region filed Count III without knowing the actual concentration of PCBs in the subject transformers. Tr. at 118 (Vol. II).

See Second Amended Complaint.

In its Second Amended Complaint, the Region proposed a penalty of $386,100 against EPS, *see* Second Amended Complaint at 13, although the Region subsequently reduced its proposed penalty to $151,800. *See* Complainant's Post Hearing Brief ("CPHB") at 64; Tr. at 17 (Vol. I).

The ALJ conducted an evidentiary hearing in this matter, which consisted of four phases, spanning fifteen days of hearings. *See supra* note 23. Following the evidentiary hearing, the Region and EPS filed post-hearing briefs on September 17, 2004, and reply briefs on October 18, 2004. On March 7, 2006, the ALJ issued an Initial Decision in which he found that EPS was liable on all three counts as alleged by the Region and imposed the $151,800 penalty proposed by the Region.

In its May 12, 2006 appeal brief, EPS generally contends that the "Initial Decision ignored the applicable laws, evidence and record and thus, resulted in a decision that was incorrect, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with applicable laws." EPS's Appeal Brief ("App. Br.") at 1. In its Appeal Brief, EPS raises the following objections to the Initial Decision:

On Counts I and II, EPS contests the ALJ's liability determination on the following seven grounds:

(1) The Region did not establish a prima facie case that EPS exceeded its applicable MSCs for transformers and capacitors;

(2) The Region did not demonstrate that EPS was not a waste "generator" – a regulatory category that falls outside the definition of a "commercial storer";

(3) EPS at all times complied with its MSC limits for PCB transformers because the company notified the Region that it would be raising its MSCs to accommodate storage of the electrical equipment in question; (4) The financial assurance instrument provided in the companys commercial storage approval was sufficient at all times to cover the cost of closing EPS's Facility at the increased MSC level;

(5) EPS was exempt from the requirement to obtain commercial storage approval for the subject electrical equipment pursuant to 40 C.F.R. § 761.20(c)(2) because EPS was processing the electrical equipment "to facilitate * * * transportation for disposal";

(6) EPS acted as a "transfer facility" with respect to the capacitors in question, holding them for no more than ten days, and thus was exempt from commercial storage approval requirements pursuant to 40 C.F.R. § 761.3; and

(7) The Region failed to provide the company with "fair notice" in applying the 5,000 pound MSC for PCB transformers against EPS and in interpreting the regulatory exemption at 40 C.F.R. § 761.20(c).

EPS challenges the ALJs liability determination on Count III on the following four bases:

(1) The Region failed to establish a factual basis for Count III of the Second Amended Complaint because the Region failed to adduce concentration data needed to demonstrate that EPS burned PCB-contaminated transformers on the dates the Region alleged;

(2) By producing PCB concentration data on transformers just before the start of the hearing and not clearly identifying which transformers were improperly burned, and at what dates and times, the Region deprived EPS of its Constitutional due process right to receive proper notice of administrative actions;

(3) The Region erroneously correlated the six-digit barcode numbers used by EPS to identify PCB waste equipment it received at the Facility with six-digit serial numbers that appeared on a list of PCB concentration samples obtained by the Region from EPS's testing laboratory; and

(4) The Region failed to give EPS "fair warning" of its interpretation of the PCB regulations to require that SMROs maintain their required temperature range *continuously* over 2.5 hours during a burn cycle rather than maintain the range for a *total* duration of 2.5 hours.

EPS also raises the affirmative defense of selective enforcement. In support of this argument, EPS contends that EPA "singled out" EPS for enforcement action while ignoring the actions of a similarly situated competitor in Region 2 – G&S Technologies ("G&S") – and that the Region, by taking enforcement action against EPS, invidiously and unconstitutionally retaliated against EPS for complaining about EPA's lack of enforcement against G&S.

In its Appeal Brief, EPS makes limited arguments with regard to the $151,800 penalty imposed, since EPS argues that it is not liable on all counts. EPS contends, however, that "even if one assumes that a violation occurred, which EPS denies," the Region failed to establish a factual foundation for imposing a penalty pursuant to the Agency's 1990 PCB Penalty Policy, which provides guidelines for calculating penalties for violations of the PCB regulations. App. Br. at 39; *see also* U.S. EPA, *Polychlorinated Biphenyls (PCB) Penalty Policy*

(Apr. 9, 1990) ("PCB Penalty Policy").[35] In EPS's view, the Region's alleged lack of factual support relative to the PCB Penalty Policy's penalty criteria precludes imposition of a penalty in this case. *Id.*

The Region filed a reply to EPS's Appeal Brief on July 3, 2006. In its reply brief, which urges the Board to uphold the ALJ's Initial Decision "in its entirety," the Region asserts that it met its burden of proof on the three counts of the Second Amended Complaint and that EPS failed to prove its affirmative defense of selective enforcement. *See* Appellee EPA Region [3's] Response to [EPS's] Appeal of Initial Decision ("Region's Response"). The parties participated in oral argument before the Board on December 13, 2006.

III. *DISCUSSION*

A. *Liability*

Below, we consider in turn EPS's arguments regarding the three counts on which the ALJ found EPS liable. After considering EPS's contentions, we determine, for the reasons explained below, that with the exception of the July 15, 1999 commercial storage violation alleged under Count I, the ALJ did not err in finding EPS liable for violating the PCB regulations as alleged by the Region.

1. *Count I: Violation of MSC Limits for Transformers*

a. *Alleged Failure by the Region to Establish a Prima Facie Case*

In its Appeal Brief, EPS contests the ALJ's determination that the Region established a prima facie case that EPS violated the MSC for PCB transformers in its PCB commercial storage approval as alleged by the Region in Count I of its Second Amended Complaint. App. Br. at 17. EPS faults the Region for presenting only cursory information in support of its charge.

In his Initial Decision, the ALJ concluded that "[b]ased upon the inspectors' observations of EPS's Facility" and "the storage information provided by [EPS]," the Region established a prima facie case that EPS exceeded the MSC for transformers in its commercial storage approval. *See* Init. Dec. at 18. In support of this determination, the ALJ first analyzed the definition of "commercial storer" at 40 C.F.R. § 761.3, a predicate condition of which is that the owner or operator of a facility "*engage[] in storage activities involving either PCB waste generated by*

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[35] As described in further detail, *infra*, the Region used the PCB Penalty Policy to calculate its proposed penalty in this case, and the ALJ ratified the Region's calculation.

others or that was removed while servicing the equipment owned by others and brokered for disposal." Init. Dec. at 12 (citing 40 C.F.R. § 761.3) (emphasis in original). With regard to handling "PCB wastes," the ALJ determined that "it is not in dispute that both the PCB transformers at issue in Count I, and PCB capacitors at issue in Count II, are considered 'PCB waste.'" Init. Dec. at 12. In this regard, the ALJ also noted that EPS identified itself as a "U.S. EPA PCB Commercial Storer" in an audit report EPS provided to potential customers, and that EPS's utility customers described themselves as "generators" on the manifest forms that accompanied the utilities' PCB waste shipments to EPS. *Id*. at 13 (citing CX 59 at 1). Thus, the ALJ concluded that the company qualified as a "commercial storer" of PCB waste. *Id.*

The ALJ further determined that the applicable MSC for PCB transformers on the days of inspection was 5,000 pounds. *Id*. at 14. Recapping the process by which EPS obtained commercial storage approval, the ALJ noted that the company's initial storage approval, issued by the Region on November 10, 1993, allowed EPS an MSC of 5,000 pounds for PCB transformers, the same amount as that for which the company had originally applied. *Id*. (citing CX 1). When the company sought to renew its application for storage approval, the ALJ recounted, "EPS requested that [the MSC] be renewed by the EPA Regional Administrator without change"; accordingly, the company's storage approval, dated September 22, 1998, contained an MSC for transformers of 5,000 pounds. *Id.* (citing CXs 2, 66). The ALJ noted the renewed approval was effective for five years, through October 1, 2003, and thus "clearly encompass[ed] the events of this case." *Id.*

Finally, the ALJ determined that the company exceeded its 5,000 pounds MSC on the days of inspection, July 15, 1999, and November 2, 1999. To support his conclusion, the ALJ highlighted the Regional inspectors McPhilliamy's and Rice's testimony regarding EPS's Facility, including the transformer storage area. The ALJ noted that the inspectors testified that they saw PCB transformers in storage on those dates and observed "6-by-6-inch" labels on several transformers indicating PCB concentrations greater than "500 parts per million" PCBs.[36] Init. Dec. at 16 (citing Tr. at 244-46 (Vol. I)). He also noted that EPS, in response to the Region's request for information regarding PCBs transformers in storage, provided faxed lists of these items to EPA, *see* Init. Dec. at 16-17 (citing CXs 9, 11), from which the inspectors calculated the number of transformers present on the

[36] Subpart C of part 761 prescribes, under limited exceptions, the use of a standardized "mark" to identify PCB Items as well as locations where such items are stored. *See* 40 C.F.R. § 761.40. Subpart C requires, among other things, that PCB transformers (but not PCB-contaminated transformers) bear a standardized mark "at the time of removal from use if not already marked." *See* 40 C.F.R. § 761.40(a)(2). For most PCB Items, except for very small ones, a mark of at least "6 inches * * * on each side is required." 40 C.F.R. § 761.45(a).

above dates.[37]

In its appeal, EPS faults the Region for providing insufficient factual support for its Count I allegation. For example, EPS avers that "[i]n this matter, EPA failed to acquire sufficient information during its July and/or November 1999 inspections to enable EPA to know whether the weights of units in the EPS commercial storage area were in excess of the MSCs in the Approval. Indeed, all EPA did was add up the weights of materials that were physically present on the day of the inspections and simplistically compare those numbers to MSCs, which EPA erroneously assumed were applicable on those days." App. Br. at 17.

More specifically, the company first argues that the Region failed to demonstrate that EPS met the definition of a "commercial storer" as a predicate to showing that the company was subject to commercial storage approval requirements, including MSCs. *Id.* at 18; *see* 40 C.F.R. § 761.3. EPS also contends that the Region failed to prove that the units in the storage area were "PCB waste" as defined in 40 C.F.R. § 761.3. Next, EPS argues that the Region failed to demonstrate that EPS was not the "owner" of the PCB waste in question. App. Br. at 18-19. In this regard, the company argues that it is the "owner" of PCB waste it receives from utility customers and therefore is the "generator" of such wastes, and that the company is therefore not subject to the MSCs in its commercial storage approval because such waste is not "commercially stored." *Id.* As EPS asserts, the "primary indicia of commercial storage is storage of equipment owned by others." *Id.*

Moreover, the company faults EPA for "failing to perform any independent weight measurements" in order to prove that the company exceeded its MSCs. *Id.* at 19 (citing Tr. at 95-97 (Vol. II)). EPS comments, in this respect, that the Region's evidence was simply based on "face-value data" from the number of PCB transformers and the company's MSCs, rather than determining whether the MSCs "were applicable on those days." App. Br. at 17-18.[38]

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[37] Regarding the Region's calculation of PCB transformers held in storage by EPS on July 2, 1999, the ALJ noted that "[b]ecause inspector McPhilliamy had requested transformer weight from EPS, he had no reason to believe that the [faxed] data provided by EPS was for something other than the PCB transformers that he observed in storage." Init. Dec. at 16 (citing Tr. at 24, 29 (Vol. II)).

[38] As part of its argument on appeal challenging the Region's establishment of a prima facie case for Count I, EPS claims that the Region failed to demonstrate that the company did not satisfy the conditions of 40 C.F.R. § 761.20(c)(2) exempting from commercial storage approval persons who process PCBs or PCB Items to "facilitate storage or transportation for disposal." *See supra* (Regulatory Background). EPS argues that "there is no support in the record for EPA's position that Respondent was not processing the [PCB transformers] units for transportation for disposal of the PCB waste." App. Br. at 25. We will address EPS's argument in a separate section below, since the issue of whether EPS is entitled to the section 761.20(c)(2) exception is not part of the Region's prima facie case. *See infra* Part III.A.1.d.

In considering whether the Region established a prima facie case that EPS exceeded the relevant MSC for commercially stored PCB transformers in July and November of 1999, we start out by examining whether EPS satisfied the threshold legal definition of "commercial storer" that forms the basis of Count I. As we see it, the Region has clearly established that EPS was a "commercial storer" subject to the MSC limits, including PCB transformers, in its commercial storage approval. In this regard, EPS undeniably satisfied the definitional test of being engaged in "storage activities involving [] PCB waste generated by others." 40 C.F.R. § 761.3 As the Region observes, the company's own public statements describing its routine business of handling and disposing the waste of its utility clients, and its receipt of hazardous waste manifests from these clients, clearly demonstrate that EPS was in the business of receiving PCB wastes from others. Region's Response at 17. For example, EPS's informational brochure defines its business as taking responsibility for the safe handling of "obsolete electrical equipment" of utilities and other industrial concerns and notes that since the start of business operations, EPS "has treated *all* material [from its customers] as if it were PCB *waste*." CX 56 (emphasis added). Moreover, EPS, as befits a disposer, rather than a generator, of PCB wastes, sends certificates of disposal back to the generators of these materials. *Id.* Indeed, EPS failed to present any evidence demonstrating that its transactions with utilities involved anything other than receiving the latter's waste equipment. Given the company's statements to the outside world regarding its waste handling business and the fact that its actions plainly conform to those representations, we are therefore unswayed by the company's assertion that the ALJ wrongly concluded that the PCB transformers EPS received were all "commercially" stored and should therefore be counted against the applicable MSC in the company's commercial storage approval.

Furthermore, EPS's emphasis on "ownership" of equipment as determining a person's "generator" status is misplaced. For example, during the oral argument, EPS's counsel, while arguing that EPS did not engage in "servicing of equipment owned by others," acknowledged that the applicable regulatory text considers a "commercial storer" the "owner or operator of a facility * * * who engages in storage activities involving * * * PCB waste *generated* by others." Oral Argument at 99 (emphasis added). The definition of "generator" makes clear that possession and physical control, not ownership, is the linchpin of "generator" status since a "generator" is the person "who has physical control over the PCBs when a decision is made that the use of the PCBs has been terminated and therefore is subject to the disposal requirements of subpart D of this part." *See* 40 C.F.R. § 761.3. As discussed previously, the actions of EPS's utility clients – in particular, their self-identification as "generators" on waste manifests – as well as EPS's public statements describing its transactions with utilities, establish that EPS's utility clients made the decision to terminate use of PCB transformers in their possession. Thus, the utilities were the "generators" of the waste PCB transformers, not EPS, and EPS, having received the transformers post-generation, is appro-

priately viewed as commercially storing them.[39] Consequently, we find that the Region had established a prima facie case that EPS was commercially storing PCB Items, including PCB transformers, at all relevant times.

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[39] In light of the emphasis EPS places on the issue of "ownership" in connection with its alleged "commercial storer" status, the Board at oral argument requested the parties to brief the Board on any policy document or guidance defining "ownership" or "own" under the PCB regulations. *See* Oral Argument at 73-74. In its brief responding to the Board's request, the Region states that it could find no regulatory guidance or policy document defining "ownership" or "own" under part 761. *See* U.S. EPA Region III's Response to EAB Request During Oral Argument ("Region's Response to EAB Request") (Jan. 12, 2007). The Region, however, refers the Board to language explaining the terms "owner" and "generator" in the preamble of the rulemaking that established storage approval requirements for commercial storers of PCB wastes. *Id.* (citing Proposed Rule: Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities, 53 Fed. Reg. 37,436, 37438 (Sept. 26, 1988)); Final Rule: Polychlorinated Biphenyls: Notification and Manifesting for PCB Waste Activities, 54 Fed. Reg. 52716, 52717-18 (Dec. 21, 1989)). The preamble to the proposed rule indicates that a "generator" of PCB waste is "any person whose act or process produces PCBs that are regulated for disposal under TSCA, or whose act first causes a 'PCB' or 'PCB Item' to become subject to the Subpart D disposal requirements of 40 CFR Part 761." Region's Response to EAB Request (quoting 53 Fed. Reg. at 37,438). The preamble further notes as an example that "'owners' or 'users' of the PCB fluids and PCB Items regulated for disposal under TSCA are, or will become, the typical generators of PCB wastes, at such time as they retire their regulated materials (50 ppm or greater) from service." *Id.* The preamble language makes clear that "generator" status turns on control and possession, not ownership. Accordingly, as the Region remarks, "contractual transfer of ownership alone * * * does not control the regulatory status of such waste." Region's Response to EAB Request.

In response to the Region's briefing on the question of "ownership," EPS asserts that to understand the relationship between "ownership" and "commercial storer" status, the Board should rely on a Region 2 guidance document – a September 12, 2000 letter in which a Region 2 official responded to a series of questions from EPS based on a hypothetical scenario in which a utility company ships to a disposal facility untested, oil-filled articles with a PCB concentration exceeding 50 ppm. *See* [EPS's] Reply to [Region's] Response to EAB Request Made During Oral Argument at 2 ("EPS Reply") (quoting RX 312 (Letter from George Pavlou, Region 2, to Keith Reed, EPS, at 2 (Sept. 12, 2000))). In the letter, the Region 2 official stated that "the disposal facility would be the owner of any materials they owned which became PCB waste during the processing of the [u]tility's PCB waste." *Id*. at 2.

Notably, the passage on which EPS relies does not address the relationship between generator status and ownership. More significantly, EPS ignores another section of the Region 2 response letter that *does* address directly the question of who would be the waste "generator" under EPS's same scenario. Region 2 here replied that the regulatory language provides that "generator" status is determined by who has "possession of PCBs at the time the decision that they were a waste was made" and that under EPS's scenario, the *utility* would be the "generator" of the PCB articles it ships to the disposal facility. *Id.* Moreover, the response letter contradicts EPS's argument that because EPS tests the vast majority (99%) of the transformers the company receives, EPS is the "entity that makes the determination that the equipment is waste." *See* EPS Reply at 3. As Region 2 stated, the requirements of generators to manifest PCB waste applies "even if the PCB concentration is unknown at the time (e.g. untested oil)," thereby indicating that the action of determining "waste" and therefore "generator" status is independent of PCB testing. RX 312 at 2. As we have described above, all the evidence in this case indicates that EPS's utility customers were the "generators," and EPS was the recipient of already "generated" wastes and thus a commercial storer. As the Region states, "the utility company customers had already made the determination that the materials being sent to [EPS] [were] waste for disposal." Region's Response to EAB Request at 2.

Having so determined, we now address the question of whether the Region proffered prima facie evidence that EPS exceeded the relevant 5,000 pound MSC for commercially stored PCB transformers on the two dates in question – July 15, 1999, and November 2, 1999.

With regard to the PCB Items EPS stored on July 15, 1999, although we consider the matter a close question, we find that the Region failed to establish that EPS, was, on this date, in possession of PCB transformers in excess of the applicable 5,000 MSC. Our determination stems from the imprecision of the words "PCB units" in the context of this case. As noted above, the storage information that EPS faxed to the Region with respect to the two inspection dates does not use the term "PCB transformers" but rather describes the objects as "PCB units," a designation that does not appear in the PCB regulations and does not necessarily correspond to "PCB transformers." *See* CX 7 (describing July 15, 1999 PCB storage information as "PCB Units Weights");CX 11 Att. 3 (describing November 2, 1999 PCB storage information as "PCB Units in Storage").[40] As a term, "PCB Units" is not confined to "PCB transformers," and could rather refer to other equipment containing PCBs, and there is no distinguishing information about the listed items on the fax besides weight and barcode number. In particular, the faxed list pertaining to the July 15th inspection simply does not contain information, such as item type and PCB concentration, that could provide assurance that the listed items referred to PCB transformers instead of other types of PCB-containing waste. *See* Tr. at 29 (Vol. II) (McPhilliamy testimony). Accordingly, we find that the Region has not established a prima facie case that EPS exceeded the MSC of 5,000 pounds for PCB transformers on July 15, 1999, and reverse the ALJ's finding to the contrary.[41]

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[40] The evidence pertaining to the transformers on hand on July 15, 1999, is strikingly sparse compared to the evidence associated with the November 2 inspection. For example, following the Region's November 2, 1999 inspection, the company submitted to the Region by fax a "PCB Storage Log " listing stored items for that date. *See* CX 11, Att. 3. The fax cover sheet preceding the storage log contains the message "PCB units in storage 11-2-99." The storage log lists four pages of stored items and provides for each item information such as item type, six-digit bar code, serial number, manifest number, the item's receipt and removal from service dates, PCB concentration, and weight. *Id.* Using the information on the PCB storage log, the Region identified sixteen of the items as PCB transformers and used this subset of items (totaling 15,360 pounds) as a basis for calculating its proposed Count I penalty relative to the November 2, 1999 violation. *See* Second Amended Complaint at 4, 7.

[41] In finding that the Region did not establish a prima facie case that EPS exceeded the MSC for PCB transformers on July 15, 1999, we are mindful of the ALJ's observation that inspector McPhilliamy testified that following the July and November inspections he had specifically asked EPS for storage information relating to PCB transformers. *See* Init. Dec. at 16 (citing Tr. at 250 (Vol. I); Tr. at 24, 29 (Vol. II)). Nevertheless, EPS's ambiguous use of "PCB units" in the storage information it provided to the Region renders this information unusable as definitive proof. Under these circumstances, it was incumbent upon the Region to resolve this ambiguity through other proof. This we find the Region failed to do.

We have no such reservations with respect to the Region's prima facie case that the company was commercially storing PCB transformers in violation of its 5,000-pound MSC on November 2, 1999. Although EPS also faxed storage information for this date under the vague description "PCB Units," EPS provided sufficient distinguishing information in the storage log, such as item type and PCB concentrations, to allow for identification of a subset of the items as PCB transformers and the conclusion that EPS was commercially storing in violation of its storage permit. *See* Region's Response at 24-26.[42] Accordingly, we uphold the ALJ's determination that the Region established a prima facie case that EPS exceeded its MSC for PCB transformers on November 2, 1999.

b. *Whether EPS Modified its MSC to 100,000 pounds for PCB transformers by Notifying the Region*

In its appeal, EPS argues that the ALJ erred in determining that EPS had not revised its MSC for PCB transformers when EPS notified EPA on July 19, 1999,[43] that the company would be increasing its MSC for such transformers from 5,000 pounds to 100,000 pounds. *See* App. Br. at 26-30; CX 52; RX 28. EPS contends that because it raised its MSC to 100,000 pounds in this manner, the company was not out of compliance with the MSC on the dates in question, as this new MSC exceeded the amount of PCBs that the company had in storage.

In his Initial Decision, the ALJ concluded that the PCB regulations require that the terms of storage approvals, such as MSCs, must be approved by the Regional Administrator and that, accordingly, EPS's "unilateral" attempt to modify its MSC through notification was contrary to the PCB regulatory scheme. Init. Dec. at 14-15 (citing 40 C.F.R. § 761.65(d)). For example, the ALJ noted that 40 C.F.R. § 761.65(d)(1) requires commercial storers of PCBs to submit an application for storage approval and that subsection (d)(2) provides that the Regional

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[42] We reject EPS's suggestion that the Region's evidence is suspect because the latter "failed to perform any independent weight measurements" on the subject transformers. App. Br. at 19. First, EPS cites no legal authority requiring EPA to independently calculate the weights of PCB Articles rather than rely upon the weight records compiled by a regulated entity. In addition, the PCB regulations require that facilities storing PCBs, including commercial storers, maintain and make available for EPA inspection "annual document logs" that include information such as the weights of PCB Articles in storage and the type of PCB waste stored. *See* 40 C.F.R. § 761.180(b)(2)(ii)(B). These recordkeeping requirements form part of EPA's PCB waste tracking system, which EPA instituted in 1989. *See* Polychlorinated Biphenyls: Notification and Manifesting for PCB Waste Activities, 54 Fed. Reg. 52,716 (Dec. 21, 1989). According to the rulemaking preamble, one of the purposes of the tracking system is to "facilitate compliance monitoring and enforcement under TSCA by EPA inspectors." *Id* at 52,720. Requiring EPA to independently measure the weight of PCB Articles in order to support a PCB commercial storage violation, as EPS suggests, would impose an enormous administrative burden on EPA not contemplated by the PCB regulations and redundant of the PCB tracking system.

[43] EPS's notification consisted of a letter and an attached "Closure Plan Modification Certification Statement." *See* RX 28.

Administrator "shall grant written, final approval to engage in the commercial storage of PCB waste" upon the applicant's satisfying certain regulatory requirements. Init. Dec. at 14-15 (citing 40 C.F.R. § 761.65(d)(1)-(2)). The ALJ observed that, consistent with this clear regulatory regime for storage approvals, EPS followed this application procedure to obtain its PCB storage approvals from the Region in 1993 and 1998, which in both cases established an MSC of 5,000 pounds for PCB transformers. *See id*. at 14-15. The ALJ also observed that this procedure is "consistent" with the terms set forth in the TSCA storage approvals themselves, *id*. at 15 (citing CX 1 at 3-4; CX 2 at 3-4), and that the Regional Administrator thus never approved an MSC increase to 100,000 pounds. *Id.* Finally, the ALJ noted that, by regulatory design, a PCB commercial storer's approved financial assurance mechanism is tied to its MSC. Accordingly, the ALJ opined that it would be "inconsistent" for a storer of PCB waste to maintain an EPA-approved financial assurance mechanism andthen allow the storer to unilaterally increase its MSC and thereby put the financial assurance mechanism at risk. *See id.* This outcome, concluded the ALJ, would "make[] no regulatory sense." *Id.*

EPS contends that the PCB regulations applicable to closure plans do not specifically require that EPA approve MSC modifications. App. Br. at 26-27. In support of this argument, EPS refers to a provision in the PCB regulations governing financial assurance that requires a facility to establish a new form of financial assurance or revise an existing financial assurance instrument in response to a facility modification that increases its MSC. *Id*. at 27 (citing 40 C.F.R. § 761.65(g)(9)). The company notes that when such a modification occurs, the "Director of the Federal or State issuing authority must be *notified* in writing no later than 30 days from the completion of the modification" and that "[t]he new or revised financial assurance mechanism must be established and activated no later than 30 days after the Director of the Federal or State issuing authority is *notified*." *Id*. (quoting 40 C.F.R. § 761.65(g)(9)) (emphasis supplied by EPS). EPS contends that the "plain wording" of the regulations supports its argument that notification alone is sufficient for a PCB storer to effect a change in its MSC since the language mentions "notification" but not "approval." *Id*. at 28-29. Furthermore, EPS asserts that since the Region delayed in responding to the company's notification until the time it initiated its administrative action, the Region waived its right to object to EPS's notification. *Id.* At 30. According to EPS, "any reasonable person, who had submitted a formal, clear notification that complied with the requirements of [40 C.F.R.] § 761.65(g)(9)) (using variants of the word 'notify') and received no acknowledgment or corrected response from EPA, would assume that its notification was both in accordance with the regulations and accepted by EPA." *Id*. at 28. EPS further asserts that Region 3 "waived any objections" to the higher MSC when Region 3 had allegedly designated EPS as a "disposal site" for 97,000 pounds of PCB transformers associated with an October 2000 Superfund site cleanup conducted under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601-67. App. Br.

at 28-30; *see* Tr. at 51-53 (Vol. V).[44]

In our view, EPS cannot accomplish by simple notice and without explicit ratification by the Region a change in its transformer MSC from 5,000 pounds to 100,000 pounds. We agree with the ALJ that the concept of notice-only ratification is at odds with the whole logic and purpose of the PCB regulatory program. Also, as the Region notes in its reply brief, within the same body of section 761.65 provisions governing storage for disposal, the regulations provide that "[t]he commercial storer of PCB waste shall submit a written request to the Regional Administrator * * * for a modification to its storage approval to amend its closure plan whenever: (I) changes in ownership, operating plans or facility design affect the existing closure plan." Region's Response at 28 (citing 40 C.F.R. § 761.65(e)(4)). As the Region notes, the regulations contemplate the Regional Administrator's approval of such requests for closure plan modification. *Id.* (citing 40 C.F.R. § 761.65(e)(5)).

A change of MSC is appropriately viewed as a "change[] in operating plan[]" that "affects [EPS's] closure plan," and as such requires a request to the Region for modification of its storage approval pursuant to the PCB regulations. 40 C.F.R. § 761.65(e)(4). This is clear from the following regulatory language, which identifies the MSC (or "maximum inventory of PCB wastes") as an integral part of a facility's closure plan:

> An acceptable closure plan must include, at a minimum * * * [a]n estimate of the maximum inventory of PCB wastes that could be handled at one time at the facility over its active life * * * .

40 C.F.R. § 761.65(e)(1)(iii).

In addition, the Board agrees with the Region that unapproved changes in MSCs, as advocated by EPS, contravene the very terms of the company's commercial storage approval. As the Region notes, EPS's 1998 commercial storage approval explicitly incorporates by reference EPS's 1992 storage approval application, *see* CX 2, at 2, in which EPS committed to modifying and submitting for the Region's approval a change in operating plans or facility design that affected

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[44] EPS maintains that the Region, in 2000, granted approval to the company to receive "97,000 pounds of PCB transformers" from a Superfund site as part of a remediation project, and that this amount of PCB wastes exceeds the 5,000 pound MSC in its 1998 commercial storage approval. The company notes that this waste level greatly exceeds the 5,000 MSC in its 1998 commercial storage approval but is less than the 100,000 pound MSC the company claims to have established through its July 19, 1999 notification. EPS points to this same alleged incongruity in its argument that the Region failed to provide "fair warning" of the application of the PCB regulations. We address this issue, *infra*, in the section on EPS's "fair warning" argument.

the Facility's closure plan. *See* CX 1, at 5.1. The closure plan that EPS submitted as part of its 1992 application for storage approval provided, among other things, that "[t]his closure plan will be modified and submitted to the U.S. EPA for approval if * * * a change in operating plans or facility design affects the closure plan." *Id.* As an example of such a change requiring EPA approval, the closure plan listed "Increases/Decreases in the estimate of maximum inventory." *Id.*

Finally, we reject EPS's arguments that by virtue of EPA's delayed response to EPS's July 19 letter and EPA's alleged approval of EPS as a site for receiving CERCLA-related PCB transformers in amounts above the MSC for PCB transformer in EPS's 1998 storage approval, the Region waived its right to object to the higher MSC for which the EPS provided notice in its July 19, 1999 letter. EPS's arguments in this regard essentially invoke the affirmative defense of equitable estoppel since EPS is asserting that because it reasonably relied upon the Region's actions and omissions, the Region should not be entitled to enforce the 5,000-pound MSC.[45] *See In re BWX Technologies, Inc.*, 9 E.A.D. 61, 80 (2000) (stating that "[e]quitable estoppel is an equitable doctrine that precludes a party from asserting a right that the party would otherwise enjoy if that party takes actions upon which its adversary reasonably relies to its detriment").

As the Board has observed repeatedly, drawing upon ample precedent, when equitable estoppel is asserted against the government, as in this case, plaintiffs bear an especially heavy burden. As we stated in one case in which the Board rejected a respondent's claim of equitable estoppel against the Agency, "generally speaking[,] public officers have no power or authority to waive the enforcement of the law on behalf of the public." *In re B.J. Carney Inds., Inc.*, 7 E.A.D. 171, 202 (EAB 1997) (quoting *United States v. Amoco Oil Co*., 580 F. Supp. 1042, 1050 (W.D. Mo. 1984)). Accordingly, a party asserting equitable estoppel against the government not only must prove the traditional elements of estoppel – that it reasonably relied upon its adversary's action to its detriment – but must also show that the government "engaged in some affirmative misconduct." *United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1995), *quoted in B.J. Carney*, 7 E.A.D. at 196.

Courts have routinely held that "mere [n]egligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct" sufficient to estop the government. *Bd. of County Comm'rs of the County of Adams v. Isaac*, 18 F.3d 1492, 1499(10th Cir. 1994). With regard to the instant case, EPS has at most demonstrated Regional inaction in response to EPS's notification letter, which does not meet the stringent test for affirmative misconduct. Because we have determined that EPS has not demonstrated affirmative misconduct by the

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[45] The Federal Rules of Civil Procedure, which we consult for guidance, list "estoppel" as an affirmative defense. *See* Fed. R. Civ. P. 8(c).

Region necessary to justify equitable estoppel in this case, we need not consider whether EPS has satisfied the traditional elements of equitable estoppel by showing that it suffered a "detriment" and reasonably relied upon the Region's actions. *See Hemmen*, 51 F.3d at 892.

Moreover, the ALJ determined that EPS had not provided a factual basis for its related claim that the Region had placed EPS on an approved list to receive PCB transformers as CERCLA waste in amounts exceeding its MSC and thereby signified its approval of a higher MSC. In this regard, the ALJ concluded that the testimony offered by EPS Vice-President Scott Reed "does not establish that [EPS] was approved by EPA to accept PCB transformers under CERCLA." Init. Dec. at 21. The ALJ commented in this regard that Reed made only "passing" mention of the CERCLA listing claim, "shedding very little light" on the subject. *Id*. at 21. As we have stated on many occasions, the Board ordinarily will defer to an ALJ's factual determinations based on witness testimony during the administrative proceeding, where witness credibility plays a role. *See In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 356 (EAB 2005); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005); *see also In re Friedman and Schmitt Constr. Co.*, 11 E.A.D. 302, 314 n.15 (EAB 2004) (holding that the Board "may defer to an ALJ's factual findings where credibility of witnesses is at issue 'because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility'") (quoting *In re Ocean State Asbestos Removal, Inc.*, 7E.A.D. 522, 530 (EAB 1998)), *aff'd, Friedman v. United States Environmental Protection Agency*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005). Accordingly, we defer to the ALJ's determination here that EPS failed to present credible evidence that the company was approved to receive PCB transformers from a CERCLA site, and that therefore the company failed to satisfy its burden of proof that EPA had approved EPS's receipt of CERCLA wastes in amounts exceeding its applicable MSC.

For the foregoing reasons, we reject EPS's argument on appeal that the company's MSC for PCB transformers had been modified such that the company was in compliance with its MSCs on November 2, 1999. While the commercial storage regulations are perhaps not a model of clarity, allowing commercial storers of PCBs to unilaterally increase their MSCs without prior EPA approval is plainly at odds with the logic and purpose of the regulations. In addition, such unilateral permit modification of this kind would directly contravene the terms of EPS's 1998 commercial storage approval.

c. *Whether EPS's Financial Assurance Instrument Was In Any Case Adequate and Therefore Ameliorative*

EPS argues that even if it did not successfully modify its PCB transformer MSC,the trust fund that the company established as its form of financial assurance was "at all times" sufficient to cover its closure costs. App. Br. at 35-37. EPS

contends that it consequently was never out of compliance with the provisions for financial assurance at 40 C.F.R. § 761.65(g) that require commercials storers of PCB waste to maintain financial assurance in amounts necessary to assure proper closure of their storage facilities. *Id.*

In his Initial Decision, the ALJ concluded that EPS's argument about the adequacy of its financial assurance instrument was "beside the point," noting that Count I "deals with excessive storage of waste PCB transformers, not with the adequacy of a financial assurance mechanism." Init. Dec. at 22.

On this point, EPS explains that the value of its trust fund had burgeoned due to shrinking costs of disposing of PCBs and the concurrent increase of the value of investments in the trust. App. Br. at 36-37. The company notes that the trust fund's value had risen so much that it was sufficient to ensure cleanup of its Facility at the increased MSC level the company had sought through its July 19, 1999 notification. *Id*. at 37.

We reject as irrelevant EPS's argument that the size of its financial assurance instrument somehow excuses its MSC exceedance. As the Region correctly observes, 40 C.F.R. § 761.65(g) includes no mechanism that would allow a commercial storer of PCB waste to unilaterally raise its MSC due to an increase in the value of its closure trust fund. *Id.* Furthermore, whether a commercial storer meets the regulation's financial responsibility standards is contingent upon the Region's determination, not EPS's. *See id*. at § 761.65(d)(2)(v). Closure costs, and the financial assurance to meet them, are keyed to a commercial storer's MSC closure cost estimate, *see id*. at § 761.65(g), which in turn is based upon "current market costs of off-site commercial disposal of the facility's maximum estimated inventory of PCB wastes." *Id.* § 761.65(f)(iii). As we have discussed, MSCs, just like financial assurance, must be approved by the Region. Here, EPS, contrary to the regulations, wishes to substitute its own judgment for PCB regulatory provisions that subject commercial storage facilities' MSCs and financial assurance levels to direct Agency oversight.

d. *Whether the Subject PCB Transformers were Exempt Because the Company was Processing Them for the Purpose of Transportation or Storage For Disposal Pursuant to 40 C.F.R. § 761.20(c)(2).*

EPS claims that the ALJ erred in determining that the company was not entitled to benefit from the exception at 40 C.F.R. § 761.20(c)(2), *see supra*, which exempts from PCB storage or disposal approval persons engaging in "processing activities which are primarily associated with and facilitate storage or transportation for disposal." App. Br. at 20-21 (citing 40 C.F.R. § 761.20(c)(2)(I)). EPS contends that the decontamination procedures that the company applied to its PCB transformers prior to burning them in its SMRO exempted EPS from com-

mercial approval because the procedures fell within the reach of section 761.20(c)(2).[46] *See id*. at 7, 24-25.

In his Initial Decision, the ALJ rejected EPS's claim of exemption from the storage approval for the subject transformers, determining that the company's handling of the PCB transformers did not fall within what he characterized as the "narrow[]" ambit of activities contemplated by the 40 C.F.R. § 761.20(c)(2) exception. Init. Dec. at 19. He characterized the exception as "narrowly drawn," applying only to those processing activities that "facilitate storage or transportation for disposal." *Id.* (quoting 40 C.F.R. § 761.20(c)(2)(I).

First, the ALJ, relying upon the Region's inspection reports, photographs of the Facility's storage area, and Regional inspectors' testimony, stressed that the subject PCB transformers were in "storage" rather than "being processed for storage or transportation incident to disposal as respondent maintains." Init. Dec. at 19. Emphasizing the items' "storage" condition, the ALJ noted that the sixteen transformers the Region held in storage at the Facility on November 2, 1999, had already been in storage for periods ranging from 39 to 127 days. *See* Init. Dec. at 19. The ALJ further mentioned that during their inspections, the Regional inspectors never witnessed any indicia of processing activities, such as workers decontaminating the PCB transformers or the transformers being in a disassembled state. *Id*. at 20. Instead, the ALJ remarked that the inspectors' testimony emphasized that the transformers were intact and non-leaking. *Id.*

In challenging the ALJ's determination in the Initial Decision that the company is not entitled to the safe harbor of 40 C.F.R. § 761.20(c)(2), EPS avers that "there is no support in the record for EPA's position that Respondent was not processing the units for transportation for disposal of the PCB waste." App. Br. at 25. EPS further asserts that EPA is ignoring "clear evidence which support[s] the applicability of the processing exemption," in particular the fact the company needed to process its PCB transformers using decontamination prior to disposing of them since EPS "cannot legally dispose of PCB waste from PCB transformers." *Id*. at 24-25. In this regard, EPS states it provided incontrovertible evidence from certificates of disposal that it decontaminated the PCB wastes in question. *Id.*

Regarding the extended period of time the PCB transformers were in storage before processing, EPS asserts that "the length of time equipment was on site at EPS, the date that equipment was received by EPS and the amount of time it

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[46] EPS does not explicitly mention in its Appeal Brief that the company's use of "self-implementing" decontamination procedures in accordance with 40 C.F.R. § 761.79(c)(2) constitutes the "processing" activities for which it seeks an exemption from storage approval requirements under section 761.20(c)(2). Nevertheless, EPS's reference to "decontamination" in its Appeal Brief and evidentiary hearing testimony, *see* Tr. at 234 (Vol. III), makes it clear that the company's decontamination activities pursuant to section 761.79(c)(2) are the basis of its storage approval exemption claim.

takes to process equipment * * * are irrelevant." App. Br. at 24. Instead, the company argues that the only time limit the PCB regulations impose on PCB storage prior to disposal is the general requirement in the PCB regulations that bars storage greater than one year once PCBs and PCB Items are determined to be PCB waste through removal from service for disposal. *Id.* (citing 40 C.F.R. § 761.65).[47]

In reviewing the parties' arguments on appeal, the Board regards EPS's claim to the regulatory shelter of 40 C.F.R. § 761.20(c)(2) as an affirmative defense on which the company must bear the burden of proof. *See In re Norman C. Mayes*, 12 E.A.D. 54, 89 (EAB 2005) (citing *In re Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 (CJO 1990), *aff'd Mayes v. EPA*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008). Also, it bears mention that the section 761.20(c)(2) storage exemption to which EPS must demonstrate entitlement is a limited one, as we have earlier noted. *See supra* Part II.A.3.b. The most natural reading of the exception's operative words "processing activities that *facilitate* storage or transportation for disposal" is that the exception applies to a restricted set of corollary and separable activities preparatory to storage (or transportation) but not to otherwise regulated storage (or transportation) itself.

We find support for a narrow reading of section 761.20(c)(2) in the regulatory history for the exemption. The preamble to the 1998 Final Rule that promulgated the exemption listed the following examples of processing activities which "are primarily associated with and facilitate storage or transportation for disposal":

> [R]emoving PCBs from service (e.g., draining liquids); pumping liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility or disposal facility; dismantling or disassembling serviceable equipment pieces and components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.

63 Fed. Reg. at 35,392. The foregoing catalogue of exempt "processing" activities makes clear, in our view, that the section 761.20(c)(2) exemption applies to actions preparatory to storage or transportation but not to storage or transportation

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[47] In this discussion, EPS also stresses the distinction between "storage" and "commercial storage," acknowledging that while it "stored" the PCB transformers prior to decontaminating them, the Region has provided no evidence that the company was "commercially storing" the transformers. In support of this point, EPS repeats its earlier argument in reference to the Region's prima facie case pertaining to Count I, i.e., that the Region failed to establish as a factual predicate to "commercial storage" that the PCB transformers in question constituted "wastes." App. Br. at 25-26. The reader is directed to Part III.A.1.a, above, for our discussion of the issue of whether the PCB transformers in storage on July 9 and November 2, 1999 were "wastes."

themselves. In other words, an entity cannot claim the exemption if it is both processing PCB wastes in preparation for storage (or transportation) and also actively storing those same wastes.

We find that EPS has failed to prove that it engaged in processing activities separable from the storage activities described in its 1998 commercial storage approval.[48] Indeed, EPS has not demonstrated that it engaged in any processing to facilitate storage of the subject PCB transformers independent of storing the transformers themselves. Rather, the record emphatically shows that the transformers for which EPS seeks regulatory exemption were in a storage condition at EPS's Facility and not undergoing processing. As the Region points out, its inspectors, during their visits to the Facility, never observed EPS carry out processing of these items. Region's Response at 31-33. In addition, EPS's documentation concerning its handling of the subject transformers indicates that EPS had no discreet processing objective – apart from storage – with regard to these items. As the Region observes, the list of stored items for November 2, 1999, that EPS faxed to the Region's inspectors showed that some of the subject PCB transformers had been in storage from July 15, 1999 (the date of the Region's first inspection) to November 2, 1999 (the date of the Region's second inspection), and in one case a transformer was in storage for 127 days. *Id*. at 32; *see* CX 11, Att. 3. We agree with the Region's comment that EPS's records indicate that the PCB transformers were in storage "for much longer than the time needed to 'process' them." Region's Response at 32-33. Furthermore, we agree with the Region's comment that the tightly stacked arrangement in which the inspectors found the PCB transformers would make processing the transformers impossible unless the items were moved elsewhere. *See id*. at 32 (citing CX 8); Tr. at 247 (Vol. 1); Tr. at 96 (Vol. II).

Also, we find persuasive the Region's argument that the wording of the 40 C.F.R. § 761.20(c)(2) exemption does not encompass the specific decontamination processing that EPS claims to have carried out on the PCB transformers. Region's Response at 34-35 (*citing* 40 C.F.R. § 761.79(c)(2)(i)). In particular, as the Region notes, the exemption applies only to "'processing activities which are *primarily associated with and facilitate storage or transportation for disposal*.'" *Id*. at 34 (*citing* 40 C.F.R. § 761.20(c)(2)). Referring to Keith Reed's testimony relating to how EPS uses the section 761.79(c)(2) procedures to reduce PCB concentrations in PCB transformers so that the transformers can be burned in EPS's SMRO, the Region explains that the objective of the company's section 761.79 decontamination procedures was not to facilitate transportation or storage, as the exemption provides, but rather to facilitate the transformers' *disposal* at EPS's

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[48] In fact, as discussed below, the record indicates that the decontamination processing activities underlying the company's regulatory exemption claim in fact were associated with and facilitated "disposal" (rather than merely storage or transportation) and hence are not entitled to the commercial storage approval exception.

own Facility. Region's Response at 34; Tr. at 263-69 (Vol. VIII). As such, the Region correctly observes that EPS's decontamination falls outside the range of the commercial storage approval exception.[49]

Finally, the Board has often observed the principle that regulatory exemptions should be interpreted narrowly in order to preserve the primary operation of the general rule. *See, e.g., In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 300-01 (EAB 2004)(citing *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)). This principle has particular relevance to the case at hand. As the Region argued, even if the PCB transformers in question were ultimately decontaminated prior to disposal, the 40 C.F.R. § 761.20(c)(2) processing exemption did not apply to the period prior to processing during which the transformers were being commercially stored. As the Region explains, since all PCB waste must be disposed of in accordance with 40 C.F.R. § 761.60, the "manner of disposal [i.e., disposal preceded by decontamination] does not affect the applicability of 40 C.F.R. § 761.65 to PCB waste storage prior to the time of disposal." Region's Response at 30. We agree with the Region that EPS's argument, according to which an entity's ultimate processing of PCB waste would render any prior storage by that entity free of regulatory consequence, would have the ironic effect here of "exclud[ing] the exact waste that is regulated by the *TSCA Storage Approval*." *Id*. at 31. Such a capacious interpretation of section 761.20(c)(2) could effectively "swallow" or eviscerate the commercial storage requirements at section 761.65(d), thereby defeating the purpose of requiring MSCs for waste PCBs. Such an outcome is irreconcilable with Congress's goal of protecting the public and environment from the dangers of PCBs. *Id*. at 34. Accordingly, we find that a narrow interpretation of section 761.20(c)(2) is warranted here in order to preserve the beneficial effect of the PCB regulations. *See Consumer Scrap*, 11 E.A.D. at 301.

For the foregoing reasons, we find that EPS has failed to meet its burden of proof that the company qualifies for an exemption from commercial storage approval requirements in accordance with section 761.20(c)(2). As indicated, this exemption is a narrow one, and EPS has simply failed to meet its burden of proof showing that its decontamination activities fit within the exception's confines. Accordingly, we reject EPS's arguments that its processing activities constitute an affirmative defense to the company's Count I liability for storing PCB transformers in excess of applicable MSCs.[50]

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[49] Reinforcing the Region's point, the Region's witness John Howard Smith noted in his testimony that the PCB regulations only specifically exempt the decontamination procedures that EPS claims to have carried out from *disposal* approval, not from commercial storage approval. *See* Tr. at 234-35 (Vol. III); 40 C.F.R. § 761.79(c)(1).

[50] With regard to the 40 C.F.R. § 761.20(c)(2)(i) exception, EPS also objects to what it characterizes as the Region's testimony that the exception "did not apply to EPS because it was not expressly mentioned in EPS's PCB [commercial storage] [a]pproval." App. Br. at 33 (citing Tr. at 94-95

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e. *The Region's Alleged Failure to Provide "Fair Warning" to EPS of its Interpretation of the Commercial Storage Approval Exception at 40 C.F.R. § 761.20 (c)(2)*

EPS asserts that EPA failed to provide to EPS "fair warning" of EPA's interpretation of the regulatory exemption at section 761.20(c)(2) before taking enforcement action against it. App. Br. at 30. EPS contends that this alleged lack of notice bars the Region from taking enforcement action against EPS. *Id.*[51]

In his Initial Decision, the ALJ dismissed EPS's fair warning argument as "inapposite to the facts and legal issues raised in this case." Init. Dec. at 21. In this respect, the ALJ stated that EPS "has not established that any exception provided by [40 C.F.R. § 761.20(c)(2)] would serve as a defense to the violation charged." *Id*.

In challenging the Initial Decision on this point, EPS contends that with regard to the MSC and processing exemption at 40 C.F.R. § 761.20(c)(2), EPA did not satisfy the test under federal case law for "fair notice" because the Region did not allow the company to identify, with "ascertainable certainty," how EPA would interpret its regulatory provisions. App. Br. at 30. As EPS states, "if an agency has not provided the regulated party with any pre-enforcement warning of its interpretation, an agency 'cannot, in effect punish a member of the regulated class for reasonably interpreting [its] rules.'" *Id*. at 30-31 (citing *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). As background, EPS notes that EPA promulgated the section 761.20(c)(2) exemption in June 1998, *see id*. at 20, shortly before the company received its second commercial storage approval in September 1998, and contends that before the Region filed its first Complaint in June 2001, EPS "received no guidance whatsoever from EPA regarding the manner in which EPA interpreted the section 761.20(c)(2) exception against EPS's commercial storage approval requirements," *id*. at 22. Regarding section 761.20(c)(2), EPS stresses that it "reasonably interpreted" the processing exception, contending that the Region's argument that the company's handling of the

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(Vol. II)). EPS contends that the commercial storage approval "must apply to and incorporate all applicable regulations in effect at the time the [a]pproval was issued, including 40 C.F.R. § 761.20(c)(2)." *Id*. EPS's argument is beside the point since we have determined that EPS's claimed processing activities involving the subject transformers do not fall within the scope of section 761.20(c)(2)(i).

[51] As part of its fair notice arguments pertaining to Count I, EPS also claims that the Region failed to provide EPS with fair notice of how the Region would apply the company's MSC for PCB transformers in view of the Region's subsequently approving EPS in 2000 to accept a larger shipment of PCB transformers than that allowed under its 1998 commercial waste approval. App. Br. at 30. We reject the EPS's fair notice claim based on this argument because, as we have previously discussed, we find that EPS failed to establish that the Region granted it any such approval. *See supra* Part III.A.1.b.

PCB transformers did not fall within this exception "is contrary to the plain language of the regulation." *Id.* at 31.

At the outset, we regard EPS's "fair notice" argument in relation to 40 C.F.R. § 761.20(c)(2) as an affirmative defense since it lies outside the Region's prima facie case on Count I. *See, e.g., In re Norman C. Mayes, Inc.*, 12 E.A.D. 54, 89 n.28 (EAB 2005); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 540 (EAB 1994) (stating that "[a] true affirmative defense, which is avoiding in nature, raises matters *outside* the scope of the plaintiff's prima facie case") (quoting 2A Moore's Federal Practice Manual 8-17a (2d ed. 1994)) (emphasis in original); *see also In re Friedman*, 11 E.A.D. 302, 320 (EAB 2004) (treating respondent's fair notice argument as an affirmative defense), *aff'd, Friedman v. United States Environmental Protection Agency*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005). Therefore, EPS bears the burden of proof with respect to the Region's alleged failure to give the company "fair notice" of its application of the PCB regulations before penalizing the company.

The "fair notice" defense arises from the Constitutional due process concern that a party should receive fair notice before being deprived of property. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). As the District of Columbia Circuit has articulated, "in the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability." *General Electr. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995)). The Board has adopted the following standard from *General Electric Company, supra*, to explain the criteria for determining if the government has accorded "fair notice" to a regulated party:

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty" the standards with which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

See, e.g. In re V-1 Oil Co., 8 E.A.D. 729, 751 (EAB 2000) (quoting *General Electr Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citation omitted)).

In our view, EPS's notice arguments are unconvincing. In particular, the provisions of 40 C.F.R. § 761.20(c)(2), in conjunction with the explanations provided in the final rule preamble, are sufficiently clear to have informed EPS with "ascertainable certainty" that EPS's decontamination activities did not fall within the scope of the section 761.20(c)(2) exemption. It is striking that *General Electric Company*, upon which EPS relies for its "fair notice" arguments, involves an earlier version of the section 761.20(c)(2) exemption at issue here, which was

adopted in 1998. Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35,384, 35,392, 35,439-40, (June 29, 1998). Promulgated in 1979, the earlier version, like the current one, listed a number of activities that were exceptions to TSCA's general ban on manufacturing, distribution in commerce, and processing of PCBs. *See* Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions, 44 Fed. Reg. 31,514, 31,549 (1979). The 1979 version, however, simply provided that "PCBs or PCB Items * * * may be processed and distributed in commerce * * * for purposes of disposal." *Id.*

General Electric Company involved respondent General Electric's use of a distillation process prior to disposal of PCBs in an incinerator. The Board found liability and imposed a fine on General Electric, concluding that the distillation process in question constituted an unapproved form of disposal not in compliance with the disposal requirements at 40 C.F.R. § 761.60(a). *General Electr. Co.*, 53 F.3d at 1327. In reversing the Board's determinations on liability and penalty, the D.C. Circuit noted that the excepting language "processing * * * for purpose of disposal" could reasonably be understood to allow pre-disposal processes "without authorization as long as [the processes] facilitate the ultimate disposal of PCBs* * * ." *Id.* at 1331. Therefore, the D.C. Circuit observed that this provision would not allow a person of "common understanding" to know that distillation was prohibited, and concluded that General Electric did not have fair notice of the prohibition. *Id.*

In 1998, EPA changed the wording of 40 C.F.R. § 761.20(c)(2) with the explicit purpose of "clarif[ying] which processing for disposal requires an approval and which does not[,]" stating that "[p]rocessing for disposal activities which are primarily associated with and facilitate storage or transportation for disposal are disposal, but do not require a TSCA PCB disposal approval." Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. at 35,392. In this regard, EPS's "fair notice" argument seem to read out the refining words "activities which are primarily associated with and facilitate storage or transportation" from section 761.20(c)(2) because the company does not identify how its decontamination processes under section 761.79(c)(2) are in any way geared toward a transportation or storage purpose. Rather, as noted previously, Keith Reed's testimony makes clear that EPS used the decontamination processing not to aid transportation or storage, but rather to reduce the PCB concentration of transformers so that they could be safely disposed in the company's SMRO. *See* Tr. at 263-69 (Vol. VIII).[52]

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[52] An examination of 40 C.F.R. § 761.20(c)(2)(ii) of the PCB regulations further favors a narrow reading of the section 761.20(c)(2)(i) exemption, contrary to the one expressed by EPS. The former clause provides, in relevant part, that processing associated with *disposal is* ordinarily subject to regulation: "[p]rocessing activities which are primarily associated with and facilitate treatment * * * or disposal require a TSCA PCB disposal approval unless they * * * are part of a self-implementing

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In sum, we find that the relevant regulatory language, along with EPA's preamble explanations, were sufficient to inform EPS with "ascertainable certainty" of the Region's interpretation of the commercial storage approval exception in 40 C.F.R.§ 761.20(c)(2). We thus reject EPS's fair notice argument.

As discussed above, the Board concludes that the ALJ did not err in finding EPS liable for exceeding its MSC for PCB transformers on November 2, 1999, as charged in Count I of the Second Amended Complaint.[53] The Region established a prima facie case of such exceedance, and EPS has presented no specific facts rebutting the Region's case. Moreover, the Board rejects EPS's arguments that the company escaped liability by simply notifying the Region of an increase in the company's MSC, without the Region's approval, or by asserting that the value of the EPS's financial assurance was allegedly sufficient to cover its closure costs. Finally, EPS has failed to prove any of the arguments it raises in affirmative defense to its Count I liability.

2. *Count II – Alleged Violation of MSC limit for PCB Capacitors*

a. *Alleged Failure by Region to Establish a Prima facie Case*

EPS challenges the ALJ's determination that EPS violated its commercial storage approval by commercially storing PCB capacitors in excess of its MSC of 1,000 pounds on July 9, 1999, as alleged in Count II. App. Br. at 40. As it did with regard to the transformers that were the subject of Count I, EPS contends that the Region failed to present facts establishing a prima facie case under Count II. *Id.*

In his Initial Decision, the ALJ concluded that EPS, a commercial storer, had exceeded its MSC for capacitors by commercially storing 26,367 pounds of PCB capacitors on July 9, 1999. Init. Dec. at 23. Stating that the company met the threshold definition of a "commercial storer" as discussed under Count I, the ALJ determined that waste manifests, hearing testimony, and inspection records clearly established the company's exceedance of its capacitor MSC. *Id*. at 25. The ALJ noted that although the Region's inspectors did not observe capacitors in storage on July 15, 1999, the Region afterward received a waste manifest from EPS indicating that on July 9, 1999, EPS shipped 26,367 pounds of PCB capaci-

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activity under * * * § 761.79(b) or (c)." 40 C.F.R. § 761.20(c)(2)(ii). Moreover, while the self-implementing decontamination procedures at 761.79(c) utilized by EPS do provide for an exemption from disposal approval, these procedures significantly provide no exemption from *storage approval*. *See id.* § 761.79(a)(1); *see also* Tr. at 234-35 (Vol. III).

[53] As explained above, the Board reverses the ALJ's liability finding with respect to Count I that EPS exceeded its MSC for PCB transformers on July 15, 1999.

tors from its Facility to Safety Kleen, information that the Region later confirmed by phone with EPS. *Id*. at 24 (citing CX 10).[54] In this regard, the ALJ further noted that Keith Reed testified that EPS had received these capacitors from American Electric Power (AEP), a utility customer. As the ALJ indicated, the incoming hazardous waste manifest documenting this waste shipment indicated that AEP shipped the capacitors to EPS on June 29, 1999. *Id.* The foregoing information, concluded the ALJ, was sufficient for the Region to establish a prima facie case that prior to shipping out the subject capacitors, EPS had been commercially storing them at its Facility in violation of its MSC for capacitors. *Id*. at 25.

EPS contends in its appeal brief that the Region has not sustained its burden of proof on Count II because the inspectors, having not actually seen the capacitors as they had been shipped from EPS before their inspection, did not take "fluid samples, determine PCB concentrations, weigh the units, determine whether EPS was the generator of the waste, and determine whether the capacitors were processed to facilitate the transportation to another site for disposal." App. Br. at 41.

We agree with the ALJ that the Region, through the documentary evidence it collected from EPS, presented a prima facie case that EPS violated its approved MSC for capacitors in July 1999. As we determined, *supra*, EPS was commercially storing waste capacitors and transformers as part of its routine business. *See* Part III.A.1.a. Furthermore, EPS's President, Keith Reed, admitted in his testimony that the capacitors in question were "PCB capacitors" containing high levels of PCBs. *See* Tr. at 46-47 (Vol. IX); Tr. at 264 (Vol. VIII); *see also* RX 515.[55] In addition, the Region reasonably relied upon the EPS's manifesting records to show that the weight of the capacitors (26,367 pounds) exceeded the applicable 1,000-pound MSC in EPS's storage approval. *See* CXs 2, 10.[56]

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[54] As discussed, *infra*, EPS shipped the capacitors in questions to Safety Kleen for incineration because the subject capacitors tested above 500 ppm PCBs, which exceeds the concentration level at which EPS is allowed to dispose of PCB wastes in its on-site SMRO.

[55] As Keith Reed explained in his testimony, the subject capacitors contained "askeral," a type of dielectric fluid with PCB concentrations of between 400,000 ppm to 600,000 ppm. Tr. at 207, 266 (Vol. VIII).

[56] As we did with respect to Count I, we reject EPS's suggestion the Region was required to obtain data independently rather than rely on manifesting records to prove its prima facie case under Count II. *See supra* note 42. In our view, the evidence the Region presented based upon these records, as well as EPS's admissions and public statements, amply support the Region's prima facie case under Count II.

b. *Whether EPS was Exempt from Commercial Storage Approval as a Waste "Transfer Facility" with Respect to the PCB Capacitors*

EPS contends that the ALJ erred in rejecting the company's affirmative defense that the company functioned as a "transfer facility" in handling the subject capacitors, *see* 40 C.F.R. § 761.3, and therefore was exempt from commercial storage approval with respect to the capacitors. App. Br. at 40. As noted *supra*, the PCB regulations define a "transfer facility" as a "transportation-related facility including loading docks, parking areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation," and provide a limited exemption from commercial storage approval where PCB wastes are held at such facilities for no more than ten days. *See* 40 C.F.R. §§ 761.3., .65(d)(5). The company asserts that it gained the benefit of this exception because EPS did not store the subject capacitors at its Facility for longer than ten days between destinations.[57] App. Br. at 43. In EPS's view, because it thereby satisfied the conditions of the transfer facility exception, the 1,000-pound MSC for PCB capacitors in the company's 1998 storage approval did not apply to the subject capacitors, and consequently the company is not liable as charged under Count II. *Id.*

In his Initial Decision, the ALJ determined that EPS's handling of the capacitors did not conform with the definition of a "transfer facility," and that the company was thereby not exempt from commercial storage approval requirements. The essence of ALJ's determination was that EPS failed to demonstrate that the capacitors were being "held during the normal course of transportation," and thereby did not meet the definition of "transfer facility." Init. Dec. at 26 (citing 40 C.F.R. § 761.3). Referring to EPS's president's testimony, the ALJ observed that after receiving the capacitors from AEP, the company dismantled the bank of capacitors into individual capacitors in "preparation for disposal," and then "sampled them as part of the disposal process." *Id.* The ALJ noted that only after discovering that the capacitors measured over 500 ppm PCBs (and could therefore not be burned in EPS's SMRO) "did the company initiate efforts to transport the capacitors off-site to Safety-Kleen for proper TSCA disposal." *Id.* at 27. The ALJ commented that EPS's actions were not consistent with the company holding the capacitors "during the normal course of transportation." *Id.* The ALJ further points to the fact that the hazardous waste manifest documenting the shipment of capacitors from AEP to EPS listed EPS as the "designated facility" and not as the "transporter." *Id.* (citing RX 515). In light of the above, the ALJ concluded that it was irrelevant whether the company held the capacitors in storage

[57] As noted, *supra*, the PCB regulations state that "[s]torage areas at transfer facilities are exempt from the requirement to obtain approval as a commercial storer of PCB waste under this paragraph, unless the same PCB waste is stored at these facilities for a period of time greater than 10 consecutive days between destinations." 40 C.F.R. § 761.65(d)(5).

for no more than ten days since the company did not establish that it was a "transfer facility" holding the capacitors "during the normal course of transportation." *Id*.

In its Appeal Brief, EPS insists that its operations include activities that are described in the definition of 'transfer facility,' and that, as such, the company is a "transfer facility." App. Br. at 42. EPS also asserts that the Region's witnesses agreed during the evidentiary hearing that "EPS's [F]acility can be a transfer facility as well as a disposal facility under the PCB regulations." *Id*. at 43. Moreover, EPS indicates that the documentary evidence and Keith Reed's testimony clearly established that the company did not exceed the ten-day storage window during which facilities can benefit from the "transfer facility" exemption. *Id.* (citing RX 515; CX 10). In this respect, EPS notes that EPA did not dispute evidence indicating that "the capacitors were shipped from EPS's client on June 29, 1999, received at EPS on June 30, 1999, and shipped for disposal on July 9, 1999 – a total of *ten * * * days between destinations.*" *Id.* (emphasis supplied).

After considering the foregoing arguments, we conclude that the ALJ did not err in finding that EPS failed to demonstrate that it qualified as a "transfer facility" with respect to the handling of the PCB capacitors. Init. Dec. at 26-27. As the Region correctly points out in its reply brief, a "transfer facility " has a "limited scope in the cradle to crave disposal process." Region's Response at 41. In illustration, the Region notes that "a 'transfer facility' is simply a loading area where trucks arrive to pick up PCB waste and or add additional waste to the truck load in order to consolidate waste which is to be taken to the ultimate disposer as described in the preamble to this rule." *Id.* The Region cities to the following language from the preamble to the PCB regulations: "[t]he 10-days of consecutive storage limitation is allowed to provide trains, trucks, and other transport vehicles a period in which to unload the PCB waste and hold it until the PCB waste can be loaded onto the next connecting transport vehicle." 54 Fed. Reg. at 52,720.

We find that EPS's unloading the capacitors, dismantling them, and then sampling them for PCB concentration did not constitute "holding waste during the normal course of transportation" as set forth in the definition of "transfer facility" and explained by the above preamble. *See* Region's Response at 41. In other words, EPS's actions show that the company did not serve as a consolidator or temporary transshipment point for PCB wastes bound for a predetermined destination. Rather, the evidence indicates that EPS's initial handling of the capacitors was not driven by a transportation objective. In his testimony, EPS President Keith Reed recounted that upon receiving the capacitors in a bank formation, company employees began dismantling them into individual components, *see* Tr. at 46-47 (Vol. IX), a task he described as taking from "eight to ten hours. " *Id*. at 68. Reed made clear that EPS took these actions *before* the company decided to ship the capacitors offsite. *See id.* As Reed explained, following testing, "the capacitors were skidded up [for offsite removal] because originally * * * , if they

were non-PCB capacitors, they would have been processed at EPS." *Id.* Thus, the record strongly indicates that EPS dismantled the waste capacitors for the purpose of on-site processing, not to facilitate transportation. In short, in our view, EPS has failed to show how its handling of the subject capacitors formed part of a "normal" or routine transportation process entitling the company to the benefit of the limited "transfer facility" exemption.

We also regard as incompatible with EPS's status as a "transfer facility" the fact that the waste manifest documenting EPS's receipt of the waste capacitors from AEP identified EPS as a "designated facility" for the capacitors. *See* RX 515. On this point, we agree with the Region's observation in its reply brief that, under the PCB regulations, while "a party may play many roles under the PCB regulations regarding electrical equipment * * * [, it] does not agree that a party can engage in such roles simultaneously for the same piece of equipment." Region's Response at 42.

For the foregoing reasons, we find that the ALJ did not err in determining that EPS failed to demonstrate that it satisfied the conditions for the "transfer facility" exemption, and we thus reject this affirmative defense to liability under Count II.

c. *Whether EPS was Exempt from Commercial Storage Approval Because the Company was Processing the PCB Capacitors to Facilitate Transportation for Disposal Pursuant to 40 C.F.R. § 761.20(c)(2)*

EPS challenges its liability under Count II by raising the affirmative defense that the company was exempt from commercial storage approval for the subject capacitors on the grounds that the company was "processing"[58] the capacitors to facilitate transportation for disposal. App. Br. at 44 (citing 40 C.F.R. § 761.20(c)(2)).[59] As background for its argument, EPS notes that after receiving the subject capacitors, testing them for PCBs, and learning that the capacitors' PCB concentrations were too high to allow burning in its SMRO, EPS decided to ship the capacitors to an approved off-site TSCA disposal facility. *Id.* The company states that "[b]efore the individual capacitors could be transported to an EPA

[58] The PCB regulations do not define the word "processing" but rather the word "process." *See* 40 C.F.R. § 761.3. The parties, however, do not refer to the regulatory definition of "process" in their arguments over the meaning of the section 761.20(c)(2) commercial storage approval exception. Instead, in order to explain the significance of the term "processing" within section 761.20(c)(2), the parties consult the preamble language of the 1998 rulemaking that promulgated the exception. *See infra.*

[59] As previously stated, this exemption from PCB commercial storage approval provides that "[p]rocessing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval." 40 C.F.R. § 761.20(c)(2)(i).

approved PCB disposal site" the company had to remove the capacitors from the "banks" in which they were arrayed and then "palletize" them. *Id*. Reprising the "processing" defense EPS used to challenge Count I, the company contends that the removal and palletizing of the capacitors constituted exempt "processing" facilitating transportation under section 761.20(c)(2) that relieved the company of commercial storage approval obligations with respect to the capacitors. *Id*.

In his Initial Decision, the ALJ rejected the applicability of the "processing" exemption to the capacitors, explaining that it was clear that the purpose of breaking down the capacitors was not to facilitate their transportation for disposal off-site, but rather to prepare the capacitors for burning in EPS's own SMRO. Init. Dec. at 28. In support of his determination, the ALJ opined that the time lag time between receipt of the capacitors and shipping them out to a TSCA disposal facility rendered doubtful the transportation motive of the company's processing activity. In particular, he noted that the dismantling process according to EPS ordinarily takes "eight to ten hours" whereas "the capacitors remained at [EPS's"] [F]acility for approximately 10 days." *Id*. at 28 (citing Tr. at 67-68 (Vol. IX)).

In its appeal brief, EPS argues that its alleged processing activities were of the kind that EPA contemplated when it promulgated the 40 C.F.R. § 761.20(c)(2) exception. App. Br. at 44. In support of this argument, the company refers to the preamble of the 1998 rulemaking that adopted this exception. In the preamble, EPA listed examples of activities that constitute "processing to facilitate storage or transportation for disposal," among which the Agency included "dismantling or disassembling serviceable equipment pieces and components" and "packaging or repackaging PCBs for transportation for disposal."[60] *Id*. at 45 (citing 63 Fed. Reg. at 35,392). EPS avers that its "dismantling of the capacitor banks and repackaging of the capacitors for shipment to a licensed PCB disposal site are not only similar to those activities cited by EPA, they are the *exact* activities cited by EPA." *Id.* (emphasis in original).

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[60] In the preamble to its 1998 rulemaking, EPA lists the following examples of exempt "processing activities which are primarily associated with and facilitate storage or transportation for disposal":

> Examples include, but are not limited to: removing PCBs from service (e.g. draining liquids); pumping liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility or disposal facility; dismantling or disassembling serviceable equipment pieces and components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.

63 Fed. Reg. at 35,392.

Upon reviewing the Initial Decision and parties' arguments on appeal, we find that the ALJ did not err in concluding that EPS failed to satisfy its burden of proof that the company was processing the capacitors in question to "facilitate * * * [their] transportation for disposal" in accordance with 40 C.F.R. § 761.20(c)(2). Rather, as explained above, the record concerning EPS's overall handling of the capacitors indicates that EPS initially dismantled the units in order to prepare them for *on-site* processing rather than transportation. In particular, the evidence plainly shows that EPS made the ultimate decision to transport the capacitors off-site based upon the results of PCB concentration testing that occurred *after* the initial dismantling. *See* Tr. at 46-47 (Vol. IX). Further casting doubt upon EPS's claims that its capacitor handling served a transportation purpose is the fact that, as the Region notes, it was not necessary to break down the capacitors to facilitate transportation, since the capacitors had already been transported beforehand (in bank formation) from AEP. Region's Response at 45. Finally, EPS fails to identify any other way in which its handling of the subject capacitors is akin to the activities EPA described in the preamble as constituting "processing activities which are primarily associated with and facilitate storage or transportation for disposal." *See* Region's Response at 44 (citing 63 Fed. Reg. at 35,392); *see supra* note 60.

For the foregoing reasons, we concur with the ALJ that EPS has not demonstrated that it met the conditions of the 40 C.F.R. § 761.20(c)(2) processing exemption with respect to the subject capacitors. Hence, the capacitors are not exempt from the commercial storage approval requirements, including the 1,000-pound MSC for capacitors, in the company's 1998 commercial storage approval.

In sum, we find that the Region has presented a prima facie case that on July 9, 1999, EPS exceeded the applicable 1,000-pound MSC for PCB capacitors at its Wheeling Facility as charged by the Region. In addition, EPS has failed to present any facts rebutting the Region's prima facie case and, moreover, has not met its burden of proof on the above affirmative defenses to Count II liability. Therefore, we conclude that the ALJ did not err in finding EPS liable as charged under Count II.

3. *Count III-Alleged Violations of 40 C.F.R. § 761.72*

EPS challenges the ALJ's determination that the company, in operating its SMRO, did not adhere to the time and temperature requirements for burning PCB-contaminated waste set forth in 40 C.F.R. § 761.72(a)(3) during eleven days in March, September, and October, 1999, as alleged by the Region. EPS contends that the Region did not provide proper notification of the factual basis of Count III and did not establish a prima facie case that the company violated section 761.72(a)(3).

In his Initial Decision, the ALJ found that the Region satisfied its burden of proof on the illegal burning violation based on documentation routinely compiled by EPS on its oven burning operations, the evidentiary hearing testimony, and the data the Region obtained by subpoena from ACTI, EPS's sampling laboratory. Init. Dec. at 34-37. Based on this information, the ALJ concluded that the Region had established that EPS had illegally burned PCB-contaminated transformers (50 ppm but < 500 ppm PCBs) during the eleven days charged by the Region. *Id*. at 37. The ALJ identified the ACTI PCB concentration data as the "critical" piece of evidence demonstrating that EPS burned regulated transformers (between 50 and 499 ppm PCB) during SMRO burn cycles that failed to reach the minimum temperatures and times of 999 F for two-and-a-half hours, respectively. *Id*. at 35-37.

As the ALJ explained, the ACTI laboratory testing data related to PCB testing that ACTI conducted for EPS in 1999. According to the ALJ, the Region was able to demonstrate that ACTI's six digit "serial numbers" corresponded with EPS's unique six-digit tracking "barcode" numbers because of the high proportion of identical PCB concentrations reported by ACTI and EPS in cases where an ACTI serial number matched the barcode number of a transformer burned in EPS's SMRO during the three weeks selected by the Region for review. *See* Init. Dec. at 37. Based on the PCB concentration data ACTI provided for the matching serial numbers, the ALJ determined that EPS burned PCB-contaminated material at times when the SMRO failed to meet the time and temperature requirements prescribed by 40 C.F.R. § 761.72(a)(3). *Id.* [61]

a. *EPS's Allegation that EPA Failed to Establish a Factual Basis for Including the Count III Charges in its Complaint*

In its Appeal Brief, EPS contends that the Region's factual allegations supporting its Count III burn charges were so deficient, changed so much during the course of the proceeding, and were so untimely, that the Region failed to provide adequate notice of the factual basis of Count III. This lack of notice, avers EPS, violated relevant portions of the Consolidated Rules of Practice ("CROP"), 40 C.F.R. part 124, governing this proceeding, as well as provisions of the Administrative Procedure Act ("APA").[62] *See* App. Br. at 48. In particular, EPS states that the Region contravened provisions in the CROP mandating that complaints include a "specific reference to each provision of the Act, implementing regulations,

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[61] In finding that EPS was liable for SMRO burn violations, the ALJ determined that EPS had violated the time and temperature parameters of 40 C.F.R. § 761.72(a)(3) during fifteen burn cycles over a three-week time period. *See* Init. Dec. at 36-37. Information presented by the Region regarding EPS's non-compliant SMRO burning, which the ALJ found to be probative of repeated burn violations by EPS, indicates, however, that EPS in fact failed to comply with time and temperature parameters during *eighteen* burn cycles. *See id*; *see also* Region's Response at 62-63.

[62] *See* 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 5372, 7521.

permit or order which respondent is alleged to have violated," and "[a] concise statement of the factual basis for each violation alleged." *Id*. at 49 (citing 40 C.F.R. § 22.14(a)).[63] EPS also maintains the Region violated the directive in the Administrative Procedure Act concerning agency adjudications that "[p]ersons entitled to notice of an agency hearing shall be timely informed of * * * the matters of fact and law asserted" by the agency. *Id.* (citing Administrative Procedure Act § 5(b), 5 U.S.C. § 554(b)). EPS asserts that the Region's alleged failure to provide notice of the factual basis of its illegal burning charges warrants dismissal of Count III. *Id*. at 51.

Further, EPS avers that the Agency's lack of notice of the factual basis of Count III violated the company's Constitutional due process rights. App. Br. at 46-50. Referring to Supreme Court cases that have examined due process in the administrative setting, the company states that "'[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Id*. at 48 (quoting *Memphis Light, Gas, and Water Div. v. Craft*, 436 U.S. 1, 11 (1978)).

In support of these contentions, EPS argues that "EPA had no information regarding the regulatory status of a single piece of equipment at the time it filed its Complaint." App. Br. at 46. EPS also states that the Region first "assumed" that the transformers in question exceeded concentrations of greater than 50 ppm, then ignored concentration information provided by EPS, and finally, "immediately prior to commencement of the administrative hearing," obtained by subpoena PCB concentration data from ACTI, EPS's testing laboratory. *Id*. at 47. EPS charges that the Region "misinterpreted and misused" the ACTI data to identify different sets of alleged illegal burn cycles. *Id.* Illustrating its claim that the Region was "unable to settle" on a firm set of non-compliant burn cycles and PCB units, EPS declares that, "EPA began by alleging 1237 [PCB] units were involved [in the non-compliant burn cycles], then went up to over 1500 and then went back down to 1267." *Id*. at 50. EPS asserts that because the company received specific dates and cycles of alleged improperly burned transformers only very late in the

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[63] The CROP requires, in relevant part, that administrative complaints include the following:

> (1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;
>
> (2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated; [and]
>
> (3) A concise statement of the factual basis for each violation alleged[.]

40 C.F.R. § 22.14(a).

proceeding,[64] EPS was unable to mount an effective defense, which would have required the company to determine the relevant PCB transformers and how each transformer was processed. *Id.* 50-51.

We disagree with EPS that the Region violated the CROP by failing to provide adequate notice of the factual basis of Count III in its Second Amended Complaint. Contrary to EPS's argument, *see* App. Br. at 46, the directive at section 22.14 for EPA to include in its administrative complaint a "concise statement of the factual basis for each violation alleged" did not obligate the Region to reference immutable and detailed evidence in the Complaint itself to support its illegal burning allegations. *See* 40 C.F.R. § 22.14. As the Region correctly observes, EPS's arguments in this respect are at loggerheads with the liberal policy toward pleading that the Board has adopted from the Federal Rules of Civil Procedure ("Federal Rules").[65] On numerous occasions, the Board has likened the CROP's pleading standard to the pleading provision in the Federal Rules, which calls for "a short and plain statement of the claims showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).[66] Accordingly, the Board has emphasized that the CROP is "'no more onerous on its face' than The Federal Rules' 'short and plain statement' standard" and does not impose "stringent pleading requirements." *In re Roger Antkiewicz,* 8 E.A.D. 218, 232 (EAB 1999) (quoting *In re CID-Chemical Waste Management of Ill., Inc.,* RCRA (3008) Appeal No. 90-1, slip op. at 4-5 n.3 (J.O., July 24, 1990)); *In re Asbestos Specialists,* 4 E.A.D. 819, 830 (EAB 1993). As we stated in *Antkiewicz*, complaints filed under the CROP must simply "include enough detail to fairly inform respondents of the claim they must defend

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[64] In particular, EPS contends that "as late as the twelfth day of the thirteen-day hearing * * * [the Region] had listed at least three different sets of burn cycles" that it alleged had been improperly processed. App. Br. at 47.

[65] Although the Federal Rules of Civil Procedure are not directly applicable to administrative proceedings, the Board has from time to time consulted the Federal Rules and court decisions interpreting them in order to aid the Board in the interpretation and application of the Part 22 Rules. *See In re J. Phillip Adams,* 13 E.A.D. 310, 330 n.22 (EAB 2007); *In re Lazarus, Inc.,* 7 E.A.D. 318, 330 n.25 (EAB 1997).

[66] Many federal courts construing Rule 8(a) have held:

> [T]he main purpose of the complaint is to provide notice to the defendant of what plaintiff's claim is and the grounds upon which the claim rests. * * * [The] plaintiff must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds claimed for recovery.

Self Directed Placement Corp. v. Control Data Corp., 908 F.2d 462, 466 (9th Cir. 1990) (citations omitted).

against." *Antkiewicz*, 8 E.A.D. at 232.[67] As articulated by the Supreme Court, "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."). *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Similarly, the Board has stated, "the objective of the Agency's rules should be to get to the merits of the controversy." *In re Asbestos Specialists*, 4 E.A.D. at 830; *see also In re J. Phillip Adams*, 13 E.A.D. 310, 330 (EAB 2007); *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993); *In re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992).

Furthermore, as the Region observes, in keeping with 40 C.F.R. § 22.14, the Region is not required to reference in the complaint evidentiary support for each of the allegations contained in its complaint. Region's Response at 46 (citing *In re DMB North Carolina 2, LLC*, Docket No. CWA-04-2002-5005 (ALJ July 10, 2003) (Order on Appellant's Motion to Dismiss)). The Region explains that under liberal "notice pleading" affirmed by federal courts and adopted for Agency administrative proceedings, all that is needed is that "'a complaint * * * state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant theory.'" *Id.* (quoting *Chawla v. Klapper*, 743 F. Supp. 1284, 1285 (N.D. Ill. 1990)); *see also Conley v. Gibson*, 355 U.S. at 47 (holding that a plaintiff satisfies Rule 8(a) by "giv[ing] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.").

Consistent with the CROP's pleading provisions and foregoing case law, we find that by referring in its Complaint to the regulatory provision at 40 C.F.R. § 761.72(a)(3) that EPS allegedly violated and by identifying the specific days on which the SMRO burn violations allegedly occurred, *see* Second Amended Complaint at 5, 10, the Region "fairly inform[ed]" EPS of the Count III claims against it, in accordance with the CROP. *See Antkiewicz*, 8 E.A.D. at 232. As the Region notes, the specific dates in March, September, and October on which the Region alleges EPS violated section 761.72(a)(3) have remained unchanged since the filing of the First Amended Complaint on January 29, 2002. *See* Region's Response at 53. Based on these considerations, we find that the Region sufficiently alerted EPS of the factual and legal basis of its of its complaint, which is all that the CROP notice pleading provisions require.

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[67] Moreover, the Board's approach to pleading is consistent with the generally liberal approach to pleading in the administrative setting. For example, in upholding an ALJ's decision pursuant to the CROP to allow EPA to amend its complaint after the close of hearing, one federal court stated: "it is well settled that administrative pleadings are 'liberally construed' and 'easily amended.'" *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10th Cir. 1985) (citing *Southern Colorado Prestress Co. v. Occupational Safety and Health Review Comm'n*, 586 F.2d 1342, 1347 (10th Cir. 1978); *Mineral Industries & Heavy Construction Group v. OSHRC*, 639 F.2d 1289, 1292 (5th Cir. 1981)).

Although EPS objects to the fact that the Region did not include PCB concentration data and burn cycle times for illegal burns alleged in the Second Amended Complaint, *see* App. Br. at 46, in our view, the CROP does not require such detailed evidentiary support at the pleading stage. *See, e.g.*, *Chawla v. Klapper,* 743 F. Supp. 1284, 1285 (N.D. Ill. 1990)(holding that "the plaintiff need not set out in detail the facts upon which a claim is based, but must allege sufficient facts to outline the cause of action."). The Supreme Court, in a decision that affirmed the Federal Rules' notice pleading policy, has rejected the notion that a plaintiff must include detailed factual allegations in its pleadings. *See Swierkiewicz v. Sorema,* 534 U.S. 506, 512 (2002) (holding that a plaintiff need not plead a prima facie case of violation in order to prevent dismissal of a complaint; rather, a plaintiff under the Federal Rules need only give the defendant fair notice of the plaintiff's claim). EPS's argument that plaintiffs under the CROP must presentdetailed factual allegations in complaints ignores the provision for pre-hearing factual development found elsewhere in the CROP. We note in this regard that in *Swierkiewicz*, the Court made it clear that discovery allowed under the Federal Rules works in tandem with the simplified pleading standard because discovery by design allows parties to "flesh out" a complaint's allegations. *See id.* As the Court stated in *Swirkiewicz,* "[the] simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* The prehearing information exchange and other discovery provisions at 40 C.F.R. § 22.19 – which the Region in this case used to obtain PCB concentration information on transformers burned by EPS – play a similar function in the context of the CROP's liberal pleading policy.

In addition to rejecting EPS's argument that the Region ran afoul of the CROP in its allegations under Count III, we disagree with the company's due process arguments. In this regard, we find that EPA provided the company notice satisfying due process standards in the context of this case. In one of the seminal due process cases examining the due process notice obligations of administrative agencies, *Mathews v. Eldridge,* 424 U.S. 319 (1976), the Supreme Court considered the question of what process the government owes to a private party in an administrative proceeding. As stated in *Mathews*, due process is "flexible and calls for such procedural protections as the particular situation demands, " *Mathews v. Eldridge,* 424 U.S. 319, 334 (1976). In accordance with *Mathews,* the inquiry into what particular process is "due" to an affected party "requires analysis of the governmental and private interests that are affected," taking into consideration the particular circumstances involved in each case.[68] Adopting the *Mathews*

[68] As the Supreme Court outlined in *Eldridge,* the process that is "due" in any particular circumstance is contingent upon the following three factors:
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contextual approach to due process, we find that under the totality of the circumstances, EPA satisfied its due process obligations to EPS.

The Tenth Circuit's decision in *Yaffe Iron and Metal Co., Inc. v. EPA* (cited by both parties in their arguments), which involved a TSCA administrative penalty action that EPA brought against a respondent pursuant to the CROP, provides useful insight into whether EPA satisfied due process notice obligations in this case. *See Yaffe*, 774 F.2d 1008 (10th Cir. 1985). In *Yaffe*, a company charged by EPA with illegal incineration of PCBs argued that it had been denied process because the ALJ, following the evidentiary hearing, allowed EPA to amend its complaint to allege a longer period of violation than that specified in the original complaint. *Id*. at 1012. The court rejected the respondent's due process arguments that amendment of the complaint had deprived it of notice in violation of due process in view of the fact that EPA based its amended incineration charge on the statements of the respondents' own employees and an inspection of the respondent's facility, and the fact that the company possessed copies of the relevant inspection reports. *Id*. at 1013. Furthermore, the court noted that the respondent had offered testimony on the specific facts alleged in the amended complaint during the evidentiary hearing. As the court in *Yaffe* stated, "if an appellant knows the basis of the amended complaint against it, it has been accorded due process if the record shows that it understood the issues and was afforded a full opportunity to meet the charges." *Id*

In another context, we rejected the contention that EPA had violated the respondents' due process rights because the ALJ allowed EPA to establish its proof at the evidentiary hearing through a written transcript in another case at which the respondents were not parties. *See In re J.V. Peters and Co.*, 7 E.A.D. 77, 99-103 (EAB 1997), *aff'd sub nom. Shillman v. United States*, No. I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part, rev'd in part on other grounds*, 221 F.3d 1366 (6th Cir. 2000). In that case, we rejected the due process challenge, determining that EPA had indeed accorded the respondents adequate notice and an opportunity to be heard because the Agency had informed the respondents of the use of the written transcript in advance of the hearing and the respondents had the opportunity to cross-examine EPA witnesses who had testified at the earlier hearing. *Id.*, 7 E.A.D. at 99-103.

(continued)

> (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 US 319, 334 (1975).

As reflected by *Yaffe* and *J.V. Peters,* courts consider holistically the question of whether the government has afforded due process to a party in an administrative proceeding. That is, the court's inquiry will go beyond the particular procedural issues in question to examine whether, viewing the proceeding as a whole, a defendant was adequately informed of the evidence underlying the government's charges and had the opportunity to challenge the evidence during the proceedings. *See, e.g., National Labor Relations Board v. Mackay R. & Tel. Co.*, 304 U.S. 333, 350 (1938) (rejecting company's argument that it was denied due process because the amended complaint against the company did not conform with NLRB's subsequent finding of fact; the court found that the company's due process argument lacked merit because the company understood the basis of the government's complaint and because it "was afforded full opportunity to justify the actions of its officers" during the evidentiary hearing.).

In addition, the Board, in considering due process arguments challenging EPA administrative actions on grounds of inadequate notice, has observed that in order to establish a due process violation in a administrative proceeding, "the aggrieved party must show both inadequate notice and prejudice caused by lack of notice." *See In re Bollman Hat Co.*, 8 E.A.D.177, 190 n.10 (EAB 1999) (citing *Rapp v. U.S. Dept. of Treasury*, 52 F.3d 1510, 1519-20 (10th Cir. 1995)). In *Bollman,* notwithstanding the respondent's claim that the Region's used an "undisclosed" and "inapplicable" policy to calculate a penalty in the case, we observed that the respondent could not demonstrate "prejudice" from lack of notice where the Region's use of the policy resulted in a penalty amount "lower than the Agency's applicable penalty policy would have recommended." *Bollman*, 8 E.A.D. at 190 n10.

The considerations expressed in the foregoing cases inform our decision to reject EPS's due process challenge to Count III. The Region, in the course of discovery, sufficiently alerted EPS to the nature and source of the PCB concentration data the Region intended to use to support Count III, and, despite the Region's request to admit the ACTI evidence shortly before the evidentiary hearing,as explained in detail *infra*, EPS was able to confront the Region's charges during the evidentiary hearing. As such, the company was not deprived thereby of its due process rights based on undue surprise. Moreover, we find significant that the key information upon which Count III turned was either controlled by EPS or accessible to it. This information included computer-generated data sheets ("EPS Furnace Operating Measurement Levels"), which recorded the temperature in Fahrenheit of the SMRO at five-minute intervals as well as well as the "Transformer Furnace Data" sheets on which the oven operators recorded the six-digit barcode numbers of the PCB equipment to be burned prior to each burn cycle. The Region used this information to identify SMRO burn cycles during the three weeks in question that did not meet the time and temperature requirements of 40 C.F.R. § 761.72(a)(3), as well as obtain the barcode numbers which the Region then linked to the "serial numbers" in the ACTI laboratory data. In fact, EPS drew

upon this same pool of information to submit a set of countervailing PCB concentration data that the company claims show that it burned almost all unregulated transformers during the weeks in question.

The record indicates that on April 25, 2002, the Region sought discovery from EPS on, among other things, "the PCB concentration claimed by the generator and/or determined through direct analysis" for the transformers identified by bar code in the Transformer Furnace Data sheets. Motion for Limited Prehearing Discovery Through Complainant's Request for the Production of Documents and Request for Depositions. In response, EPS, drawing upon the Transformer Data Sheets, provided the Region a list of PCB concentration data for 1237 barcodes, RX 571, App. G,[69] which the company claims showed that "[n]inety-nine plus percent of the transformers processed on the dates initially cited by EPA were non-regulated," App. Br. at 47; *see also* Tr. at 82 (Vol. IX). EPS further states that the PCB barcode concentration data on the barcode lists came from "laboratory analyses conducted by an independent, certified laboratory, ACTI." App. Br. at 47. According to Keith Reed, EPS President, EPS first provided the barcode lists to the Region during a meeting between the parties held on July 12, 2002. RX 571, at 12. At that meeting, noted Reed, the Region objected to the barcode lists because it was based on "batch testing" – in which PCB testing is performed on a "batch" of waste oil and dielectric fluid drained and collected from multiple transformers, yielding an average PCB concentration – rather than testing of individual transformers.

In our opinion, the foregoing shows that by a date (July 2002) substantially prior to the start of the evidentiary hearing in June 2003, EPS was on notice that the Region was seeking individual PCB testing data from EPS, which is what the Region purports the ACTI laboratory data to be. We also agree with the Region that EPS's provision of PCB barcode concentration data to the Region shows that well before the hearing, EPS had "the capability of matching laboratory results to the burned transformers at issue." Region's Response at 55; Tr. at 82 (Vol. IX); *see* App. Br. at 46-47. In our view, EPS's demonstrated ability to match allegedly illegal burn cycles with its own concentration data outweighs any lack of notice caused by the Region's failure to precisely identify the scope of burns on which it

[69] The EPS-supplied barcode PCB concentration lists are included as an "attachment G" to an April 30, 2003 affidavit filed by Keith Reed, EPS President, opposing the Region's April 16, 2003 motion below seeking sanctions against EPS for not complying with the ALJ's March 6, 2003 discovery order. *See supra*; Keith R. Reed's Affidavit in Support of Respondent's Memorandum of Law in Opposition to Complainant's Expedited Motion For Sanctions; The Issuance of a Default Order; The Drawing of An Adverse Inference And/Or the Issuance of An Order to Compel Compliance with the Discovery Order. RX 571.

was basing its Count III.[70] Moreover, the fact that the Region obtained PCB concentration data from ACTI – EPS's own contractor – undercuts EPS's notice arguments, since EPS not only had access to all of the relevant information but also presumably knew what testing protocol it had arranged with ACTI, such that it was well positioned to challenge the Region's allegations in this regard.

At the evidentiary hearing, EPS addressed the ACTI laboratory data issue while cross-examining the Region's direct testimony and presenting its case-in-chief. *See, e.g.*, CBI Tr. (Vol. IV); Tr. at 212-26 (Vol. IX); Tr. at 53-56 (Vol. X); CBI Tr. (Vol. IX); CBI Tr. (Vol. X); CBI Tr. (Vol. XI); CBI Tr. (Vol. XII). Thus, the record shows that the evidentiary hearing afforded EPS "full opportunity to meet the charges" in Count III in a manner protective of due process. *Yaffe*, 774 F.2d at 1013. In addition, EPS failed to show that it suffered any "prejudice" stemming from alleged lack of notice, as the company must in order to prove a due process violation. *See Bollman Hat*, 8 E.A.D. at 190 n.10. In this respect, EPS's actions at the evidentiary hearing are not consistent with its assertions that the Region's alleged lack of notice handicapped the company's ability to mount a defense against Count III. For instance, it is revealing that EPS did not take any corrective actions during the hearing process such as request the ALJ's

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[70] EPS correctly notes that during the course of the case below, the Region identified different sets of allegedly non-compliant burn cycles in charging violations of Count III. A review of the record shows that Region's revised penalty of $86,900 for Count III was based on a different set of burn cycles than the Region's original penalty calculation. In particular, there are seven burn cycles that formed the basis of the Region's revised penalty that were not represented in the Region's original penalty calculation. *See* CXs 20 & 49 (CBI). The Region explains that it changed the number of burn cycles that it considered for purposes of alleging a violation because the Region originally gave credence to EPS's written statements on the bottom of the company's oven operating data sheets that the actual temperatures reached by the primary oven were 150 to 200 F higher than recorded on the sheets. Region's Response at 54 (citing CXs 16A, 16B, 16C.); Tr. at 209-10 (Vol. II). According to the Region, the company's claims prompted the Region to allege fewer days of illegal burns than was warranted by the operating data alone. Region's Response at 54. The Region further relates that in response to its discovery request, EPS was unable to substantiate its SMRO temperature claims, leading the Region to bring back into the equation the burn cycles that it had omitted from its initial penalty calculation. *Id.* Asserting that the company's "misrepresentations" should not be the basis for a due process claim, the Region maintains that in any case it provided EPS with sufficient notice because despite the company's unsupported SMRO temperature claims, the Region did not revise the *dates* on which it alleged illegal burns. *Id.* While acknowledging that the Region was not entirely consistent regarding the number of illegal burns, we nevertheless find that EPS did not thereby suffer a due process violation. In our view, this inconsistency was counterbalanced by the fact that the Region's discovery request to EPS to submit evidence regarding SMRO temperatures placed EPS on clear notice that its claims regarding higher than recorded temperatures in its SMRO, and therefore the company's compliance with 40 C.F.R. § 761.72(a)(3), were in question and were being verified. Moreover, we agree with the Region that the fact that the Region did not revise the dates on which it alleged violations served to ameliorate the inconsistency in the number of alleged violations. *See id.* As the Region states, the "Appellant was already on notice that burn cycles on those dates were the subject of the violations alleged in Count III and had possession of its own data showing which specific burn cycles failed to meet that time and temperature standard on those specific dates." *Id.* at 54 n.21.

permission to expand the scope of discovery or reopen the hearing in order to introduce new evidence contradicting the ACTI data. *See, e.g., Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 842-43 (C.A.D.C. 1950) (finding that the petitioner in administrative hearing had not established prejudice to support his due process claim against the government where the petitioner had not taken advantage of opportunities available to him to request additional evidence on a disputed issue); *see also In re Chippewa Hazardous Waste, Inc.*, 12 E.A.D. 346, 368 (EAB 2005) (rejecting respondent's claim that it suffered prejudice and was therefore denied a fair hearing as a result of the ALJ's allowing the Region to substitute witnesses before trial, where the respondent failed to cross-examine the new witnesses during the hearing). By contrast, EPS did take such steps with regard to other issues in the case, such as its selective enforcement affirmative defense. *See, e.g.*, [EPS's] Motion to Supplement the Record (Oct. 16, 2003) (on question of selective enforcement); Respondent [EPS'S] Motion to Reopen Hearing to Supplement the Record (Mar. 17, 2004) (same). Throughout the evidentiary hearing, EPS maintained the position that the list of transformer data it generated before the hearing disproved the Region's allegations of illegal burning and that ACTI "serial number" data, *see supra*, lacked any significance. *See, e.g.*, Tr. at 50-57 (Vol. X). If anything, EPS's actions show that despite any alleged lack of previous notice by the Region, the evidentiary hearing afforded the company the opportunity to fully litigate the factual basis of Count III.[71]

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[71] In our view, EPS, as part of its due process argument, misconstrues *Rodale Press, Inc. v. Federal Trade Commission*, 407 F.2d 1252 (D.C. Cir. 1968), a case in which a federal court set aside a Federal Trade Commission ("FTC") order on the grounds that the theory under which the complaint was issued differed from the theory upon which the complaint was sustained by the FTC. *See* App. Br. at 49 (citing *Rodale Press*, 407 F.2d at 1258). As a concurring judge opined, the fact that FTC "decided the case on a basis different from that on which it was brought, tried, and decided by the Trial Examiner * * * denied respondents an opportunity to defend, either by evidence or argument, against a charge palpably different from the one brought against them." *Rodale Press*, 407 F.2d. at 1258. We fail to see any similar infirmity that could raise due process concerns based on surprise in the instant case. Here, the Region in Count III of the Second Amended Complaint alleges that EPS burned "PCB-contaminated transformers" in its SMRO without adhering to time and temperature requirements at 40 C.F.R. § 761.72(a)(3). Given that the applicability of section 761.72(a)(3) turns on the PCB concentration level of PCB Articles, we fail to see how the Region's adducing germane concentration evidence concerning the transformers at issue subjects EPS to a "charge palpably different" from that which was litigated. Moreover, we find misplaced EPS's invocation of *Rodale* to assert that by revising its original charge that the company had burned "PCB transformers" in its SMRO to allege that the company had burned "PCB-contaminated" transformers (in its Second Amended Complaint), the Region similarly changed the theory of the case in a manner offending due process. *See* App. Br. at 50. Notably, when the Region sought leave to amend its complaint, EPS indicated that it had no objection to the proposed revision. *See* Region's Response at 56. Also, as the Region observes, "if [the Region] had intended to charge improper disposal of PCB transformers (that is items over 500 ppm), [the Region] would have cited 40 C.F.R. § 761.60 as authority instead of 40 C.F.R. § 761.72 (a) [,] which is limited to PCB-contaminated transformers." *Id.*

For the foregoing reasons, taking all factors into consideration, we reject EPS's argument that the Region deprived EPS of due process by failing to provide notice of the factual basis of Count III claim. Essentially, Count III revolves around a factual dispute between the parties over whose set of PCB concentration data accurately depicts the regulatory status of the transformers EPS burned in its SMRO during the three weeks in March, September, and October, 1999. We now turn to this factual dispute.[72]

b. *The Region's Alleged Failure to Establish a Prima Facie Case on Count III*

In challenging the ALJ's liability finding on the Count III burning charges, EPS claims that the Region failed to establish a prima facie case that the company illegally burned PCB-contaminated transformers as alleged in the Second Amended Complaint. As the company states, "[e]ven without looking at EPS's evidence, which invalidates the evidence proffered by EPA to support Count III, EPA cannot establish its prima facie case." App. Br. at 51. EPS's challenge to the Region's prima facie case on Count III centers on the PCB concentration data that the Region obtained by subpoena from ACTI to demonstrate that EPS was burning regulated "PCB- contaminated" transformers (≠ 50 ppm but < 500 ppm PCBs) on the dates alleged in the Second Amended Complaint. *See* CBI CX 44 (ACTI Laboratory Data). Thus, with reference to the burning charges under 40 C.F.R. § 761.72(a)(3), EPS's challenge to the Region's prima facie case focuses on whether the Region presented sufficient evidence on the transformers' regulatory status – i.e., whether the transformers were "PCB-contaminated" – rather than on whether the company met the provision's time and temperature parameters. EPS avers that the Region failed to establish its prima facie because the Region "grossly misinterpreted" the ACTI laboratory data. App. Br. at 55.

In particular, EPS faults Regional inspector Rice with inappropriately matching ACTI-designated "serial numbers" with EPS's own tracking barcode numbers as a means of identifying alleged PCB-contaminated transformers (≠ 50 ppm but < 500 ppm) that had been illegally burned. *See* App. Br. at 54 (citing CBI Tr. at 7-8 (Vol. IV)). EPS asserts that one set of numbers had nothing to do with the other. *See* App. Br. at 54-55.As EPS asserts, the "ACTI data labeled 'Serial Number' * * * was not involved in any analysis and reporting process by ACTI and, instead, was simply an extraneous data column." *Id*. at 54. To bolster its

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[72] Our determination that EPS was accorded adequate notice and due process on the Count III charges likewise defeats EPS's argument that the Region violated the APA provision governing agency adjudications that "persons entitled to notice of an agency hearing shall be timely informed * * * of the matters of fact and law asserted." 5 U.S.C. § 554(b). *See, e.g., Golden Grain Macaroni Co. v. F.T.C.*, 472 F.2d 882, 885 (9th Cir. 1972) (holding that "the purpose of [5 U.S.C. § 554(b)] is satisfied, and there is no due-process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity to justify its conduct.'") (citations omitted).

position, the company claims that a letter from ACTI to EPS (stating that "when test results are electronically sent to EPS by Weidmann-ACTI, Inc. personnel, the batch number and the sample's associated PPM level are the only two pieces of data sent for each sample") confirms that ACTI did not use the company's six-digit barcode in any way in its laboratory analysis and reporting. *Id.* (citing RX 521 (Letter from David Koehler, Weidmann-ACTI, Inc., to Keith Reed, EPS (Aug. 4, 2003)). In EPS's view, the Region's concentration claims based on ACTI laboratory data were "mere suspicions, allegations, and suppositions" that cannot establish a prima facie case on Count III. *Id*. at 56. EPS concludes its arguments by stating that the Region, in support of the illegal burn charges, has offered a "glaring misinterpretation" of the ACTI data.[73] *Id* at 58.

As explained below, we disagree with EPS's arguments, and concur with the ALJ that the Region has established a prima facie case that EPS burned "PCB-contaminated" transformers in its SMRO in violation of 40 C.F.R. § 761.72(a)(3) in March, September, and October 1999, as alleged by the Region in the Second Amended Complaint.[74]

Under the CROP, the Region bears the burden of demonstrating that the alleged violation occurred "as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R.§ 22.24(a). A prima facie case of violation is established upon the Region's production of "evidence of sufficient quality and quantity on each of the * * * elements such that, if not rebutted, the trier of fact would 'infer the fact at issue and rule in [complainant's] favor.'" *In re J. Phillip Adams*, 13 E.A.D. 31, 321 (EAB 2007); (quoting *In re City of Salisbury*, 10 E.A.D. 263, 283 (EAB 2002) (quoting Black's Law Dictionary 1209 (7th ed. 1999))); *see United States v. RGM Corp.*, 222 F. Supp. 2d 780, 786 (E.D. Va. 2002). Once the Region establishes its prima facie case, "the respondent must come forward with evidence to support any defenses it has that will rebut the allegations in the com-

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[73] In the section of its brief challenging the Region's prima facie case on Count III, EPS objects that at the time the Region filed Count III, the Region lacked concentration data for transformers EPS allegedly burned in its SMRO during the three weeks in question and failed to identify for EPS the number of noncompliant burn cycles and improperly burned transformers. *See* App. Br. at 51-53. EPS's arguments here repeat those it raised in challenging Count III on the due process and CROP grounds and, as before, we reject these arguments. Hence, we limit our discussion in this section to whether the Region presented a prima facie case based on the ACTI concentration data and other evidence.

[74] The Initial Decision states that EPS burned 73 transformers exceeding regulatory levels during burn cycles that did not meet time and temperature parameters. *See* Init. Dec. at 37. The Region's penalty chart, however, indicates that 81 items burned by EPS did not meet such parameters during non-compliant burn cycles. CX 49 (CBI); *see also* Tr. at 125-140 (Vol. IV) (Rice penalty discussion). Despite his different calculation of illegally burned transformers, the ALJ imposed an $86,900 penalty on EPS for Count III, the same amount indicated in the Region's penalty chart. *See* Init. Dec. at 60; CX 49 (CBI).

plaint." *J. Philip Adams*, 13 E.A.D. at 321; *Salisbury*, 10 E.A.D. at 289; *see* 40 C.F.R. § 22.24(a).

As noted previously, the PCB regulations allow burning of "PCB-contaminated" electrical equipment measuring 50 ppm but 500 ppm PCBs in SMROs under specified time and temperature parameters. *See* 40 C.F.R. § 761.72. In particular, the regulations mandate that "[t]he primary chamber [of the SMRO] shall operate at a temperature between 537 C [(999 F)] and 650 C [(1,202 F)] for a minimum of 2½ hours and reach a minimum temperature of 650 C [(1,202 F)] once during each heating cycle or batch treatment of unheated liquid-free equipment." *Id.* § 761.72(a)(3).

We concur with the ALJ that the Region satisfied its prima facie case on Count III by demonstrating that (1) EPS was operating a SMRO subject to 40 C.F.R. § 761.72(a)(3); (2) that EPS did not comply with time and temperature requirements of this provision during dates in March, September, and October 1999;[75] and (3) that EPS was burning PCB-contaminated transformers (50 but < 500) on those dates. *See* Init. Dec. at 33-38.

The Region's arguments in support of the first two elements of its prima facie case are straightforward and not disputed by EPS. *See* Region's Response at 58-62. First, EPS's own representations to others, including its statements in an audit report (*see* CX 59), a brochure (*see* CX 56), and in hearing testimony (Tr. at 78-79 (Vol. II); Tr. at 219 (Vol. VIII)), establish that EPS, at its Wheeling Facility, operated at relevant times a SMRO with primary and secondary chambers designed for burning PCB-contaminated electrical equipment, as described at 40 C.F.R. § 761.72(a). Regarding the second element of its prima facie case, the Region outlines the process by which, using SMRO operating data it obtained from the company following its November 1999 inspection, *see supra*, Part II.B.2., it identified cycles during which the SMRO did not meet the section 761.72(a)(3) time and temperature parameters during three randomly selected weeks in March, September, and October, 1999. *See* Region's Response at 58-63; *supra* Part II.A.[76] During his testimony, Regional inspector Scott Rice described in close detail the methodology the Region followed to obtain its evidence on noncompliant burn times. *See e.g.*, CBI Tr. at 34-42 (Vol. IV); *see also* CXs 16A, 16B, 16C.

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[75] Specifically, the Region alleges in its Second Amended Complaint that EPS did not meet the time and temperature requirements of section 761.72(a)(3) on the following dates in 1999: March 23; September 27, 28, 30; and October 1, 2, 26, 27, 28, 29, 30.

[76] The Region relied upon EPS's Furnace Operating Measurement Levels and Transformer Furnace Data sheets to identify burn cycles during which the SMRO did not meet time and temperature parameters as well as to identify by barcode specific transformers burned during such cycles. *See, supra* Part II.B.2.; CX 16A, 16B, and 16C; CBI Tr. at 34-42 (Vol. IV).

With regard to the third and, in this case, key element of the Region's prima facie case – the regulatory status of the PCB transformers – we, like the ALJ below, find the striking correlation between PCB concentration values that EPS[77] and ACTI provided for pairs of identical barcode numbers and serial numbers too significant to discount. The Region explains that this identity of values is apparent upon inspecting the "CBI Table" that Rice assembled from the matching pairs of numbers and their corresponding concentrations. Region's Response at 70-71 (citing CBI Tr. at 9-13 (Vol. XI)); *see* "CBI Table Attachment," CBI section of Complainant's Post Hearing Reply Brief. For example, the Region notes that among the 344 matching pairs of serial and barcode numbers during the three-week review period at issue, corresponding PCB concentrations matched in 316 cases. Region's Response at 71 (citing "CBI Table Attachment"; CBI Tr. at 10 (Vol. XI)).[78]We agree with the ALJ that the correlation is far too significant to attribute to happenstance.[79] Notably, during the evidentiary hearing, the ALJ had

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[77] The EPS-supplied PCB concentration barcode lists are included as an "attachment G" to an April 30, 2003 affidavit filed by Keith Reed, EPS President, opposing the Region's April 16, 2003 motion below seeking sanctions against EPS for not complying with the ALJ's March 6, 2003 discovery order. *See* Keith R. Reed's Affidavit in Support of Respondent's Memorandum of Law in Opposition to Complainant's Expedited Motion For Sanctions; The Issuance of a Default Order; The Drawing of An Adverse Inference And/Or the Issuance of An Order to Compel Compliance with the Discovery Order. RX 571. As noted before, EPS provided the PCB barcode lists to the Region in a July 2002 settlement meeting between the parties. The PCB concentration barcode lists are derived from the company's Transformer Furnace Data sheets, on which the SMRO operator identifies by barcode the transformers burned in each SMRO burn cycle. *See* Tr. at 82 (Vol. IX); CXs 16A, 16B, 16C.

[78] In explaining why PCB concentration differed in 28 of 344 cases of matching serial/barcode numbers, the Region notes that in the 316 cases of matching concentrations, the concentrations reported were all below regulatory level (50 ppm), but that in the 28 cases where concentrations differed, EPS reported a concentration below regulatory levels and ACTI reported a PCB concentration above regulatory levels. *Id.* at 71-72. Commenting on this divergence, the Region states that "it appears that [EPS] selectively excluded data or substituted the data reported by ACTI for those 28 transformers to make it appear as though they were unregulated." *Id.*

[79] Apart from concentration values, another striking piece of evidence for the identity of barcode numbers and ACTI "serial numbers" is the way the bar code and serial numbers correlate with EPS's five-digit "oil batch numbers" – another identifier used in EPS's tracking system. In his testimony, EPS President Keith Reed stated that EPS used what he variously called "oil batch numbers," "oil batch identification numbers" and "sample identification oil batch numbers" to track samples of transformer oil and that the six-digit barcode played no role in ACTI's system for reporting testing results to EPS. CBI Tr. at 21-24 (Vol. IX); *see also* RX 521 (Letter from David Koehler, Weidmann-ACTI, Inc., to Keith Reed, EPS (Aug. 4, 2003)). As Reed explained, *id.*, CBI oil batch numbers may represent from one to "thirty to fifty" barcoded transformers depending on whether transformers are individually tested or batch-tested. During the discovery period, as he further recounted, EPS provided to the Region information on which transformers during the relevant time period were batch-tested and which were individually tested. See Tr. at 220 (Vol. IX); RX 571 Att. P. In particular, on a set of pages designated "long sheets" that EPS provided to the Region, EPS compiled lists of individual six-digit barcode numbers with the matching five-digit "oil batch numbers" for dates in September and October 1999, indicating which transformers were batch tested and which were indi-

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the opportunity to hear EPS's proffered testimony through which the company sought to discount any identity between the barcodes and serial numbers – testimony that the ALJ found not credible. *See, supra, In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 356 (EAB 2005) (stating principle that the Board generally defers to an ALJ's factual finding where credibility of witnesses is at issue); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 313 (EAB 2005) (same).

The Region, in our view, bolstered its case below by pointing out significant circumstantial evidence that EPS indeed was illegally burning PCB-contaminated transformers in its SMRO during the relevant time period. *See* Region's Response at 58-59, 64-65. In this regard, we find particularly persuasive the fact that EPS's brochure and audits describe how EPS burns PCB-contaminated and non-contaminated transformers together in the SMRO, *id* at 58-59 (*citing* CXs 56, 58), as well as EPS's admission that "ten to fifteen percent" of the equipment that EPS burns is PCB-contaminated. *Id*. at 74 (citing Tr. at 135 (Vol. X)). Also telling is testimony by EPS's SMRO operator showing how he operated the SMRO in a "blind" manner – that is, placing transformers in the SMRO without knowing their regulatory status. *See* Region's Response at 73 (citing Tr. at 111 (Vol. V)). These facts, together with EPS's failure to meet the time and temperature parameters of 40 C.F.R. § 761.72(a)(3) during a significant number of cycles, *see* CX-14, constituted circumstances, as the Region states, "in which violations of [SMRO] operating standards would be inevitable and routine." Region's Response at 74.

In sum, as did the ALJ below, we likewise find that the high correlation of PCB concentrations for matching serial and barcode numbers, as well as other evidence that the Region presented, constitute persuasive evidence that ACTI serial numbers and EPS's tracking barcode numbers are one and the same, and that, therefore, the PCB concentrations reported by ACTI provide the PCB concentrations for transformers burned by EPS during the Region's three week review period. Based on this evidence, together with the other elements of the Region's prima facie case not challenged by EPS, *see supra*, we find that the Region has presented a prima facie case that EPS violated section 761.72(a)(3) as alleged in the Second Amended Complaint.

We further agree with the ALJ that the evidence EPS presented on this issue of the regulatory status of the transformers it burned in its SMRO is not sufficient

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(continued)
vidually tested, and the testing results for each batch number. *Id.* A column of the five-digit "oil batch numbers" also appears on the ACTI laboratory data obtained by the Region. *Compare* CX 44 (CBI) at 274, 287 (second column from the left) *with* RX 571 Att. P (Bates Nos. R004802-03). It is noteworthy that for identical pairs of oil batch numbers on the "long sheets" and ACTI laboratory data, the corresponding barcode and serial numbers are identical as well. *See* RX 571 Att. P; CX 44 (CBI).

to rebut the Region's prima facie case on Count III liability. As noted previously, EPS relies upon a set of PCB concentration barcode lists based substantially upon batch testing, *see* Tr. at 215 (Vol IX), to argue that "[n]inety-nine plus percent of the transformers processed on the dates initially cited by EPA were non-regulated." App. Br. at 46. As the Region's witness, John Smith, explained in his testimony, however, batch testing provides only an average concentration for multiple underlying transformers, some of which may have individual PCB concentrations that exceed regulatory levels. *See* Tr. at 209-16 (Vol. XI). Due to these inherent limitations, EPS's batch-test based data cannot invalidate the evidence that the Region brought forward, which served to provide concentration values for barcode/serial numbers representing individual transformers. In other words, when compared with the Region's transformer-specific proof, EPS's batch-test based data cannot provide as accurate a picture of the regulatory status of the transformers EPS burned during the relevant time period. In light of EPS's failure to rebut the Region's prima facie case, we conclude that the ALJ did not err in finding that the Region satisfied its burden of persuasion that EPS violated the SMRO burning regulations at 40 C.F.R. § 761.72(a)(3). *See* 40 C.F.R. § 22.24(a); *J. Philip Adams*, 13 E.A.D. 310, 321-24 (EAB 2007).[80]

c. *Whether EPS Received Fair Warning from the Region Regarding the Latter's Interpretation of 40 C.F.R. § 761.72(a)(3)*

In further challenge to the ALJ's finding of Count III liability, EPS raises as an affirmative defense the argument that EPA failed to provide the company with fair warning of EPA's interpretation of 40 C.F.R. § 761.72(a)(3) as requiring that the provision's time and temperature standards be met on a continuous basis. *See* App. Brief at 59. EPS argues that the regulatory provision requiring that "the primary chamber shall operate at a temperature between 537 C [999 F] and 650 C [1,202 F] for a minimum of 2 ½ hours and reach a minimum temperature of 650 C (1,202 F) once during each heating cycle" does not specifically require that SMROs maintain this temperature range "continuously" during a heating cycle. App. Br. at 58 (citing 40 C.F.R. § 761.72(a)(3)). EPS explains that in the absence

[80] In support of its position, EPS cites an Agency case in which an ALJ determined that the complainant had failed to meet its burden of proving that the respondent had caused a PCB spill where the Region had not challenged the credibility of respondent's testing results indicating insufficient PCB contamination at the site of the alleged spill. *See* App. Br. at 56 (citing *In re Pacific Refining*, Docket No. TSCA-09-0010, 1993 WL 53462 (ALJ Dec. 14, 1993) (Initial Decision)). That case is of little moment to the matter at hand. First, generally, ALJ decisions are without precedential weight. *See In re Howmet Corp.*, 13 E.A.D. 272, 300 n.56 (EAB 2007). Second, the setting in the case before us is completely different. In *Pacific Refining* the Region had provided no testing results on the allegedly spilled PCBs, whereas here the Region has proffered PCB concentration evidence, which we, like the ALJ, find credible prima facie evidence that EPS was burning PCB-contaminated transformers as alleged in the Second Amended Complaint.

of any explicit continuity requirement in the regulatory language, it is reasonable to determine compliance with the provision's 2 ½ minimum burn time by considering the total span of time over which a SMRO meets temperature parameters – regardless of whether that span of time is continuous. *See id.* [81] As EPS elaborates:

> A clear reading of the regulation is that one complete cycle must maintain a total time of 2½ hours between the required temperatures. Nowhere in the regulation is the word "continuous" found when referring to the 2½ hour temperature requirement. Indeed, nowhere in the entire sentence is the word "continuous" in close proximity to the temperature requirement or in close proximity to any other word. * * * However, [Regional inspector] Rice's calculations in support of the violation allegations in Count III are based on the time between when the primary chamber first reached 537 C and the first five-minute recorded period in which the temperature fell below 537 C. The fact is that for all burn cycles alleged to have been insufficient in length the burn temperatures rose after the initial five minute period during which it first fell below 537 C and stayed above the required temperature for a length of time that, when added to the first time span of acceptable temperature, totals 2½ or more hours.

App. Br. at 58 (citing Tr. at 105-07 (Vol. II); CBI Tr. at 32-33 (Vol. IV)). In addition to asserting that the company, in fact, complied with 40 C.F.R. § 761.72(a)(3)'s burn requirements under its "total time" interpretation, EPS contends that "[b]ecause EPA did not provide EPS with any pre-enforcement warning of its interpretation of * * * § 761.72(a), it cannot punish EPS for reasonably interpreting this rule." *Id*. at 59 (citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1330 (D.C. Cir. 1995)).

In rejecting EPS's fair warning arguments regarding Count III of the Complaint, the ALJ stated that EPS "ignores the clear and unmistakable regulatory language of Section 761.72(a)(3) as it relates to the time and temperature requirements for burning regulated material" and noted that EPS had participated in the rulemaking that led to the promulgation of the SMRO regulations and thus should have been aware of how EPA would interpret the provision. Init. Dec. at 38; *see*

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[81] With regard to its theory of non-continuous burning, EPS asserts that "Keith Reed, qualified as an expert in the field of design and operation of [SMROs] and combustion of PCBs, testified specifically that the regulation does not need to require continuous temperature in excess of 2 ½ hours and that it, in fact, does not." App. Brief at 59 (citing Tr. at 149-57 (Vol. XI)).

also id. at 31. He also observed that EPS's arguments on the reasonableness of non-continuous burning ignores the "contrary testimony of its own scrap metal recovery oven operator, Chuck Ernest, who was aware of the regulation's requirements." *Id*. at 38 (citing Tr. at 210, 218 (Vol. I)).[82]

In its reply brief, the Region argues that despite the absence of the word "continuous" in 40 C.F.R. § 761.72(a)(3), EPS's interpretation of this provision to allow compliance on a non-continuous, "total time" basis is contrary to the further articulation of the meaning of the provision in the rulemaking record. *See* Region's Response at 75 (citing Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35,384, 35,402 (June 29, 1998)). In addition, the Region reiterates that EPS's participation in the discussions during the rulemaking process leading to the development of the 2 ½ hour SMRO burning rule undercuts the company's fair notice arguments. *Id*. at 78-80.[83] Specifically, the Region points out that it was EPS who suggested the 2 ½ hour burn time requirement in the final regulations. *Id.* (citing EPS's Motion for Request for Production of Documents at 26-27 (May 7, 2002); Letter from EPS to Denise M. Keehner, Chief, Chemical Regulation Branch, EPA (Feb. 20, 1989)). Furthermore, the Region argues that EPA's interpretation of section 761.72(a)(3) merits deference because it is reasonable and consistent with the purpose of the regulation. *Id*. at 78 (citing *Modine Mfg. Corp. v. Kay*, 791 F.2d 267, 273-74 (3rd Cir. 1986)). Asserting that EPA's continuous burning interpretation of the regulation is "within a reasonable person's comprehension of what the regulation requires," Region's Response at 76-77, the Region observes that EPS's differing interpretation would "frustrate the purpose of the regulations," which is to vaporize and destroy PCBs. *Id* at 77. The Region explains that sustained heat is necessary to fully vaporize PCBs in contaminated transformers and that non-continuous heating would pose the risk of "PCBs remaining in the scrap metal which is redistributed into commerce." *Id*. The Region analogizes EPS's argument to "suggesting that a baking recipe, which requires baking a cake for thirty minutes at 350 [F] * * * would produce the same result as baking the cake for five minutes each hour during a six hour period." *Id.*

We find that EPS has not demonstrated that EPA failed to accord the company fair notice that compliance with 40 C.F.R. § 761.72(a)(3) requires meeting temperature parameters for a continuous period of 2 ½ hours. In addressing EPS's

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[82] In his testimony, Chuck Ernest described EPS's SMRO burning procedures in the following manner: "You light it, you get your temperature up to * * * a 1,000, then you have to control that over 1,000 for two and a half hours. * * * That's our procedure. * * * And you've got to *maintain* the burn until the time limit." Tr. at 210 (Vol. I) (emphasis added).

[83] The Region, contradicting EPS, notes that in any case, even under EPS "total time" theory, only one of the burns found to be noncompliant by the ALJ would satisfy the time and temperature requirements of section 761.72(a)(3). Region's Response at 78. Because we find the "total time" approach incompatible with the better reading of the regulation, we do not reach this issue.

fair notice arguments, we again refer to the D.C. Circuit's decision in *General Electric Company*,[84]which offers the following criteria for determining whether an agency has accorded fair notice to a regulated party:

> If, by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with "ascertainable certainty," the standards with which the agency expects the parties to conform, then the agency has fairly notified a petitioner of the agency's interpretation.

General Elect. Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)).

In finding that EPA provided fair notice to EPS here, we regard as key the manner in which the Agency explained the newly promulgated SMRO regulations in the preamble to the final rulemaking:

> 3. *Disposal in scrap metal recovery ovens and smelters.* Under the existing PCB disposal regulations * * * , disposal of drained PCB-Contaminated Electrical Equipment and other drained PCB Articles is not regulated. * * * However, some drained PCB-Contaminated articles have been prepared for metal smelting under uncontrolled combustion conditions such as open burning. Open burning can result in significant amounts of products of incomplete combustion such as PCBs, polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans. * * * Therefore, EPA has prohibited open burning (see § 761.50(a)(1)) and in § 761.72 has established [SMROs] operating conditions that control emissions and result in no unreasonable risk of injury to health or the environment.
>
> EPA has responded affirmatively to commenters who have provided acceptable alternatives to EPA's proposal, which required direct disposal of the drained PCB-Contaminated articles in a metal smelter. The commenters' alternative includes primary and secondary combustion chambers. In the primary combustion chamber,

[84] We earlier referred to the D.C. Circuit's decision in *General Electric Company* in addressing EPS's fair notice challenge to the Region's application of the company's MSC for PCB transformers and the processing exemption for PCB storage approval at 40 C.F.R. § 761.20(c)(2).

> the articles are slowly warmed to a temperature below the melting point of aluminum and *kept* at that temperature for a number of hours, much longer than the time waste is in the primary chamber of a PCB incinerator. Any PCBs present in the drained PCB-Contaminated articles will vaporize or be destroyed at these temperatures. The primary combustion chamber operates under a slightly negative pressure (or draft) so that combustion gases do not leak out but are passed into the secondary chamber. The secondary combustion chamber operates at the same combustion conditions as a PCB incinerator. In the secondary chamber any remaining PCBs and any incomplete combustion products formed in the primary chamber are destroyed. Both EPA's proposed method and the method proposed by the commenters are included in the final rule.

Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35,384, 35,402 (June 29, 1998) (emphasis added).

We agree with the Region's assertion that the wording "*kept* at that temperature for a number of hours" contemplates that compliance with the 40 C.F.R. § 761.72(a)(3)'s temperature parameters be met continuously. *See* Region's Response at 76 (emphasis added); *see also* The American Heritage Dictionary (4th Ed., 2000) (defining "keep" as "to cause to continue in state, condition, or course of action."), quoted in Region's Response at 76. As stated in Webster's Third New International Dictionary (unabridged) (3d Ed. 1993), at p. 1235, "keep" means to "preserve, maintain * * * : to continue to maintain: not cease from or intermittent * * * : to cause to remain in a given place, situation or condition: maintain unchanged: hold or preserve in a particular state." Accordingly, the preamble language satisfied *General Electric*'*s* fair notice test by allowing EPS and other members of the regulated community to identify with "ascertainable certainly" what was required of them to comply with section 761.72(a)(3).

Moreover, as we have stated, "an agency's interpretation of a regulation must be accorded 'substantial deference' and 'controlling weight' unless 'plainly erroneous or inconsistent with the regulation.'" *In re Lazarus, Inc.*, 7 E.A.D. 318, 351 (EAB 1997) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)); *accord U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001). The Board has also observed that "interpretations of regulations announced through notice and comment rulemaking are entitled to a high degree of deference." *Lazerus*, 7 E.A.D. at 352 (citing *Atchison, Topeka and Santa Fe Ry. v. Pena*, 44 F.3d 437, 442 (7th Cir. 1994)). Furthermore, the Board's deference to the Agency's interpretation in this case is especially warranted since the Agency adopted the above preamble language supporting a "continuous basis" approach to

compliance during notice and comment rulemaking. *See Lazarus*, 7 E.A.D. at 352.

In reaching this determination, we also give significant weight to the Region's account of how EPS, in correspondence with EPA, was engaged in helping the Agency formulate regulations for SMROs as far back as 1989, and that at this time, EPS suggested the 2.5-hour burn time based on its own SMRO operations. *See* Region's Response at 78-80 (citing EPS's Motion for Request for Production of Documents at 26-27 (May 7, 2002); Letter from EPS to Denise M. Keehner, Chief, Chemical Regulation Branch, EPA (Feb. 20, 1989)). In view of the company's long involvement in developing the SMRO regulations and the lack of any record evidence that EPS ever challenged the need to achieve compliance on a "continuous time" basis during the rulemaking process that led to the final SMRO regulations and preamble language noted above, we find EPS's claims of lack of fair notice less than convincing.

Here, EPS has not identified, and we are unable to find, anything "plainly erroneous" or "inconsistent" in the Agency's interpreting 40 C.F.R. § 761.72(a)(3)'s directive to operate the primary chamber of the SMRO "at a temperature between 537 C [999 F] and 650 C [1,202 F] for a minimum of 2 ½ hours" to mean that operators must meet these temperature parameters continuously for 2 ½ hours. In this regard, it strikes us as reasonable, as the Region contends, that sustained heat rather than intermittent heat is necessary to properly vaporize PCBs in order to facilitate their destruction and thereby realize the regulatory objective of decontaminating PCB-contaminated articles. *See* Region's Response at 77. Indeed, since the purpose of section 761.72 is to prescribe conditions that will allow safe and proper disposal of PCB-contaminated equipment, and since section 761.72 is quite specific with respect to such conditions (*e.g.*, temperature, number of chambers, and monitoring[85]), we find it implausible that the Agency would have intended to accord SMRO operators the flexibility to achieve the temperature limits in the open-ended fashion EPS advocates in this case. Also, as the ALJ noted, EPS's own operating practice suggests that the company understood that compliance with section 761.72 requires meeting its temperature parameters on a continuous basis. *See supra* note 82.

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[85] Section 761.72 prescribes SMRO monitoring as follows:

> Continuous emissions monitors and recorders for carbon dioxide, carbon monoxide, and excess oxygen in the secondary chamber and continuous temperature recorders in the primary and secondary chambers shall be installed and operated while the primary and secondary chambers are in operation to assure that the two chambers are within the operating parameters in paragraphs (a)(3) through (a)(5) of this section.

40 C.F.R. § 761.72(a)(6).

For the foregoing reasons, we reject EPS's claim that EPA failed to provide the company with fair notice of the requirement to meet 40 C.F.R. § 761.72(a)(3)'s SMRO temperature parameters on a continuous basis. We therefore find that the Region is not barred from seeking sanctions from EPS for failure to comply with the Agency's reasonable interpretation of the SMRO regulations. *See In re V-1 Oil Co.*, 8 E.A.D. 729, 751-52 (E.A.D. 2000)

B. *EPS's Affirmative Defense of Selective Enforcement*

In its Appeal Brief, EPS reasserts its affirmative defense that EPA engaged in "selective enforcement" against the company by "exercising two wholly different enforcement policies" against EPS and a New Jersey competitor, G&S (located in EPA Region 2), which EPS alleges engages in a similar business. App. Br. at 73. EPS contends that G&S is a "commercial storer" of PCB wastes, receiving oil-filled regulated waste electrical equipment, including transformers, like EPS, but that EPA has nevertheless not enforced the commercial storage requirements against G&S, as it has against EPS. *Id.* In particular, EPS avers that G&S violated commercial storage requirements by failing to notify EPA of its "commercial storage" activities from 1990 to 1999[86] and by operating its facility without a commercial storage approval. *See id*. at 103-04. EPS maintains that G&S processes 120,000 transformers per year and that information that G&S has provided to EPA regarding its operations "unequivocally" demonstrates that G&S was exceeding daily the 500-gallon PCB storage threshold, thus requiring G&S to obtain commercial storage approval from EPA. *See id*. at 104-05; CX 36.[87] As part of its affirmative defense, EPS also maintains that the EPA undertook "vindictive" enforcement action against EPS when EPS complained that EPA was not enforcing commercial storage requirements and other laws against G&S. App. Br.

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[86] The notification requirements that EPS alleges G&S violated provide, in relevant part, that "[a]ll commercial storers, transporters, and disposers of PCB waste who were engaged in PCB waste handling activities on or prior to February 5, 1990[,] shall notify EPA of their PCB waste activities by filing EPA Form 7710-53 with EPA by no later than April 4, 1990." 40 C.F.R. § 761.205. The record indicates that G&S submitted a Form 7710-53 (dated September 21, 1999) notifying Region 2 of its commercial storage activity. *See* RX 479. In a letter to a Region 2 official, G&S indicated that it was notifying as a "small" commercial storer because the amount of PCBs it commercially stored at one time did not exceed the 500-gallon PCB threshold beyond which commercial storers must obtain EPA approval. *See id.*; *infra* note 87. The record indicates that G&S later submitted an application to EPA Region 2 for commercial storage approval in April 2000, but withdrew its application in July 2002 explaining that its average storage of PCB waste for 2002 "approximated only 101 gallons per week." *See* RX at 486.

[87] The PCB regulations provide that "[i]f a facility's storage of PCB waste generated by others at no time exceeds a total of 500 gallons of liquid and/or non-liquid material containing PCBs at regulated levels, the owner or operator is a commercial storer but is not required to seek EPA approval as a commercial storer of PCB waste." 40 C.F.R. § 761.3 (defining "Commercial storer of PCB waste").

at 74. EPS contends that the EPA's alleged selective enforcement warrants dismissal of all the Region's charges against it. *See id*. at 153.

In response, the Region vigorously disputes EPS's claims that EPS and G&S are two similarly situated businesses and that EPA's actions against EPS, including its inspection of EPS and enforcement action against the company, were motivated by bad faith or vindictiveness. *See* Region's Response at 82-83. Observing that EPS bears the burden of establishing its selective enforcement claim, the Region asserts that "[t]aken as a whole, the evidentiary record refutes and disproves any notion that EPA engaged in selective enforcement of EPS." *See id*. at 83. In the section that follows, we examine in greater detail the factual context for EPS's selective enforcement claim.

1. *Background: G&S's Operations and the Disagreement between EPS and Region 2*

G&S, as the record indicates, operates a facility in Kearney, New Jersey, that processes used electrical equipment, including transformers, that the company purchases from electric utilities. *See* RXs 412, 422. Describing itself as the "largest oil-filled electrical equipment disposal facility on the East Coast," *see* RXs 401, 422, G&S receives both drained and filled electrical equipment at its facility. *See* RX 412. In one component of its business, G&S purchases undrained, filled transformers as "surplus [transformers] for resale." *See id; see also* Tr. at 150-65(Vol. XII). G&S's practice is to test the filled transformers' PCB concentrations, and, based on testing results and the condition of the transformers, to either dispose of the transformers after draining them, or resell the transformers for rebuilding and reuse. RX 412. According to a Region 2 inspection report regarding G&S, the company's president reported that G&S only resells transformers that measure under 50 ppm PCBs. *Id.* G&S disposes of used transformers in an onsite SMRO, including all units with PCBs 50 ppm. *Id.*[88] The shipping papers – primarily bills of lading – that document shipments of used, oil-filled transformers from utilities to G&S variously identify the transformers as "surplus for evaluation," "for test and evaluation," and "for testing and advisement." *See, e.g.*, RXs 411, 419, 471, 482, 483.

In 1998, EPS began complaining to EPA Region 2, Region 3, and EPA Headquarters that under its "surplus for evaluation" arrangement with client utilities, G&S was commercially storing PCB-contaminated waste without notification in violation of the PCB regulations, and that Region 2 was failing to take

[88] The record indicates that G&S does not accept for disposal at its facility transformers with PCB concentrations over 500 ppm. If G&S does receive such a high-concentration transformer, the original owner must make arrangements for disposing of it. *See* RX 412.

enforcement action against G&S. *See* RXs 422, 423, 426, 427, 428.[89] EPS urged that, notwithstanding the "surplus for evaluation" characterization, G&S's utility customers were in effect selling regulated transformers to G&S for the purpose of disposal, and, because these transformers were thereby "waste," the transformers should have been shipped to G&S on manifests rather than bills of lading. *See id; see also* 40 C.F.R. § 761.207.Further, EPS contended that since G&S was essentially receiving utility-generated waste, G&S should have obtained a commercial storage approval for its operations. *See* RXs 422, 423, 426, 427, 428. Moreover, EPS protested that G&S had violated other provisions of the PCB regulations and that Region 2 was showing favoritism to G&S by not taking enforcement action against it. *See* RX 428.

In its communications with EPS, Region 2 expressed the contrary view that the "surplus for evaluation transformers" that G&S buys from utilities are intended for potential resale, and hence are "still in service" and not "waste." *See* Tr. at 163-65 (Vol. XII); Tr. at 331-33, 338-39 (Vol. XIII); RX 445. Both Region 3 and EPA Headquarters expressed their concurrence with Region 2's interpretation of "commercial storage" in a series of e-mail exchanges between the offices in August 2000. *See* RXs 444, 445. In contrast, Region 5, which conducted an independent inspection of G&S in December 2000 as part of the Agency's response to EPS's complaints about Region 2's alleged favoritism towards G&S,[90] recommended that G&S obtain a commercial storage permit to address its receipt of filled transformers under the "surplus for evaluation" arrangement and suggested that G&S should have notified EPA about its commercial storage activities in 1990. *See* RX 458. In April 2001, a Region 2 official drafted an intra-office briefing memorandum that expressed strong disagreement with Region 5's recommendations. *See* RXs 458, 459. Among other things, Region 2's memorandum argued that G&S was not acting as a "commercial storer" of transformer wastes under the surplus for evaluation arrangement. Region 2 forwarded the briefing memo to EPA Headquarters (Office of Pollution Prevention and Toxics) for approval, and EPA Headquarters, in a May 14, 2001 e-mail, resolved the question in favor of Region 2's position. *See* RX 459.

Fundamentally, the disagreement between EPS and Region 2 turns on the issue of when G&S's "surplus for evaluation" transformers become waste, which is dictated by who controls the transformers when the decision is made that they

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[89] EPS's contacts with various EPA offices included correspondence, phone conversations and meetings with the following: Region 2, Region 3, EPA Headquarters, the New York office of the Office of Inspector General, and the Criminal Investigation Division ("CID") in Trenton, New Jersey. Init. Dec. at 47-48.

[90] The record indicates that Region 5 inspected G&S at the request of Region 2 in response to EPS's complaints to Region 2's Office of Inspector General that Region 2 officials were biased against EPS. See Tr. at 194 (Vol. I); Tr. at 167-68 (Vol. XII).

are "waste" or destined for disposal.[91] In EPS's view, the utilities sell regulated, surplus transformers to G&S with the intent that G&S dispose of them. Under this view, because the transformers become "waste" while under the control of the utilities, G&S receives the transformers as "wastes," making G&S a "commercial storer" receiving "wastes generated by others." *See* 40 C.F.R. § 761.3. By contrast, in Region 2's and, ultimately, EPA Headquarter's view, it is G&S who, upon evaluating the surplus transformers for PCB concentration and other factors, determines the transformers' ultimate fate, whether disposal or reuse. Pursuant to this line of thought, because G&S determines waste status when the transformers are under its control, G&S is thereby the "generator" of the wastes, which precludes the company from being a "commercial storer" of the wastes. *See* 40 C.F.R. § 761.3; Tr. at 331, 338-39 (Vol. XIII); RXs 445, 459.[92]

2. *The Affirmative Defense of Selective or Vindictive Enforcement*

The parties in this case, as well as the ALJ in his Initial Decision, point to the relevant case law governing the affirmative defense of selective enforcement or selective prosecution; there is little disagreement about its thrust. *See* App. Br. at 74-76; Region's Response at 83-84; Init. Dec. at 42-43. As the Board has observed in the past, the case law supports the conclusion that, to prevail on the defense, a proponent must prove that (1) the government singled out a violator while other similarly situated violators were left untouched, and (2) the selection was in bad faith based on such impermissible considerations as race, religion, or the desire to prevent the exercise of Constitutional rights. *See In re B&R Oil, Co.*, 8 E.A.D. 39, 51 (EAB 1998) (citing *U.S. v. Smithfield Foods, Inc.*, 969 F. Supp. 975, 984-85 (E.D. Va. 1997); *U.S. v. Anderson*, 923 F.2d 450 (6th Cir. 1988)).

As EPS observes, there is a variant of selective enforcement known as "vindictive" enforcement or prosecution, of which it claims to have been an object here. App. Br. at 76. "Vindictive prosecution," as elaborated by some federal courts, is "prosecution to deter or punish the exercise of a constitutionally protected right." *See, e.g., Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir. 1996)). A defense of "vindictive enforcement" requires a defendant to show "(1) exercise of a protected right; (2) the prosecutor's 'stake' in the exercise

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[91] As noted earlier, the PCB regulations define, in relevant part, a "generator" of PCB waste as "any person * * * who has physical control over the PCBs when a decision is made that the use of the PCBs has been terminated and therefore is subject to the disposal requirements of subpart D of this part." 40 C.F.R. § 761.3.

[92] In response to a written question by EPS asking Region 2 to consider a scenario in which a disposal company (such as G&S) receives transformers from utilities and then tests the transformers' PCB concentration to determine which transformers can be resold and which must be disposed, a Region 2 official responded that under such an arrangement the disposal company is the waste "generator" because "the decision that the PCBs are a waste is made when the PCBs are in the possession of the disposal facility." RX 445 (citing 40 C.F.R. § 761.3).

of that right; (3) the unreasonableness of the prosecutor's conduct; and (4) that the prosecution was initiated with the intent to punish the plaintiff for the exercise of the protected right. *Id.*

Whether framed as selective enforcement or vindictive enforcement, the common denominator of the defense is a demonstration of "bad faith" or invidiousness by the government. *See Heaton v. City of Princeton*, 47 F. Supp.2d 841, 843-44 (W.D. Ky. 1997). As we noted in *B&R Oil*, *supra*, the case law imposes a heavy burden upon defendants who raise the defense of selective enforcement against the government because "courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement." *B&R Oil*, 8 E.A.D. at 51.

3. *EPS's Selective Enforcement Arguments on Appeal*

In its appeal brief, EPS contends that it has demonstrated that the Region practiced selective and vindictive enforcement against EPS, and that the Initial Decision ignored the record supporting the company's selection prosecution case. *See* App. Br. at 78, 145-53.

First, EPS asserts that it has satisfied both prongs of a traditional selective enforcement defense. App. Br. at 79-84. Regarding the first prong of the defense, EPS points to differential treatment between EPS and its competitor G&S, arguing that G&S is a commercial storer of the "surplus for evaluation" transformers, and is thus "similarly" situated to EPS. In particular, EPS contends that G&S and its utility customers, through their "surplus for evaluation" arrangement, had "predesignated" for disposal all regulated, oil-filled transformers, thereby making the utility clients the "generators" of the waste transformers and G&S a "commercial storer." App. Br. at 79-80. In its Appeal Brief, EPS explains its "predesignation" theory in the following manner:

> [I]f a utility makes the decision to dispose of PCB equipment and/or pre-designates equipment for disposal, as in the case of G&S, or if a disposal company has a pre-designated policy that it will **only** accept PCB equipment for disposal, then the disposal company, such as G&S, would be subject to the requirements of Subpart D of Part 761. For each and every utility that ships untested oil-filled (un-drained) electrical equipment to G&S with a **pre-designated** intention by either party that electrical equipment testing above 50 ppm PCBs will be disposed (after "evaluation" of PCB concentration), then the utility customer is the original generator of the waste * * * .

App. Br. at 80-81.

Relying on the language contained in service contracts describing the work G&S was to perform for its utility clients, *see* App. Br. at 84-85 (citing RXs 406, 462, 485), as well as the findings of an investigation conducted by EPA's CID, *see id*. at 84-90, EPS avers that the clear intent of the G&S's utility clients was to dispose of oil-filled, regulated transformers through G&S.[93] Finally, EPS contends that despite G&S's "commercial storer status," and G&S's failure to comply with its attendant obligations to notify the EPA of its commercial storage activities, ship its waste on manifests, and obtain commercial storage approval, EPA left G&S untouched in its enforcement efforts while selectively enforcing against EPS for essentially the same activity. *See id*. at 84 -107.

To demonstrate that it satisfied the second prong of a traditional selective enforcement defense, EPS contends that EPA's differential treatment of it and G&S was so "arbitrary" and "irrational" that it constituted "bad faith" or invidiousness by the Agency. App. Br. at 75-76. In this regard, EPS avers that EPA's differential treatment of G&S and EPS, "two similarly operated entities," lacks a "factually or legally supportable or rational basis." *Id*. at 78.[94]

In support of its arguments that the Agency practiced illegal "vindictive" prosecution against it, EPS claims that despite the company's efforts to exercise its "constitutionally protected rights * * * to bring [G&S's] violations to the attention of EPA and to ensure the equal enforcement and application of the laws by EPA," EPA responded with "vindictiveness, hostility, resentment, and punitive measures." *Id*. at 73-74. EPS explains that these vindictive actions took the form of Region 2 staff "actively protect[ing]" G&S, advocating "unorthodox and incorrect interpretations of the regulations and facts to justify G&S unlawful operations,"and influencing Region 3 to take enforcement action against EPS. *Id*. at 73-74, 133-34. EPS identifies as the primary spur for EPA's alleged retaliatory action a March 22, 1999 letter EPS sent to EPA's Office of Inspector General ("OIG") in which the company requested an investigation of Region 2 staff.

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[93] The record shows that EPA's CID, at EPS's urging, initiated an investigation into G&S's activities starting in 2000. *See* Tr. at 27-29 (June 29-30, 2004); Tr. at 176-179 (Vol. V). The investigation's findings are compiled in a CID Reportthat was part of the record below. *See* RX 610. Based on its investigation, CID concluded that G&S's activities did not constitute criminal misconduct. *See* Tr. at 104 (June 29-30, 2004); RX 610.

[94] In its arguments relating to "bad faith," EPS largely restates the evidence the company presented purportedly showing that G&S's "surplus for evaluation" arrangement masks a disposal operation in which G&S is the "commercial storer." App. Br. at 113-132. EPS's emphasis here, however, is on the fact that, by ignoring what EPS considers incontrovertible factual evidence indicating the true disposal purpose of the arrangement, Region 2 has "distorted" the factual record and "perverted" the PCB regulations. *Id*. at 113-14. In particular, EPS contends that Region 2 officials have consistently perpetrated two "fictions": (1) that G&S purchased its regulated PCB equipment for resale, and (2) that a PCB-contaminated unit or a PCB unit sent to G&S is not really PCB-contaminated or a PCB unit until it is tested. *Id*. at 113-32.

RX 432. In the letter, EPS charged Region 2 with ignoring G&S violations, and "providing direct assistance" to G&S to evade the law. *Id.*[95]

In addition, EPS asserts that the Region's allegedly dilatory enforcement efforts cast doubt upon the propriety and motives behind the Region's Complaint. For example, EPS states that the "EPA has made no attempt to explain why, if EPS was committing major PCB storage violations, EPA would not have advised EPS of such a 'major' concern during the two-year period leading up to the issuance of EPA's Administrative Complaint in June of 2001." App. Br. at 135. Also, EPS notes that in a meeting that EPS held with the Agency in September 2000, nine months after Region 3's last inspection of EPS, the Region did not inform EPS of any PCB storage violations. *See id*. at 138. In view of the time that passed between the inspections and resulting enforcement action, EPS suggests that "EPA filed its Complaint without sufficient factual evidence." *Id*. at 138. Because Region 3 proceeded to enforcement without a factual basis, according to EPS, "the underlying reasons and purpose for its Complaint against EPS must be seriously questioned, and can be answered with only one inescapable conclusion: the June 2001 Complaint was filed against EPS to punish EPS for its audacity in questioning and exposing Region [2's] failures to enforce the PCB regulations against G&S and accusing Region [2] officials of wrongful conduct based on its non-enforcement of G&S and favorable treatment of G&S." *Id.*

Finally, EPS maintains that Region 3's explanation that the company's request for a change in its financial assurance mechanism prompted the Region's inspection of EPS was only a "pretext" for EPA's allegedly retaliatory designs on EPS. App. Br. at 147-49; *see supra* Part II.B. For example, EPS claims that the Region's purported concern over EPS's "rush to release funds" from its trust fund financial assurance mechanism, *see* CX 7 Att. 1, was "illusory" since, in accor-

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[95] EPS also suggests that G&S had "financially rewarded" Region 2 staff for their services, a proposition for which we find no support in the record. EPS's most concrete allegations regarding EPA's alleged vindictive motives concern the actions of Dan Kraft, Chief of the Toxics Section in the Pesticides and Toxic Substances branch in the Division of Enforcement and Compliance Assistance in Region 2. EPS notes that shortly after it sent its letter to OIG, Kraft, who admitted being "very upset" by EPS's accusations against Region 2, *see* Tr. at 354 (Vol XIII), instructed a staff member to perform a compliance check on EPS, *see* App. Br. at 133 (citing Tr. at 299, 303 (Vol. XIII)). EPS observes that only ninety days after the letter to OIG, and shortly after Kraft's inquiry, Region 3 conducted its first inspection of EPS. *Id.* at 134. EPS further notes that before the Region issued its initial complaint, Kraft e-mailed a Region 3 official to inquire about the progress of Region 3's administrative complaint against EPS. *See id.* at 142 (citing Tr. at 357 (Vol. XIII)). EPS also recounts that Kraft remained "oddly interested in the enforcement action" even after the filing of the Complaint, asking Region 2 to be informed of the EPS case and requesting a copy of the Complaint against EPS. *Id.* (citing Tr. at 360 (Vol. XII)). As we will discuss, the ALJ considered all of these allegations and, in view of the totality of the evidence in the case, concluded that Regions 2 and 3 had acted within the bounds of propriety and their authority. As discussed below, we find no basis for reversing the ALJ's conclusion on this point.

dance with the PCB regulations, EPS's trust fund "cannot * * * unilaterally be rescinded and revoked by EPS" and only the "Regional Administrator is allowed to direct the trustee to make payments for any closure costs from the trust fund." App. Br. at 148-49 (citing 40 C.F.R. §§ 264.151(a)(1)); *see* 765.65(g)).Therefore,EPS asserts that "EPA was at all times protected by this irrevocable trust fund, and any purported 'rush' to judgment was illusory and pretextual." *Id*. at 149.

4. *The ALJ's Initial Decision on EPS's Selective Enforcement Arguments*

In rejecting EPS's arguments on selective enforcement in the proceedings below, the ALJ concluded in his Initial Decision that "[t]he evidence in this case does not establish that EPS was singled out by EPA Region [3] for prosecution for violation of environmental regulations, while others similarly situated (i.e., G&S in Region [2]) were left untouched. Nor does the evidence show that EPA prosecuted this action in order to punish respondent for complaining to the government about G&S's environmental practices and thereby silence respondent." Init. Dec. at 43. In reaching this conclusion, the ALJ observed that EPS, like all selective enforcement proponents, confronted a difficult challenge in proving its case. *Id*. at 42-43. Surveying the case law on selective enforcement, the ALJ noted that the courts that have addressed selective enforcement defense have emphasized that governments enjoy broad discretion in deciding whom to prosecute. *Id.*

The ALJ devoted the bulk of his discussion to refuting EPS's arguments that bad faith, retaliation, or other invidious motive impelled EPA to single out EPS for enforcement.[96] While taking note of the EPS's persistent and long-term efforts to bring to the attention of several EPA offices G&S's alleged violations of the PCB regulations, and Region 2's forbearance with respect to the alleged viola-

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[96] In his Initial Decision, the ALJ did not address in detail whether EPS satisfied the first prong of the selective enforcement defense – that the government singled out a defendant while leaving "similarly situated" violators untouched. *See Smithfield Foods*, 969 F. Supp. at 984-85. At one point, as noted above, the ALJ declared that "[t]he evidence in this case does not establish EPS was singled out for prosecution * * * while others similarly situated * * * were left untouched." Init. Dec. at 43. Elsewhere in the Initial Decision, the ALJ suggested that the issue of whether G&S was a "commercial storer" and thereby "similarly situated" to EPS is one that he did not need to consider. For example, when discussing the disagreement between Regions 2 and 5 on whether G&S was engaging in commercial storage at its facility, *see supra*, the ALJ attributed the disagreement between the two offices to a "professional difference of opinion," noting that "[i]t is not the intention of this opinion to say which side is right and which is wrong." Init. Dec. at 54. While, as noted below, we agree with the ALJ that it is unnecessary to resolve the issue of whether EPS and G&S conduct equivalent operations, and indeed we do not reach this issue, we must note that we do not believe that a "professional difference of opinion" between Regional offices should lead to fundamentally different approaches to regulating equivalent operations based solely on where the operations in question happen to be located. We come back to this point in note 103, *infra.*

tions, the ALJ rejected EPS's claims that such complaints prompted the Agency to take bad faith retaliatory action against EPS.

Instead, relying on documentary evidence as well as the testimony of Region 3 officials, the ALJ characterized Region 3's decision to inspect EPS's Facility as the culmination of a normal intra-agency process prompted by the Region's valid concerns over EPS's request, in September 1998, to change the company's form of financial assurance from trust fund to insurance. Init. Dec. at 44-45 (citing CXs 7, 60 (Tr. at 17-21 (Vol XII)); *see also supra*, Part II.C. As the ALJ stated, EPS's request "caused immediate concern among the EPA Region [3] personnel who handle such matters," given the "obvious importance of a financial assurance mechanism in the event of a closure of a PCB storage facility." Init. Dec. at 44. The ALJ related that these concerns were of sufficient importance to induce the Region to seek the guidance of EPA Headquarters, which then led to the decision to inspect EPS's Facility in order to determine if the company's PCB waste storage matched the MSC prescribed in its storage approval. *See id*. at 44-45 & n.39 (citing Tr. at 18 (Vol. XII); CX 60). In emphasizing the legitimacy of the Region's concerns, the ALJ noted that the PCB regulations establish a strong connection between a commercial storage facility's MSC and an appropriate level of financial assurance in order to ensure a facility's closure. *See* Init. Dec. at 43 n.38 (citing 40 C.F.R. § 765.65(f)(1); 54 Fed. Reg. 52,738 (Dec. 21, 1989)). Based on the evidence and testimony before him, the ALJ opined, "it was EPS's financial assurance mechanism communication with EPA, and nothing more, that placed the Agency in the inspection mode that ultimately resulted in this enforcement case." Init. Dec. at 45.[97]

The ALJ, relying upon the testimony of Region 3 officials, likewise ascribed the Region's decision to proceed from inspection to enforcement action as the product of a routine, deliberative process untainted by vindictive motives. *See* Init. Dec. at 45-46. The ALJ explained that the Region's enforcement action was based simply upon the facts revealed in the inspection and noted that this decision was the result of an internal review process involving the "collaboration" of the Region's Waste and Chemicals Management Division, the Office of Regional Counsel, and the Office of Enforcement and Compliance Assurance. *See id*. at 46 (citing Tr. at 39-40, 108-09 (Vol. XII)). The ALJ accordingly con-

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[97] Moreover, the ALJ, in ruling against EPS's claims of retaliatory or other invidious motive, described EPA as being very accommodating and responsive to the problems and concerns EPS raised about G&S and about Region 2's interpretation of the PCB regulations on commercial storage. *See* Init. Dec. at 48-49. For example, the ALJ notes the following examples in the record of EPA responding to EPS's queries, holding meetings with EPS, and conducting investigations at EPS's request: EPA Headquarters response by letter (Dec. 21, 1998) to Keith Reed's questions regarding the PCB commercial storage regulations, *see* RX 414; a Region 2 response to a forty-one-question EPS questionnaire, *see* RX 427; an EPA CID investigation of G&S's clients, *see* RX 611; and a September 15, 2000 meeting between EPS, and Regions 2 and 3. RX 447; CX 36 at ¶ 20. *See* Init. Dec. at 47-48.

cluded that "the record shows that in reviewing the results of that investigation EPA Region [3] followed its normal course of business in deciding whether to file a complaint in this case." *Id*.

Moreover, the ALJ rejected EPS's claims that Region 2 had sought to shield G&S from enforcement or to influence Region 3's decision to take enforcement action against EPS. *Id*. at 47. Citing the testimony of two Region 2 officials, Anne Finnegan and Dan Kraft, who were involved in G&S inspections, the ALJ noted that the two officials strenuously denied having received any compensation, such as financial award, from G&S or other entity in exchange for protecting G&S. The ALJ also observed that during their testimony, the two officials vigorously denied having encouraged Region 3 to commence enforcement actions against EPS. *See id*. at 50-52 (citing Tr. 202-25 (Vol. XII); Tr. at 294-96 (Vol. XIII)). EPS offered no countervailing testimony, and, with EPS afforded ample opportunity for cross-examination, the ALJ found the testimony of the Region 2 witnesses to be credible.

In sum, the ALJ concluded that EPS failed "by a wide margin" to meet its heavy burden of showing that it was the victim of selective or vindictive enforcement. Init. Dec. at 55. The ALJ remarked that accepting EPS's theory of selective enforcement would require him to "draw adverse inferences from many sets of competing facts, seeing only the worst in the government's actions, despite the existence of more persuasive, alternative explanations showing that those actions were lawfully motivated."[98] *Id.*

5. *The Board's Conclusion on EPS's Selective Enforcement Affirmative Defense*

We find that the ALJ, in his Initial Decision, did not err in concluding that EPS failed to demonstrate selective or vindictive enforcement by the EPA in the instant case, particularly in view of the difficult burden of proof the law imposes on proponents of such defenses. *See* Init. Dec. at 42-43, 55; *B&R Oil*, 8 E.A.D. at 51. In particular, we find that the EPS has failed to show that the ALJ erred in

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[98] In its Appeal Brief, EPS alleges that EPA failed to take enforcement action against G&S for illegal disposal, as well as export and import of PCB wastes. *See* App. Br. at 108-113. We note that these allegations, even if accepted as true, are unrelated to G&S's putative status as a "commercial storer," which is central to EPS's selective enforcement defense. *See id.* Thus, we do not consider EPS's allegations of non-commercial storage violations by G&S as germane to EPS's affirmative defense. We also note that while EPS alleges that G&S does not comply with the same SMRO burning provisions that the Region charges EPS with violating, *see id*. at 110, EPS does not point to evidence in the record relating to G&S's SMRO that would serve to establish such noncompliance. Instead, EPS appears to raise both of the foregoing points as a way to protest, in a general manner, EPA's alleged favoritism to G&S. In this regard, we generally agree with the Region's comment that since "G&S was not a participant in these proceedings * * *, anything in the record is not dispositive of any violations alleged against [G&S] by EPS." Region's Response at 94.

concluding that EPS failed to demonstrate retaliatory motive or any other form of bad faith by EPA.[99] As noted, in his Initial Decision the ALJ observed that EPS's version of the facts were outweighed by more "persuasive, alternative explanations" showing that the Agency's actions were lawfully motivated. *See* Init. Dec. at 55.[100] During the evidentiary hearing, the ALJ had the opportunity to hear contrasting testimony regarding the factors that motivated the Region to file its administrative action. *See, e.g.*, Tr. at 80-81, 93 (Vol. I); Tr. at 182-86, 235-41 (Vol. VIII); Tr. at 7-21 (Vol. IX); Tr. at 108-09 (Vol. XII). Based on the statements of Region 2 and 3 officials, whose hearing testimony the ALJ found to be credible, *see* Init. Dec. at 43-46, 49-52, the ALJ determined that appropriate considerations, not retaliation, prompted Region 3's enforcement action against EPS and that Region 2 played no role in this decision, *see supra*; Init. Dec. at 44-45, 49-53. As we have stated on many occasions, the Board ordinarily will defer to an ALJ's factual determinations based on witness testimony during an administrative hearing when witness credibility plays a role in the ALJ's assessment of the facts. *See In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 356 (EAB 2005); *In re Vico Constr. Corp., L.L.C.*, 12 E.A.D. 298, 313 (EAB 2005); *see also In re Friedman*, 11 E.A.D. 302, 314 n.15 (EAB 2004) (holding

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[99] We take issue with EPS's suggestion that, under selective enforcement jurisprudence, "bad faith" or "invidiousness" inheres in arguably inconsistent enforcement treatment of similarly situated entities. *See* App. Br. at 75. We find the following passage from the Sixth Circuit instructive in this regard:

> Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law.

Futernick v. Sumpter Township, 78 F.3d 1051, 1058 (6th Cir. 1996); *cf. United States v. Brown Transport Co.*, 448 F.Supp. 773, 775 (N.D. Ga. 1978) (holding that "Constitutional equal protection does not require the polarized conclusion that either all of those who arguably committed a crime must be prosecuted or else all must go free"). In sum, the case law is at odds with EPS's contention that inconsistency in treatment can alone suffice to show bad faith or invidiousness. Thus, EPS cannot establish its selective enforcement case by simply arguing that the EPA did not mete out the same enforcement to G&S, a putatively "similarly-situated" company, as it did to EPS.

[100] In its reply brief, the Region characterizes the actions of Dan Kraft, a Region 2 enforcement official whom EPS assigns a central role in Agency's alleged retaliatory agenda, as follows: "[W]hile Mr. Kraft testified that he sent an email to Scott Rice asking about the progress of the Region 3 complaint (Tr. at 358-59 (Vol. XIII); RX 449), this one isolated email does not remotely support or even plausibly suggest a finding that the Regions joined forces in some manner to come to a decision to bring an enforcement action against EPS and not to bring an enforcement action against G&S." Region's Response at 87. The Region also argues that EPS has overplayed the significance of its March 1999 letter to the EPA's OIG by suggesting that the letter stimulated Region 3 to inspect EPS approximately 90 days later. *See* App. Br. at 134. We see no basis in the record for reversing the ALJ's conclusion that EPS's conjectures are counterbalanced by Region [3]'s testimony that EPS's request for a change in financial assurance prompted legitimate concerns about whether EPS was complying with its MSCs, particularly in view of the nexus between MSCs and the financial assurance levels.

that the Board "may defer to an ALJ's factual findings where credibility of witnesses is at issue 'because the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility'") (quoting *In re Ocean State Asbestos Removal, Inc.*, 7E.A.D. 522, 530 (EAB 1998)), *aff'd, Friedman v. United States Environmental Protection Agency*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007). Furthermore, in *Vico*, we held that where the Board accords such deference to an ALJ's factual conclusions based on witness credibility, the "appellant must demonstrate the ALJ's factual conclusions constitute clear error or otherwise exceed his or her discretion." *Vico*, 12 E.A.D. at 327-28. In keeping with the Board's jurisprudence outlined above, we accord deference to the ALJ's factual determination that appropriate considerations motivated the Region's enforcement action and that, consequently, the Region's asserted grounds for inspecting EPS and for bringing this action were not a pretext for a retaliatory agenda against EPS. EPS has failed to demonstrate that the ALJ's determinations in this regard were clearly erroneous. Indeed, the arguments advanced by EPS before us are essentially the same fact-based arguments brought before the ALJ and rejected by him based on his assessment of witness credibility and the preponderance of the evidence presented.

Accordingly, we uphold the ALJ's determination that EPS failed to meet its burden of demonstrating that the Agency engaged in selective enforcement against EPS, under either a traditional selective enforcement theory or under a "vindictive"[101] enforcement variation of the theory.[102] At bottom, whether or not

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[101] As we have noted before, the "vindictive prosecution" form of the selective enforcement defense generally requires proof of intentional discrimination against a defendant based on defendant's exercise of a constitutionally protected right. In this regard, EPS seeks to demonstrate that EPA took enforcement action against EPS in retaliation for the company exercising its constitutional right to complain about Region 2's alleged favoritism to G&S. We do not need to reach the question whether EPS' activities constituted constitutionally protected speech because we uphold the ALJ's conclusion that EPS failed to prove that the Region's enforcement activities against EPS were retaliatory.

[102] It bears noting that, in its arguments on appeal, the Region vigorously disputes EPS's assertion that EPS and G&S are "similarly situated" companies. In particular, the Region argues that under G&S's "surplus for evaluation" arrangement, the transformers G&S purchases from utilities are "still in service" and therefore not waste. *See* Region's Response at 90. Stressing that the two companies' operations are fundamentally different, the Region states that "EPS is in the business of electrical equipment storage and disposal, including storage and disposal of waste PCB electrical equipment," adding that the record reveals that, unlike G&S, "EPS does not rebuild or resell transformers." *Id.* at 91. Ultimately, the Board does not have to resolve the question of whether the two companies are "similarly situated" in order to decide whether EPS has prevailed in its affirmative defense, for EPS has failed to demonstrate, as it must, that a retaliatory motive or other form of bad faith prompted the Region's enforcement action against it. As the Sixth Circuit noted in *Futernick*, "[t]here is no right under the Constitution to have the law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) that you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced

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EPS's and G&S's operations are similar, EPS remains responsible for complying with the law, and in this case we have determined that the ALJ did not err in finding that the Region established by a preponderance of the evidence EPS's liability in this case with the exception of the company's alleged MSC exceedance on July 15, 1999 under Count I. EPS is fairly plainly subject to regulation as a commercial storer of PCB wastes – indeed, EPS submitted to such regulation by applying for treatment as such. EPS cannot, by pointing to its competitors, escape its own regulatory reality in an enforcement action that flows proximately from it.[103]

C. *Penalty*

As noted previously, EPS challenges the ALJ's assessment of a $151,800 penalty against it as lacking a factual foundation. The ALJ's penalty assessment adopted the amount proposed by the Region, which calculated the penalty utilizing the EPA's 1990 PCB Penalty Policy. *See supra* Part II.C. The PCB Penalty Policy, issued in 1990, provides a methodology for calculating penalties for violations of PCB regulations in accordance with a set of statutory penalty factors that EPA must consider when assessing penalties in civil administrative enforcement actions under TSCA. *See* PCB Penalty Policy at 1; TSCA § 16, 15 U.S.C. § 2615; *see also In re Newell Recyling Co.*, 8 E.A.D. 598, 625 (EAB 1999). TSCA sets forth the statutory penalty factors as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such viola-

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(continued)
somewhere, and prosecutors have broad discretion in deciding whom to prosecute." *Futernick*, 78 F.3d at 1056.

[103] Although EPS has framed its arguments before us around the idea that it was inappropriately singled out for enforcement – a defense that we find it cannot sustain – its concerns can alternatively be viewed as questioning the Agency's decision not to regulate its competitor in the same manner. While there may be a path for pursuing such a claim (*see, e.g.*, 15 U.S.C. § 2619, which, subject to certain conditions, allows citizens to file civil actions against persons who violate TSCA as well as against EPA for failure to carry out an "act or duty * * * which is not discretionary"), this appeal is plainly the wrong forum and vehicle for its assertion.

Our conclusion that EPS failed to make out a case of selective enforcement here should not be taken as an indication that the Board considers consistency in regulatory applicability determinations unimportant. To the contrary, a consistent and even-handed approach to regulation levels the competitive playing field and is essential to the predictable and fair functioning of the market place. Accordingly, the Board would expect that the Agency would be vigilant in ensuring that equivalent operations are regulated under federal law in a like manner regardless of their location.

> tions, the degree of culpability, and such other matters as justice may require.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

The CROP, which governs EPA administrative enforcement actions, directs the ALJ, in assessing penalties, to "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The CROP further provides that the ALJ "shall consider any civil penalty guidelines issued under the Act." *Id.* While the CROP grants the Board *de novo* review over an ALJ's penalty decisions, in cases where an ALJ assesses a penalty that "'falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the [ALJ] absent a showing that the ALJ has committed an abuse of discretion or clear error in assessing the penalty.'" *In re City of Wilkes-Barre*, 13 E.A.D. 332, 346 (EAB 2007); *In re Friedman*, 11 E.A.D. 302, 341 (EAB 2004) (quoting *In re Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994)), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd*, No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

In its appeal brief, as noted above, EPS mounts only a limited challenge to the ALJ's penalty assessment, instead devoting the overwhelming bulk of its arguments to contesting the ALJ's liability findings on the three counts of the Second Amended Complaint. In parallel to its arguments pertaining to liability, EPS here emphasizes the alleged lack of factual foundation for the penalty, asserting that the Region did not present the requisite facts necessary to identify the "nature," "extent," and "circumstances" of the violations upon which a penalty assessment is properly based. *See* App. Br. at 39, 45 (quoting PCB Penalty Policy at 1-2). Based on this alleged information deficit, EPS contends that "it is not possible [for the Region] to properly calculate a penalty for [Counts I and II] even if one assumes that a violation occurred, which EPS denies." App. Br. at 39, 45. The company objects at somewhat greater length to the ALJ's Count III assessment, contending that the Region incorrectly calculated the penalty because the Region at the outset had erroneously alleged that the company had burned "PCB transformers" in its SMRO rather than the "PCB-contaminated" transformers the company is allowed to burn in its SMRO pursuant to 40 C.F.R. § 761.72. App. Br. at 59-60. EPS maintains that this error renders the Region's Count III penalty "void *ab initio*." *Id.* at 60. EPS, in addition, claims that the Region miscalculated the penalty for Count III because the Region ignored statements by EPS President Keith Reed and Regional inspector Scott Rice indicating that PCBs were effectively destroyed during EPS's alleged illegal burns in its SMRO. *Id.*

As explained below, except for that portion of the penalty that reflects the ALJ's finding of liability regarding the transformer MSC exceedance on July 15, 1999, which we have reversed, *see supra* Part III.A.1.a, we find that the ALJ's

penalty assessment is supported by the record and appropriate. *See* Init. Dec. at 55-60.

As noted, the ALJ's assessment of a $151,800 inflation-adjusted penalty[104] against EPS essentially ratified the Region's proposed penalty calculation,[105] which in turn adhered closely to the PCB Penalty Policy's recommendations. *See* Init. Dec. at 56, 60-61; PCB Penalty Policy at 2-19; CPHB at 64-93. As noted above, these recommendations are keyed to the TSCA statutory section penalty factors. *See* TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). In accordance with the PCB Penalty Policy, EPA first assigned to each of the subject violations a base-level "gravity-based penalty" ("GBP"), which considers the "extent" and "circumstance" of a violation.[106] Then, the Region adjusted the GBPs by considering violator-specific statutory penalty factors of "culpability," "ability to pay," "ability to stay in business," "prior history of violations," and "other factors as justice may require." *See* PCB Penalty Policy at 14; TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

More specifically, with respect to the commercial storage violations under Counts I and II of the Complaint, the Region used the weight of PCB transformers as the gauge for ranking the "extent" of the violations (either minor, significant, or major). *See* PCB Penalty Policy at 3. In particular, the Region ranked the commercial storage violations under Count I as "significant" and the violation under Count II as "major" based on the amount in weight by which the transformers and capacitors in question exceeded their respective MSCs. *See id.;* CPHB at 77; CXs 19-24. With regard to "circumstance," the Region ranked all the commercial storage violations as "High Range Level One" (the highest level) in keeping with the

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[104] The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, increased the maximum penalty assessable under TSCA to $27,500.00 per day for each violation occurring after January 30, 1997. *See* 40 C.F.R. pt. 19; *see also* CXs 19, 48.

[105] As noted previously, the Region lowered its proposed penalty from $386,100 to $151,800 at the beginning of the evidentiary hearing, and during the hearing introduced into evidence the penalty worksheets that documented its proposed penalty. *See supra;* CXs 19, 30, 48, 49 (CBI). Following the evidentiary hearing, the Region proposed enhancing the penalty under Count III's SMRO burning violations by 25% (from $86,900to $108,625) to reflect EPS's failure to comply with the ALJ's discovery order to produce PCB concentration data on transformers burned by EPS in its SMRO and the allegedly prejudicial impact on the Region's case that resulted therefrom. CPHB at 59, 79, 95. In his Initial Decision, the ALJ denied the Region's request for sanctions in the form of penalty enhancement based on the company's alleged lack of cooperation on the grounds that it was not clear from the record whether the transformer concentration data that the Region sought was available to EPS. *See* Init. Dec. at 38-40. On appeal, the Region has not challenged the ALJ's decision on this point.

[106] The PCB Penalty Policy explains that the variable of "extent" refers to the "potential or actual environmental harm from a given violation" while the variable of "circumstance" reflects a violation's "probability of causing harm to human health or the environment." *See* PCB Penalty Policy at 1, 9.

PCB Penalty Policy's recommendation that the failure to comply with the conditions of a storage approval be given the highest circumstance ranking under the Policy. *See* PCB Penalty Policy at 10; CPHB at 75. With these determinations in hand, the Region relied upon the PCB Penalty Policy's penalty "matrix" to identify proposed penalty amounts in accordance with the particular combination of "circumstance" and "extent" rankings for each violation.[107] *See* PCB Penalty Policy at 9; CX 19.

With regard to the Count III disposal violations, the Region followed the PCB Penalty Policy's recommendation to use volume to measure the "extent" of violations involving drained PCB transformers. *See* PCB Penalty Policy at 6. In particular, the Region used the cubic footage of PCB-contaminated transformers that EPS burned during noncompliant burn cycles to measure the "extent" of the Count III violations. *See* PCB Penalty Policy at 6; Tr. at 127-31 (Vol. IV). With regard to "circumstance," the Region explained that the Count III violations merited the highest "High Range Level 1" ranking because they involved "disposal of PCBs or PCB Items in a manner that is not authorized by the PCB regulations." CPHB at 90 (quoting PCB Penalty Policy at 10). As further justification for the high circumstance rating, the Region argued that EPS's burn violations posed a high risk to human health because contaminated scrap metal from EPS's SMRO that entered the flow of commerce could expose the public to PCBs and "toxic byproducts of incomplete combustion"; the Region further asserted that such violations harmed the "integrity of the PCB disposal program." *See id*. at 81-90.[108] As it did in calculating the GBPs for Counts I and II, the Region use the PCB Penalty Policy's matrix to select proposed GBPs for Count III. Furthermore, in accordance with the Policy's instructions for situations of "continuous or repeat" violations, as in the instant case, *see* PCB Penalty Policy at 13-14, the Region calculated the proposed Count III penalty on a per-day basis for the eleven days of violation, *see*

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[107] The PCB Penalty Policy's "Gravity Based Penalty Matrix" provides recommended GBPs for all of the various combinations of "extent" and "circumstance" determinations. *See* PCB Penalty Policy at 9.

[108] In this regard, the Region referred to the testimony of John Howard Smith, an author of the SMRO burning regulations, *see* Tr. at 232 (Vol. II), who explained that products of incomplete PCB combustion are even more toxic than PCBs themselves. *See* CPHB at 87 (citing Tr. at 261 (Vol. II)). Notably, the Region maintains that EPA promulgated the two-and-a-half hour-burn time at section 761.72(a)(3) based upon EPS's own recommendations during the rulemaking process, *see* CPHB at 84 (citing EPS's Motion for Request for Production of Documents at 26-27 (May 7, 2002)). EPS has not refuted this suggestion. Further, in the preamble to the final rule, EPA announced that "'there is no unreasonable risk of injury to health or the environment from PCB [and products of incomplete PCB combustion] from incineration of small amounts of PCBs *in accordance with the requirements of § 761.72*,'" *id.* at 86 (quoting 63 Fed. Reg. at 35,402-03) (emphasis supplied by Region)). In sum, the foregoing shows that the Region specifically determined that compliance with the two-and-a-half-hour minimum burn time requirement in section 761.72 was necessary to adequately protect public health and the environment and that EPS itself recognized the importance of this burn time requirement as a means of achieving destruction of PCBs through combustion.

CX 49 (CBI), leading to a significant GBP for Count III.[109]

The Region did not adjust the base GBP after considering the additional factors listed under the TSCA section 16 and the PCB Penalty Policy. *See* TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B); *see* PCB Penalty Policy at 14-19. For example, the Region declined to increase the penalty on grounds of "culpability" and "history of prior violations" because it found no evidence that EPS's violations were "willful" or that the company had previously committed violations of the PCB regulations. CPHB at 100-01. In opting not to reduce the penalty downward on "ability to pay" grounds, the Region noted that EPS had never raised the defense of inability to pay in the proceedings and that information in the record indicated that EPS enjoyed a good credit rating and was able to procure loans for business expansion. *Id*. at 95-97 (citing CXs 22, 58). As noted, the ALJ accepted the Region's proposed penalty and adopted the Region's penalty rationale as his own.

EPS, in its limited penalty arguments, has demonstrated no clear error or abuse of discretion in the ALJ's penalty assessment, except for that portion of the penalty based upon the ALJ's erroneous finding that the Region had established EPS's liability for the alleged July 15, 1999 commercial storage violations under Count I. We briefly review some of EPS's principal arguments and our conclusions related thereto.

EPS's contention that the ALJ's penalty assessment lacks a factual basis is, with the exception of the July 15th violation, without merit. EPS's assertions in this respect are generally contradicted by our finding that the Region has proved by a preponderance of the evidence that EPS exceeded its MSC for transformers on November 2, 1999 under Count I, exceeded its MSC for capacitors under Count II, and failed to comply with the PCB regulations' SMRO burning parameters over multiple days as alleged under Count III.

The specific objections that EPS levels against the Region's Count III assessment likewise lack merit. First, contrary to EPS's assertions, there is no evidence that the Region ignored the fact that the subject transformers were "PCB-contaminated" transformers as opposed to "PCB transformers." The Region's post-hearing brief offers a useful roadmap in terms of explaining how the Region calculated its proposed penalty and how it approached the particular issue to which EPS points. CPHB at 64-103. There, the Region observes that although

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[109] Section 16 of TSCA provides, in relevant part, that any person who violates a provision of section 15 of TSCA (which makes unlawful, inter alia, the failure or refusal to comply with the PCB regulations at issue in this case) "shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation" and that "[e]ach day such a violation continues shall * * * constitute a separate violation * * * ." TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1); *see* PCB Penalty Policy at 13. As noted, the $25,000 has since been adjusted upward to account for inflation.

the PCB Penalty Policy was published in 1990, before EPA adopted regulations on drained, *PCB-contaminated transformers* in 1998,the PCB Penalty Policy did recommend volume as a means of gauging the "extent" of violations involving drained *PCB transformers.* CPHB at 92 & n.48 (citing PCB Penalty Policy at 6). In this regard, the Region observed that "use of volume as a measure of extent [for PCB-contaminated transformers] appears equally reasonable because it indicates the size of the unit that is being disposed of and thus bears a relationship to the quantity of material and cost of proper disposal." *Id.*[110] Thus, rather than ignoring the issue, the Region offered a defensible rationale for approaching PCB-contaminated transformers and PCB transformers in a like manner in this limited context.[111] Furthermore, EPS's suggestion that EPS achieved "destruction" of PCBs in the subject transformers regardless of whether it met SMRO burn parameters – even if such a consideration were relevant to a penalty determination[112] – lacks factual support. For example, EPS, in its appeal brief, asserts that during his hearing testimony, EPS President Keith Reed, "testifying as an expert witness on the combustion of PCBs, confirmed that PCBs were destroyed in the EPS scrap metal recovery oven during the cited burns," *see* App. Br. at 60 (citing Tr. at 154-57 (Vol. IX)). However, EPS points to no documentation in the record to

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[110] The record reveals that the Region was already cognizant that the Count III transformers were "PCB-contaminated" transformers rather than "PCB transformers" at the earliest stage of calculating a proposed penalty. *See* Second Amended Complaint; CX 20. For example, in calculating its original proposed penalty of $386,100, the Region adopted the PCB Penalty Policy's "concentration adjustment," which implements the PCB Penalty Policy's statement that "concentration of PCBs is relevant to the potential or actual harm from violating the PCB regulations." *See* CX 20, PCB Penalty Policy at 8. In particular, the Region reduced by 30% the cubic footage of drained transformers burned by EPS in its SMRO, responding to a PCB Penalty Policy's recommendation that for PCBs measuring between 50 ppm and 500 ppm (i.e. "PCB-contaminated"), the "total amount of PCB material involved in an incident should be reduced by * * * 30%." *Id.* Thus, contrary to EPS' argument, it seems plain that the Region viewed the transformers in question as "PCB-contaminated" rather than as "PCB transformers." We see nothing in the record that shows that the Region changed its view in this regard. We note that while the Region did not use a "concentration adjustment" in calculating its revised proposed penalty of $151,800, this is an inconsequential artifact of the case. An examination of the Region's penalty worksheet reveals that even if the Region had reduced the cubic footage of illegally burned transformers by 30% (as the Region did originally), the adjustment would not have been significant enough to lower the "extent" rankings for the Count III violations pursuant to the PCB Penalty Policy, and thus would not have generated a lower penalty amount. *See* CXs 48, 49 (CBI).

[111] While the PCB Penalty Policy does not explicitly provide instructions for calculating penalties related to *drained, PCB-contaminated transformers,* we regard the Region's application of volume as a measure of "extent" for the drained transformers in Count III, *see supra;* CPHB at 92 & n.48, to be a reasonable extension of the Policy's approach to *drained PCB transformers,* and thus in keeping with the Policy. *See* PCB Penalty Policy at 6. EPS has offered no explanation for why the use of a volumetric method to calculate the Count III penalty amount should be regarded as erroneous.

[112] The PCB Penalty Policy does not specifically provide for a penalty reduction where a SMRO or incinerator operator can demonstrate that it destroyed PCBs despite not adhering to burn parameters. *See* PCB Penalty Policy at 5-9, 17-20.

support this contention.[113] Finally, EPS misconstrues Regional inspector Scott Rice's testimony purportedly supporting Mr. Reid's assertions that EPS's SMRO destroyed the PCBs in the subject transformers. App. Br. at 60 (citing RX 558 at 107-110). A review of his testimony clearly shows that Mr. Rice was not addressing whether EPS's SMRO destroyed the PCBs as a factual matter, but rather under what PCB Penalty Policy category he should calculate the penalty for Count III. In particular, Mr. Rice represented that because the purpose of EPS's SMRO was to "destroy" PCBs, the violations under Count III should be treated as "disposal" violation rather than a "non-disposal" violation in accordance with the Policy. *See* RX 558, at 107-10; PCB Penalty Policy at 2-7.

In sum, as discussed above, except for that portion of Count I with respect to which we have found that the ALJ erroneously found EPS to be liable (the alleged July 15, 1999 commercial storage violation), EPS has shown no abuse of discretion or clear error in the ALJ's penalty assessment, which, as outlined above, was predicated on the PCB Penalty Policy. *See City of Wilkes-Barre*, 13 E.A.D. 332, 346 (EAB 2007); *Friedman*, 11 E.A.D. at 341 (holding that the Boards will generally not disturb ALJ's penalty assessment falling within range of penalty guidelines barring a showing of clear error or abuse of discretion). As such, we determine that EPS should pay a final penalty of **$133,100 –** which we calculate by subtracting the penalty amount associated with the reversed portion of Count I – $18,700 (*see* CX 19) – from the ALJ's overall penalty assessment of

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[113] In the portion of the hearing testimony cited with approval by EPS, Keith Reed explained that based on his experience and observations, the process of destroying PCBs "doesn't require that, you know, you have two and a half hours, two hours, three hours or – you know, it's taking place right away." Tr. at 156-57 (Vol. IX). By challenging the validity of the burn time parameters specified at 40 C.F.R. § 761.72(a)(3) within its penalty arguments, EPS is in effect, challenging the 1998 final rulemaking that produced this requirement. *See* Disposal of Polychlorinated Biphenyls, 63 Fed. Reg. 35,384, 35,402-03, 35,455-56 (June 29, 1998). The Board, however, has repeatedly articulated a presumptive rule against reviewing challenges to the validity of final regulations in proceedings before the Agency. For example, we have stated that as "a general rule * * * challenges to rulemaking are rarely entertained in an administrative enforcement proceeding." *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994) (quoting *In re American Ecological Recycle Research Corp.*, 2 E.A.D. 62, 64-65 (CJO 1985)); *cf. In re USGen New England, Inc*, 11 E.A.D. 525, 555-56 (EAB 2004) (rejecting challenges to final regulations in permit appeals before the Board). While we have acknowledged that the Board may in an exceptional case entertain such a challenge – for example, where a rule has been declared invalid in an intervening court decision, *see Echevarria*, 5 E.A.D. at 635 n. 13 – EPS has pointed to no such exceptional circumstance justifying departure from the presumption of non-reviewability in the case before us. Finally, we note that EPS is simply reprising an argument that the ALJ correctly rejected in the proceeding below, applying the same presumptive rule against reviewing final regulations in EPA administrative proceedings. In particular, the ALJ invoked the presumptive rule to deny an earlier motion by EPS to strike Count III in which the company had argued that there was no rational connection between section 761.72(a)(3)'s two and one-half hour burn requirement and decontamination of PCB-contaminated articles. *See* Init. Dec. at 30.

$151,800.[114]

IV. *CONCLUSION*

The Board hereby reverses the ALJ's finding that EPS violated its MSC for PCB transformers on July 15, 1999, as alleged under Count I of the Region's Second Amended Complaint, and reduces the penalty accordingly. The Board otherwise upholds the ALJ's liability and penalty determinations. Based on the foregoing, we assess a total penalty of **$133,100** for three counts of violating the PCB regulations. Payment of the entire amount of the civil penalty shall be made within thirty days of service of this Final Decision and Order, by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

U.S. EPA, Region 3
Regional Hearing Clerk
P.O. Box 360582M
Pittsburgh, PA 15251[115]

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[114] The $133,100 penalty we impose on EPS includes the $27,500 component for Count II's capacitor commercial storage violation as assessed by the ALJ. *See* CX 19. The Board regards this amount to be an appropriate sanction for the EPS's illegal commercial storage of capacitors in quantities (23,637 pounds) considerably above its 1,000-pound MSC for capacitors stated in its commercial storage approval. Although it appears from the record that EPS did not hold the capacitors for more than ten days, and acted with some dispatch in sending the capacitors offsite when it learned from laboratory testing of their high PCB concentration, *see supra* Part III.A.2.b., this does not absolve EPS from accountability for exceeding its MSCs, even temporarily. It is apparently EPS's practice to receive untested electrical equipment at its Facility. *See supra* note 24. This practice exposes EPS to the risk that its Facility can receive shipments of high-concentration PCB equipment in excess of its MSCs that are considered "commercially stored," as occurred in this case. Indeed, it appears that EPS's MSCs – which were set at the levels for which EPS applied for them – were not well calibrated to its intake practice, at least during the relevant time period. Given that the MSCs form the basis for estimating closure costs and posting adequate financial assurance to ensure closure, *see* 40 C.F.R. § 761.65(d), it is incumbent upon EPS to align its commercial storage approval with its normal business activities to avoid situations in which it acquires equipment substantially beyond both its MSCs and the capacity of the financial assurance mechanisms predicated on its MSCs. Moreover, EPS, as we have determined above, did not demonstrate that it operated as a "transfer facility" with respect to its handling of the Count II capacitors, and as such does not qualify for the limited exception from commercial storage approval for PCB waste stored no longer than ten days. *See supra* Part II.A.2.b.

[115] EPS has attached, as an addendum to its appeal brief, an appendix listing "59 errors" that the ALJ allegedly committed in the Initial Decision. *See* App. Br. (App. B); *see also id*. at 61-67. EPS asserts that these multiple errors "dictate that the Initial Decision be reversed in favor of respondent." App. Br. at 61. In a few instances, EPS identifies errors by the ALJ that, even if accepted, are minor or clerical in nature and have no bearing on the outcome of our decision. With respect to the remainder, we find that EPS's list of errors essentially reiterates the company's main arguments in the body of its appeal brief challenging the ALJ's liability findings, factual determinations, penalty assessment, as

Continued

So ordered.

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well as the validity of the final SMRO regulations. The Board has already addressed these arguments, and these repackaged arguments do not merit separate discussion. Also, on August 3, 2007, EPS filed a motion requesting the Board strike certain portions of the Region's response brief in which the Region enumerates several instances of what the Region characterizes as EPS's "careless and misleading" citations to the record in its Appeal Brief. *See* [EPS's] Motion to Strike Portions of Attach. 2 of [EPA's] Response ("EPS's Motion to Strike"); Region's Response at 2, Attachment 2. In its motion, EPS asserts that several of the Region's allegations are "patently false" and "misleading" and should therefore be struck. EPS's Motion to Strike at 1-2. On August 15, 2007, the Region filed a response to EPS's Motion to Strike in which the Region conceded that EPS had accurately cited to the record in a few of the instances but affirmed its allegations of improper citation. *See* [Region's] Response to [EPS's] Motion to Strike Portion of Attachment 2 of [EPA's] Response Brief. The Board regards the issue of whether EPS inaccurately cited to the record in certain instances as tangential or irrelevant to our decision, in that we have performed our own independent view of the record in the course of our deliberations. We therefore deny as moot EPS's Motion to Strike.