

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

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In the Matter of )  
Standard Scrap Metal )  
Company, Inc., ) Docket No. TSCA-V-C-288  
Respondent )

1. Test results for which the underlying test data is made available and which are introduced through an expert who has reviewed the data and can be cross-examined on it are admissible into evidence notwithstanding the fact that the persons who actually did the testing or supervised it are not made available for cross-examination.
2. When the issue is raised as to whether PCBs were spilled before or after February 17, 1978, the initial burden is upon the EPA to produce evidence from which it is reasonable to infer that the spill occurred after February 17, 1978. Once that evidence is produced, the burden of persuasion, i.e., of showing that it was more probable that the spill occurred prior to February 17, 1978, is upon the Respondent.
3. The mere fact that PCBs in concentrations of over 500 ppm are found in the soil at a facility is not in itself sufficient evidence to support the inference that the PCBs in that concentration were spilled after February 17, 1978.
4. Transformers containing mineral oil received prior to 1982 are assumed to be PCB-Contaminated Transformers unless their PCB concentration is known, even though the presumption was not expressly included in the regulations. The presumption was in accordance with the EPA's construction of its regulations and the factual premise upon which the presumption was based that mineral oil dielectric fluid is likely to contain PCBs in concentrations between 50 and 500 ppm was not really questioned by Respondent.

5. Claim that Respondent in purchasing transformers for scrap or resale relied upon certification by vendors that transformers were free of PCBs found not sufficient to rebut presumption that transformers were PCB-Contaminated Transformers when Respondent did not obtain a copy of the certification and retain it in its files.
6. It will be assumed that transformers purchased from a public utility had been either tested and found to be free of PCBs or had been drained of PCB-contaminated fluid in compliance with the regulatory requirements, unless there is evidence indicating otherwise.
7. Where the evidence indicates that Respondent may have handled a small quantity of mineral oil from PCB-Contaminated Transformers after February 17, 1978, but fails to indicate how such oil could have been spilled, Complainant's claim that the oil was spilled after February 17, 1978, is rejected.

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INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), Section 16(a), 15 U.S.C. 2615(a), for the assessment of civil penalties against Respondent Standard Scrap Metal Company, for alleged violations of a rule issued under Section 6(a) of the Act, 15 U.S.C. 2605(a), regulating the manufacturing, processing, distribution, use, disposal, storage and marking of polychlorinated byphenyls ("PCBs"), 40 CFR Part 761. <sup>1/</sup> The complaint, issued by EPA Region V, initially alleged that an inspection was made of Standard Scrap's facility in March 1984, at which soil samples were taken from Standard Scrap's west storage lot. Analysis of these samples revealed the presence of PCBs well over 500 parts per million ("ppm"), which constituted an improper disposal of PCBs under 40 CFR §§ 761.60(a) and (d)(1). A penalty of \$25,000 was requested. Standard Scrap answered denying the violation and asserting further that a penalty of \$25,000 was neither appropriate or warranted.

The complaint was subsequently amended to add a second count alleging that a second inspection of Standard Scrap's facility was made in June 1985, and at this inspection, soil samples were taken from Standard Scrap's east

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1/ TSCA, Section 16(a) provides in pertinent part as follows: "(1) Any person who violates a provision of Section 15 shall be liable to the United States for a civil penalty in an amount not to exceed \$25,000 for each such violation. Each day such violation continues shall, for the purposes of this subsection, constitute a separate violation of Section 15."

TSCA, Section 15, makes it unlawful among other acts, for any person to "(1) fail or refuse to comply with . . . (c) any rule promulgated . . . under Section . . . 6."

lot. Analysis of these samples revealed the presence of PCBs over 50 ppm, and that this also was an improper disposal of PCBs under 40 CFR §§ 761.60(a) and (d)(1). An additional penalty of \$5,000 was requested for this violation. In its amended answer, Standard Scrap denied the violations charged in both counts, asserting again that a penalty was neither appropriate nor warranted. Standard Scrap also alleged as affirmative defense that if there were PCBs or PCB items on or in the soil of its premises, they were placed there prior to February 17, 1978, the effective date of the Federal regulations governing the disposal of PCBs.

A hearing was held in Chicago, Illinois on June 10 and 11, 1986. Thereafter, each of the parties submitted proposed findings of fact, conclusions of law, and an order with a supporting brief. The EPA has also moved to again amend the complaint. Replies to each other's submissions were filed and Standard Scrap filed its response opposing the EPA's motion to amend the complaint. On consideration of the entire record, and the parties submissions, this following initial decision is rendered.

For convenience in writing this decision, certain findings of fact are set forth below. Additional findings on disputed facts together with conclusions of law, and findings as to an appropriate penalty are set forth in the part of this decision headed "Discussion, Conclusions and Penalty."

#### Findings of Fact

1. The Respondent, Standard Scrap Metal Company, Inc. ("Standard Scrap") is a corporation incorporated under the laws of the State of Illinois with a place of business at 4004 South Wentworth Avenue, Chicago, Illinois. (Alleged in amended complaint and not denied.)

2. Mr. Buddy Cohen, his mother, his cousin, Ronald A. Kantor, and his uncle are principals of Standard Scrap. (Transcript of proceedings, hereinafter "Tr.", 298-299).
3. The business of Standard Scrap consists of buying copper, aluminum and steel bearing material, separating the ferrous from the non-ferrous and selling the reclaimed material to smelters and mills. (tr. 298-99.)
4. Standard Scrap owns and operates a facility consisting of two lots: A western lot located on the west side of Wells Street between Wells and Princeton Streets (hereinafter referred to as "the west lot") and an eastern lot on the east side of Wells street between Wentworth and Wells streets (hereinafter referred to as "the east lot"), in the city of Chicago, IL. (Complainant's Exhs. 1, 1-B.)
5. On March 30, 1984, two employees of the U.S. Environmental Protection Agency (hereinafter "EPA"), Marion Young, an Environmental Protection Specialist, and Gregory P. Czajkowski, Environmental Scientist, inspected Standard Scrap's facility to determine compliance with the PCB regulations, 40 CFR Part 761. (Tr. 17-18; Complainant's Exh., hereinafter "C. Ex.", 5).
6. Ms. Young and Mr. Czajkowski took four composite soil samples from Standard Scrap's west lot along the railroad tract that ran through the lot (Sample Nos. 84TS57S01 - S04) and one wipe sample (Sample No. 84TS57S05) from a pile in the west lot. (Tr. 22; C. Ex. 5.)
7. Sample No. 84TS57S01 ("S01") was taken from soil by Mr. Czajkowski in circular area with approximately a 10-foot radius, located about 17 feet south of the railroad tracks running through the west lot. (Tr. 43; C. Ex. 1-B, 5.)

8. Sample No. 84TS57S02 ("S02") was taken from soil by Mr. Czajkowski from a triangular area approximately 19 feet by 27 feet by 17 feet, in the middle of the west lot, 12 feet north of the railroad track. (Tr. 43; C. Ex. 1-B, C. Ex. 5.)
9. Sample No. 84TS57S03 ("S03") was taken by Mr. Czajkowski from soil in the southwest corner of the west lot. (Tr. 43, 164-166; C. Ex. 1-B, C. Ex. 5.)
10. Sample No. 84TS57S04 ("S04") was taken by Mr. Czajkowski along a 15 foot length in the west lot parallel to the railroad track. (Tr. 43, 164-66; C. Ex. 1-B, C. Ex. 2, C. Ex. 5.)
11. Sample No. 84TS57S05 ("S05") was a wipe sample taken by Ms. Young from four pieces of scrap electric motors which were part of a pile of motors in the west lot on the south side of the railroad track near a crane. (Tr. 43-49; C. Ex. 1-B, C. Ex. 5.)
12. The five samples were analyzed for PCBs at Gulf Coast Laboratories by Ms. Linda Mackley. The results were as follows:

<u>SAMPLE NO.</u>	<u>PCBs (PPM)</u>
84TS57S01 (soil)	780
S02 "	1,505
S03 "	1,480
S04 "	2,095
S05 (wipe)	76

(Tr. 89, 110-11; C. Ex. 5.)

13. On June 18, 1985, Jeffrey Stoufferahn, a member of the technical assistance team (TAT) for Roy F. Weston, Inc., a company under contract with the EPA, collected three soil samples from Standard

Scrap's east lot. (Tr. 121-22, 126.) He was accompanied and assisted by Mike Lock. (Tr. 128.) Mr. Stoufferahn collected two soil samples, Sample Nos. S-86 and S-87, along the north edge of the east lot for analysis of PCB content. Mr. Lock collected a sample, Sample No. S-88, from the central part of the east lot for PCB analysis. (Tr. 129-31; C. Exh. 1.)

14. The three samples were sent by Roy F. Weston, Inc. to Radian Corp. for analysis. The PCB contents of the three samples as reported by Radian to Roy F. Weston and the EPA were as follows:

<u>SAMPLE NOS.</u>	<u>PCBs (ppm)</u>
S-86	212
S-87	257
S-88	336

(Tr. 145-46; C. Ex. 14.)

15. Mr. Cohen testified that Standard Scrap stopped handling transformers that were identified as PCB transformers or as containing PCBs about 10 years ago, prior to the time PCBs became subject to Federal regulation. (Tr. 302-303, 320-22, 336-37). <sup>2/</sup> Standard Scrap, however, has since February 17, 1981, handled transformers that either contained oil at the time they were received or had contained oil. (Finding 20 below.)

16. According to Mr. Cohen, the only kind of transformers handled by Standard Scrap since February 17, 1978, that have had liquid in them

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<sup>2/</sup> The first regulation of PCBs was the disposal and marking rule published in February 17, 1978. 43 Fed. Reg. 7150

have been "KVA transformers." (Tr. 306-07.) The prices for these transformers have been based upon their KVA rating when they are transformers that will be reused or rebuilt. In other cases, the price at times has been based upon the weight of the transformers. (See e.g., C. Ex. 20-24, 34; Tr. 357-58.)

17. "KVA transformers" have been purchased mostly from Northern Indiana Public Service ("NIPSCO") (Tr. 301, 322).
18. If the transformers purchased from NIPSCO were drained of oil when purchased by Standard Scrap they could still sometimes contains up to a half-inch of oil. (Tr. 319-20, 330-31, 342, 366.)
19. In those instances where transformers purchased from NIPSCO did contain oil, Standard Scrap would drain them either on NIPSCO's premises or on its own. (Tr. 341-42, 366-369.)
20. Purchases and sales of transformers by Standard Scrap after February 17, 1978, have been as follows:
  - a. On or about November 21, 1978, Standard Scrap made two sales of KVA transformers to Highland Electric Supply Co. One sale was for 115 "KVA transformers" of various ratings and one sale was for 121 "KVA transformers." The transformers appear to have been purchased from NIPSCO. (Tr. 356, 361; C. Ex. 20, 21.)
  - b. In December 1978, Standard Scrap appears to have bought some "KVA transformers" from Indiana Iron & Metal Co., Inc. A handwritten note of this purchase states "No Oil." (C. Ex. 25.) Indiana Iron & Metal Co. was a company through whom Standard Scrap purchased transformers from NIPSCO. (Tr. 361.)



- c. In March 1979, Standard Scrap purchased 114 transformers from Indiana Iron & Metal Co. The transformers were all described as "scrap transformers." (C. Ex. 26.)
- d. On or about June 27, 1979, 39 "KVA transformers" were sold to Highland Electric Supply by Standard Scrap, who had obtained them from NIPSCO. (Tr. 361; C. Ex. 23.)
- e. In June 1979, Standard Scrap purchased over 100 "KVA transformers" from Indiana Iron & Metal. (C. Ex. 27; Tr. 361-63.) 3/
- f. On or about July 9, 1979, Standard Scrap purchased 30 "KVA transformers" from NIPSCO, through W. Morris. (C. Ex. 28; Tr. 343-44.)
- g. Between May 30, 1979 and July 9, 1979, Standard Scrap purchased from Valpariso Metal Co. 113 "KVA transformers" plus an unspecified number of KVA transformers totalling 2324 KVAs. The shipping ticket evidencing the delivery of 107 transformers had the statement "contains no PCB" and the ticket evidencing the delivery of transformers totalling 443 1/2 KVAs had the notation "no PCBs." The transformers were apparently obtained from NIPSCO. (C. Ex. 29; Tr. 361.)

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3/ The EPA reads C. Ex. 27 as evidencing a purchase of approximately 157 "KVA transformers." (Proposed Finding of Fact No. 20F). This is the quantity shown on one of the handwritten memoranda (P00501) but it does not agree with other memoranda apparently relating to the same purchases. (See P00496, P00499). Accordingly, reliance has been placed upon the two shipping orders showing that 116 "KVA transformers" were shipped to Standard Scrap, 68 on June 22, 1979, and 48 on June 25, 1979. (P00491, P00495.)

- h. In October 1979, Standard Scrap sold to Highland Electric Co. 78 "KVA transformers" which it had obtained from NIPSCO (via Indiana Iron & Metal and Valpariso Iron & Metal). (C. Ex. 24; Tr. 360-61.)
- i. In May and June 1980, Standard Scrap purchased an unspecified number of "scrap transformers" and also "transformer scrap" from Indiana Iron & Metal. The price for these transformers was based upon their net weight. (C. Ex. 30.) One purchase of two scrap transformers was noted as being for the transformers less 1875 pounds of oil, and the transformers were billed to Standard Scrap less the oil. (C. Ex. 30 at P00636 - P00639.)
- j. In late July and early August 1980, Standard Scrap received four loads of "drained" KVA transformers purchased from E. Cohen & Sons. It also made a purchase of transformers totalling over 22 tons (44050 pounds) in weight. (C. Ex. 31.)
- k. In October 1980, Standard Scrap purchased from NIPSCO through Valpariso Metal transformers with the notation "transformers with water - some oil." According to Mr. Cohen, they were drained transformers with a small quantity of oil in the bottom. (C. Ex. 33; Tr. 330-331.)
- l. In March 1980, Standard Scrap purchased an unstated number of KVA transformers from Valpariso Metal with a total rating of 492 1/2 KVAs. (C. Ex. 32.)
- m. In April 1981, Standard Scrap purchased three transformers from Nate Winski Co. The purchase order contains the notation "transformer w/water & some oil," and a shipping order which

appears to relate to the same purchase describes the transformers as "w/oil." (C. Ex. 34.)

- n. In July 1981, Standard Scrap purchased 20 transformers from Standard Corporation. (C. Ex. 35.)
- o. In January 1984, Standard Scrap purchased a transformer with oil from Alan Industrial Services, Inc. (C. Ex. 36.)
- p. On August 5, 1985, Standard Scrap purchased one lot of transformers from Harrison Iron & Metal Co. A list appended to the record of purchases stated that all transformers contained less than 50 ppm PCB. (C. Ex. 37.)

#### Discussion, Conclusions and Penalty

This case arose because of PCBs found in the soil at Standard Scrap's facility. Seven soil samples were taken and all disclosed the presence of PCBs in excess of 50 ppm. 4/ The EPA contends that these are PCBs illegally disposed of by Standard Scrap. Standard Scrap denies liability asserting that it has not handled PCBs since February 17, 1978 when the disposal of PCB became subject to regulation. 5/

The amended complaint charged that the PCBs found in the soil samples had been improperly disposed of. 6/ The EPA now moves to further amend the complaint by adding the charges that Standard Scrap also improperly

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4/ Findings of Fact Nos. 5-14.

5/ If PCBs have been deposited in the soil prior to the February 17, 1978, no violation is incurred for leaving them in place so long as they are not disturbed. See Allen Transformer Co., TSCA Appeal No. 81-3 (March 23, 1982) (affg., Allen Transformer Co., TSCA Docket No. VI-76 (Initial Decision, May 27, 1981)).

6/ The amended complaint did not mention the PCBs found on the scrap pile.

disposed of the solid PCBs resulting from the spill and of PCB-contaminated electrical equipment in which the PCBs had been contained. It is true that these charges are related to the issue which was tried of whether PCBs in concentrations of 50 ppm or more were handled by Standard Scrap after February 17, 1978. But they are not so obviously related that it can be said that Standard Scrap was given notice that it would be held accountable not only for spilling PCBs but also for not properly disposing of the PCBs resulting from the spill and the PCBcontaminated electrical equipment.<sup>7/</sup> It may be that Standard Scrap's defense to these violations is the same as the defense to the spill of PCBs, namely, that it did not handle PCBs after February 17, 1978. Without adequate notice of the issues, however, it would be speculative to assume how Standard Scrap would have tried its case. Consequently, the motion to amend the compalint is denied.

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<sup>7/</sup> The complaint charged a violation of § 761.60(a). The proposed amended complaint would charge specific violations of § 761.60(a)(1) (requiring that all PCBs at concentrations of 50 ppm or greater be incinerated unless otherwise provided in the rule), § 761.60(a)(2) (special disposal requirements for the disposal of mineral oil dielectric fluid from PCB-contaminated electrical equipment), § 761.60(a)(3) (special disposal requirements for liquids containing PCBs in concentrations between 50 ppm and 500 ppm other than mineral oil dielectric fluid), and § 761.60(a)(4) (special provisions for the disposal of non-liquid PCBs in concentrations of 50 ppm or greater). It can be argued that the charge of violating § 761.60(a) necessarily included these four separate violations. The charge of a violation of § 761.60(a), however, must be read with the charge of a violation of § 761.60(d)(1). When this is done, the fair construction is that the only improper disposal being complained of is the spill of PCBs.

A question to be considered initially is the validity of the test results reported by Radian Laboratory for the three soil samples it analyzed. 8/ Standard Scrap argues that it would be unfair to give any weight to these results because they were not introduced through a witness who had personally done the testing or observed it and Standard Scrap had no opportunity to cross-examine on certain matters which could only be testified to by one who had personal knowledge of the test procedures followed. 9/ The EPA did furnish Radian's records of the test procedures and the data obtained. 10/ Denis Weslowski an experienced chemist and data reviewer for the EPA reviewed the records for the EPA. 11/ He found that the test results were acceptable, explaining as follows:

A. [G]oing back through some of the things that were - - things that were provided in the package, \* \* \* the data on the blank which showed that there were no interferences in the laboratory processing of the sample, the column criteria, which noted that the linearity detector was good, although breakdown is not really much of a problem with PCBs, it also showed that the columns were in good condition because of the numbers generated there, and that the dibutylchloroendate retention times were well within the acceptable limits for the column used, so that made the retention times reliable in comparing the standard to the sample.

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8/ See Finding of Fact No. 14.

9/ Respondent's post-hearing brief at 5, 9, n. 1.

10/ See. C. Exs. 10-13, 15, 16. These records were authenticated as the records of Radian relating to its analysis of the three soil samples obtained from Standard Scrap's facility both by the affidavit of Steven C. Madden, Radian's laboratory supervisor (C. Ex. 15), and by the testimony of Denis Weslowski who personally reviewed them for the EPA (Tr. 168-204).

11/ Tr. 169-204.

Also that the blank surrogate was recovered, a good amount within limits that were established, and the percent moisture that was used to give the sample amounts the dry weight, and then looking at the samples versus the standard chromatograms to visually see that indeed these are PCB patterns. 12/

Respondent argues first that Mr. Weslowski has no personal knowledge of whether or not Radian Laboratory conducted its analysis according to EPA protocol or approved procedures. Contrary to what Respondent argues (post-hearing brief at 5), the records permit an assessment as to whether EPA's protocol was followed, and Mr. Weslowski concluded from the records that it was. 13/

Respondent also argues that Mr. Weslowski had no personal knowledge of what percent differential Radian Laboratory considered acceptable when a duplicate analysis produced different results. 14/ Mr. Weslowski, however, was experienced in evaluating the validity of test data, and his opinion that a 22% differential was acceptable is to be credited. 15/

Respondent further claims that Mr. Weslowski had no personal knowledge of what Radian Laboratory did to insure homogeneity of the sample.

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12/ Tr. 203-204.

13/ Tr. 214, 225.

14/ On selected samples as a quality control, the sample is divided into aliquots which are analyzed and the results cannot differ by more than a certain limit. See Tr. 101, 104.

15/ See Tr. 215-16. An analysis of two duplicate "spikes", i.e., sample portions to which a known concentration of PCBs had been added, was run on Sample No. 5-163355. (C. Ex. 16, p. 13, and C. Exs. 15-2, pp. 0062 and 0067.) So large a differential for Aroclor 1254, between the two was recorded that Mr. Weslowski recommended that the results for that type of PCB be treated as an estimated value. (Tr. 195-96.) According to Mr. Weskowski, the different values could be explained by the heterogenous nature of the soil in the sample since the reading for one of the duplicate spikes with respect to the percent of Aroclor 1254 was very similar to that obtained on the unspiked portion. (Tr. 200-01.)

This undoubtedly could affect the test results as shown in the different readings obtained for Aroclor 1254 in the tests run on Sample S-163355. The effect was to produce a reading of 520 ppm for Aroclor 1254 in one of the spiked duplicates, which was a much higher concentration than the 220 ppm in the other spiked duplicate and the 230 ppm Aroclor 1254 found in the unspiked aliquot. 16/ The 520 ppm PCBs was also much higher than the results obtained in the analysis of a duplicate sample of the soil taken in the same area which disclosed the presence of 190 ppm of Aroclor 1254. 17/ In all cases, however, the results were well over 50 ppm PCBs. If there had been a failure by Radian Laboratories, accordingly, to completely homogenize the samples, which is what Respondent presumably would like to cross-examine on, it does not appear likely that it resulted in any misstatement of the PCBs in an amount sufficient to impeach the basic finding that PCBs were present at Respondent's facility in excess of 50 ppm. 18/

Finally, Respondent objects that it could not cross-examine on the types of soil included in the sample intake. The sample tested, however, was taken from Respondent's facility. It is difficult then to see what

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16/ See Tr. 200-01; C. Ex. 16, p. 13, and C. Ex. 15-2, pp. 0062, 0064.

17/ See results for Sample S-163354, C. Ex. 16, p. 11. Sample S-1633511 corresponds to Sample No. S-86 as identified by the EPA investigator, and Sample S-163355 corresponds to the EPA investigator's Sample S-87. C. Ex. 10.

18/ It should also be noted that the fact that the PCB concentration may vary according to the composition of the soil could mean simply that PCBs are retained longer in some types of soil than others. In that case, failure to completely homogenize the soil is more likely to result in giving too low a reading than too high a reading of the PCBs that were actually disposed of. See. Tr. 99.

information Respondent needed to know about the types of soil that it could not obtain for itself.

In sum, none of the matters on which Respondent contends it was denied cross-examination would appear to have had any material affect on the validity of the test results insofar as they show the presence of PCBs in excess of 50 ppm.

Turning to the question of whether Standard Scrap has improperly disposed of PCBs, the disposal involved here, namely, the spilling of PCBs on the ground, however it was done, would be a violation only if it occurred on or after February 17, 1978. <sup>19/</sup> Standard Scrap's defense is that it has not handled PCBs since February 17, 1978, and, therefore, the PCBs must necessarily have been deposited prior to February 17, 1978. The burden of showing that PCBs were deposited prior to February 17, 1978, and by this is meant the burden of persuasion and not simply of coming forward with evidence, is upon Standard Scrap. It is fair to impose this burden on Standard Scrap because it has been conducting its business at that site for well over 10 years and, therefore, is the one who has or should have the relevant evidence on the issue of when the spill was likely to have occurred. <sup>20/</sup> This burden, however, does not relieve the EPA, as the proponent of the order assessing a penalty, of the initial burden of

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<sup>19/</sup> Supra, n. 5.

<sup>20/</sup> Commonwealth of Puerto Rico v. Federal Maritime Comm., 152 U.S. App. D.C. 28, 468 F.2d 872 (D.C. Cir. 1972); Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998, 1004 (D.C. Cir. 1976), cert. denied, sub nom. Velsicol Chemical Corp. v. EPA, 431 U.S. 925 (1977); United States v. Continental Insurance Co., 776 F.2d 962, 964 (11th Cir. 1985).



producing sufficient evidence to make a prima facie case that the PCBs were deposited on or after February 17, 1978. The prima facie case must consist of facts from which it could be reasonably inferred that PCBs were spilled after February 17, 1978, unless there is evidence to show the contrary. 21/

Aside from the test results showing soil containing over 500 ppm PCBs, the EPA also introduced evidence that after February 17, 1978, Standard Scrap handled transformers that contained oil. The only inference that can reasonably be drawn from this is that Standard Scrap may have been dealing in PCB-contaminated transformers which contained PCBs in concentrations between 50 and 500 ppm. 22/

Thus, insofar as the complaint charges an unlawful disposal of PCBs in concentrations of 500 ppm or more, it appears that the soil samples themselves are the only evidence of the fact. That PCBs are found in the soil, is in itself no indication of when the PCBs were placed there, and I do not understand the EPA to be contending differently. Accordingly, I find that the EPA has not made a prima facie case showing that Standard Scrap has improperly disposed of PCBs in concentrations of 500 ppm or more. Alternatively, since the record should be evaluated in its entirety once all the evidence is in, I find that the testimony of Mr. Cohen that Standard Scrap has not handled electrical equipment containing PCBs since February 17, 1978, which, with respect to PCBs in concentrations of 500

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21/ Environmental Defense Fund v. EPA, 548 F.2d at 1004.

22/ See definition of "PCB-Contaminated Electrical Equipment," 40 CFR 761.3.

ppm or more has not been contradicted by anything discoverable in the company's records or by any evidence concerning the company's operations, outweighs whatever inference is suggested to the contrary by the mere presence of PCBs in the soil in concentrations of 500 ppm or more.

The evidence as to Standard Scrap's probable disposal of PCBs in concentrations of 50 to 500 ppm after February 17, 1978, stands on a different footing. Since February 17, 1978, Standard Scrap has handled transformers containing oil. <sup>23/</sup> The PCB regulations in the definition of PCB-Contaminated Electrical Equipment, i.e., equipment containing 50 to 500 ppm PCBs, require that oil-filled electrical equipment must be serviced and disposed of as PCB-Contaminated Electrical Equipment unless it is known to contain less than 50 ppm PCBs. <sup>24/</sup> In effect, what is established is a rebuttable presumption that oil in electrical equipment contains 50 ppm or more PCBs. This presumption was added by amendments to the regulations in August 25, 1982. In its preamble to the amendments, the EPA stated that the reason for the presumption was that it had received data indicating that approximately 12 to 14 percent of oil-filled transformers, voltage regulators and switches contain PCB concentrations of 50 ppm or greater but that concentrations over 500 ppm are rare. <sup>25/</sup> Prior to August 25, 1982, there was no presumption specifically included in its regulations which then applied only to PCB-Contaminated Transformers. The PCB regulations issued on May 31, 1979, which created the PCB-Contaminated Transformer category, however, were construed by the EPA as imposing much

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<sup>23/</sup> Findings of Fact 20.K., 20.M., 20.O.; Tr. 320, 342, 366-67.

<sup>24/</sup> 40 CFR § 761.3.

<sup>25/</sup> 47 Fed. Reg. 37352-353 (August 25, 1982).

the same presumption for PCB-Contaminated Transformers that was later incorporated in the 1982 regulations with respect to PCB Contaminated Electrical Equipment, namely that oil-filled transformers must be assumed to contain 50 - 500 ppm PCBs unless tests have shown the fluid to be below 50 ppm. 26/ The EPA stated that this assumption was required "because of the widespread PCB contamination of transformers that were designed to use PCB-free mineral oil dielectric fluid." 27/

There is no question of the presumption applying to transformers with oil handled by Standard Scrap since September 24, 1982 (the effective date of the August 1982 amendments). Does it also apply to transformers containing oil handled by Standard Scrap prior thereto? In my order denying Standard Scrap's motion for an accelerated decision, I relied upon the EPA's construction of its 1979 regulation as a ground for denying the motion without specifically deciding whether it was a proper construction. 28/ Standard Scrap has not really questioned the general finding of the widespread PCB contamination of transformer oil which underlies the presumption that transformer oil must be treated as containing PCBs in concentrations of 50 - 500 ppm PCBs, unless there is reason to believe otherwise. It's

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26/ 44 Fed. Reg. 31517.

27/ Id.

28/ Order Denying Motion for Accelerated Decision (February 27, 1986) at 3. The EPA's finding as to the probable PCB contamination of transformer oil was also cited as grounds for my denying Standard Scrap's renewed motion for an accelerated decision at the hearing (Tr. 295).

defense has been rather that Standard Scrap has proof that its transformers are free of PCBs. Further, the EPA's construction of its 1979 regulation is entitled to weight. Accordingly, for purposes of determining whether Standard Scrap has handled PCBs in concentrations of 50 to 500 ppm, it will be assumed that the transformers with oil contained PCBs in that range of concentrations unless there is evidence to the contrary.

It can be seen, then, that the question of whether Standard Scrap improperly disposed of PCBs depends upon the resolution of two issues: First to be decided is whether transformers handled by Standard Scrap since February 17, 1978, were in fact, free of PCBs. That the transformers were not specifically designated or marked as PCB transformers or as containing PCBs does not in itself establish that fact. If the transformers were free of PCBs, then obviously the spill must have occurred prior to 1978. If they were not, however, then there must be decided the second issue of whether the spill occurred before or after February 17, 1978.

On the issue of whether Standard Scrap has handled PCBs in concentrations between 50 ppm and 500 ppm since February 17, 1978, Standard Scrap argues that the transformers it received were drained of oil and are certified by the vendor that they do not contain PCBs, or with respect to transformer parts (e.g., transformer coils), that they did not come from PCB-Contaminated Transformers. 29/ The record does not support the claim that all transformers were drained of oil at the time of receipt. 30/ Even if the transformers were drained, they could still have a small amount

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29/ Respondent's post hearing brief at 2.

30/ In some cases the documents relating to the purchase of the transformers showed them as containing oil. See Finding of Fact 20.K., 20.M., 20.O. KVA type transformers purchased from NIPSCO could also contain oil, even if the documents themselves did not specifically say so. See Tr. 366-68.

of oil in them. 31/ Mr. Cohen's testimony as to the transformer being certified by his suppliers as free of PCBs would be more convincing if written certifications had been obtained and kept in the company's files. Standard Scrap, however, apparently made no effort to obtain copies of any written certification. 32/ Consequently, it is not clear as to what was actually stated in the certificates. At times Mr. Cohen seems to indicate that all that was being represented was that the transformers were not PCB transformers containing 500 ppm or more PCBs. 33/ More to the point, is the question of whether Standard Scrap's suppliers were likely to be illegally disposing of PCB-Contaminated Transformers by selling them to Standard Scrap without first draining the PCB contaminated oil from them. Certainly it would seem that a public utility like NIPSCO, who presumably is knowledgeable about the PCB regulations, would be unlikely to do so, absent some evidence to indicate the contrary. The same cannot be said of the other suppliers who appear to have sold transformers to Standard Scrap with oil in them. 34/ Mr. Cohen, himself, appears to have had doubts about the reliability of his sources other than NIPSCO and similar companies. 35/

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31/ Tr. 320, 342.

32/ Tr. 327, 334. At one point Mr. Cohen seems to be saying that NIPSCO would not give him a copy of the certification, yet apparently a certification was furnished in another instance even though Mr. Cohen never asked for it. See Tr. 327-29.

33/ Tr. 303, 370.

34/ See Findings of Fact No. 20.M. (purchase from Nate Winshi), No. 20.0. (purchase from Alan Industrial Services).

35/ See Tr. 336 where Mr. Cohen testifies that he has stopped handling transformers except that he will still handle transformers from NIPSCO and "some of the public services."

Nor can it be overlooked that even the transformers obtained from NIPSCO may have contained a small quantity of the PCB contaminated fluid. The presumption with respect to oil dielectric fluid, unlike that with respect to the time when the spill occurred, would appear to be one simply of shifting the burden to Standard Scrap to come forward with sufficient evidence to dispel the inference that the fluid contained PCBs in concentrations between 50 ppm and 500 ppm. I find that the evidence produced here to show that all transformer oil handled by Standard Scrap was free of PCBs is too inconclusive to do that. The amount of oil containing 50-500 ppm PCBs handled by Standard Scrap, however, appears to have been small. 36/


On the question of whether PCBs found in the soil at Standard Scrap's facility were spilled before or after February 17, 1978, the EPA relies principally on the evidence which it contends proves that Standard Scrap handled transformers containing oil after February 17, 1978. If the evidence showed that Standard Scrap was handling oil from PCB-Contaminated Transformers or other electrical equipment in any volume, this would probably be sufficient to make a prima facie case putting on Standard Scrap the burden of showing why it was more likely for the spill to have occurred

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36/ The EPA contends that one purchase of transformers from Indiana Iron & Metal, which would have been transformers obtained from NIPSCO, contained 1875 pounds of oil at the time of receipt. The reference is to a purchase of scrap transformers. The price was based upon the weight of the transformers after 1875 pounds of oil had been deducted (C. Ex. 30 (P. 00636-639)). Since Standard Scrap did not pay for the oil, it is questionable whether it was included in the shipment. Even if it was included in the shipment, I would have to assume that the transformer, which came from fluid NIPSCO, was a PCB-Contaminated Transformer that was being sold without first being drained as required by the PCB regulations, an assumption I am unwilling to make.

prior to February 17, 1978, then after. The evidence, however, indicates that only a small quantity of oil containing over 50 ppm PCBs was probably handled by Standard Scrap after February 17, 1978. As to likelihood that such oil was spilled, the evidence on this was very sparse. Mr. Cohen did admit that he had observed fluid dripping to the ground when transformer fluid was being drained out of a transformer. But the testimony was to transformers obtained from NIPSCO, which I am unwilling to assume necessarily contained PCBs in concentrations of 50 ppm or more, and is also unclear as to the time period involved. 37/ Mr. Cohen also admitted that transformers could have been tipped over so as to let the fluid run out, but he indicated that it would have happened very rarely. 38/ Given the small amount of oil from PCB-Contaminated Transformers that has been probably handled by Standard Scrap, since February 17, 1978, and the paucity of evidence bearing upon whether there could have been spills of such fluid on or after that date, it would be purely speculative to infer that the PCBs discovered in the soil in concentrations over 50 ppm resulted from a spill taking place after February 17, 1978.

Accordingly, the complaint in the matter is dismissed.

  
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Gerald Harwood  
Chief Administrative Law Judge

DATED: January 5, 1987  
Washington, D.C.

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37/ See Tr. 368.

38/ Tr. 320-21.