

2/7/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
General Electric Company, ) Docket No. TSCA-IV-89-0016  
 )  
Respondent )

Toxic Substances Control Act - Rules of Practice - Pleadings - Multiple Counts

Where evidence established that count for unauthorized use of PCBs required proof of a fact separate and distinct from facts necessary to support count for improper disposal of PCBs, counts for improper disposal and unauthorized use were proper.

Toxic Substances Control Act - PCBs - Improper Disposal - Unauthorized Use

Notwithstanding that distillation of PCBs is a physical separation technique rather than a method of destroying PCBs, definition of disposal in § 761.3 is sufficiently broad to encompass such techniques and distillation of PCBs required an EPA alternate method permit pursuant to 40 CFR § 761.60(e). Because of anti-dilution rule (40 CFR § 761.1(b)), solvent contaminated with PCBs in the process of flushing PCB transformers is presumed to contain PCB concentration originally in transformers and use of distilled solvent to flush PCB transformers being processed for disposal, in the absence of EPA approval, was a violation of 40 CFR §§ 761.20 and 761.30.

Toxic Substances Control Act - Penalties - Civil Penalty Guidelines

Where evidence established that gravity or risks involved in improper disposal and use of PCBs were not those contemplated by PCB Penalty Policy (45 Fed. Reg. 59776) (1980), Penalty Policy was disregarded in determining penalty for violations.

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#### INITIAL DECISION

This is a civil penalty proceeding under section 16(a) of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). The proceeding was commenced on May 12, 1989, by the issuance of a complaint by the Director, Air, Pesticides and Toxics Management Division, U.S. EPA, Region IV, charging Respondent, General Electric Company (GE), with violations of the Act and applicable regulations, i.e., the "PCB Rule" (40 CFR Part 761). Specifically, GE was charged in Count I of the complaint with the improper disposal of 10,126 gallons of PCB material in violation of 40 CFR § 761.60(a). Count II charged GE with having processed for use a total of 10,126 gallons of solvent containing PCBs without a permit in violation of 40 CFR §§ 761.20(a) and 761.30. These disposal and use violations were alleged to have occurred during the period March 16, 1987 through August 12, 1987. It was proposed to assess GE a penalty of \$125,000 for the violation alleged in Count I and a penalty of \$100,000 for the violation alleged in Count II.

GE answered, denying the alleged violations, and requested a hearing.

During the extended pre-hearing period, several motions were decided, including the parties' respective motions for an accelerated decision.<sup>1/</sup> A hearing on this matter was held at EPA Headquarters during the period March 19-22, 1991.

Based on the entire record, including the briefs and proposed findings and conclusions of the parties,<sup>2/</sup> I make the following:

**FINDINGS OF FACT**

1. GE operates a service shop or center in Chamblee, Georgia. The shop repairs and rebuilds electrical equipment and, in addition, prepares PCB transformers and PCB items for disposal for its customers.
2. Prior to March of 1987, GE's Chamblee Shop used the oil-flush method of preparing PCB transformers for disposal, i.e., the transformers were drained, the transformers were then refilled with a solvent in which PCBs are readily soluble and allowed to soak for 18 hours.<sup>3/</sup> After the soak period, the

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<sup>1/</sup> The motions for accelerated decisions were denied by an order, dated August 30, 1990. GE is a party to six other proceedings involving the unpermitted operation of its solvent distillation system. GE's motion for consolidation of these proceedings was granted in part by an order, dated December 13, 1990.

<sup>2/</sup> Proposed findings of the parties not adopted are either rejected or considered unnecessary to the decision.

<sup>3/</sup> Oldham, Tr. 3-12. Mr. William Oldham, PCB facility supervisor at the Chamblee Shop during the period August 1986  
(continued...)

transformers were again drained. The transformer carcasses were then sent to an approved chemical waste landfill, while the PCB liquids were incinerated in an incinerator complying with 40 CFR § 761.70. See 40 CFR § 761.60(b)(1)(i)(B).

3. In the fall of 1986, GE purchased seven freon distillation units from Quadrex HPS, Inc., Gainesville, Florida. One of the units was installed at GE's Chamblee, Georgia facility and is the subject of the instant action, while the other six units were installed at various GE facilities in Chicago, Cincinnati, Cleveland, Philadelphia, Portland, Oregon and Houston, Texas and are the subject of the proceedings referred to supra at note 1.
4. The freon distillation unit at the Chamblee facility became operational on March 16, 1987. The distillation system as described by Mr. Oldham, consists chiefly of four components: a 1,500-gallon "clean" freon tank, a 1,500-gallon tank for PCB-contaminated freon, the "still" vessel or container and a PCB still bottom or holding tank of 134-gallon capacity (Tr. 3-20, 21; Schematic Diagram, GE Exh 38). The various tanks and the still are connected by associated piping and valves.
5. Mr. Oldham described operation of the system. The first step was to drain the PCB dielectric fluid from a transformer. This would be accomplished by attaching a hose to the drain

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<sup>3/</sup>(...continued)  
through February of 1988, described the flush as "10 seed mineral oil or something" (Tr. 3-13, 40).

valve located at the base of the transformer (Tr. 3-22, 23). The cover plate of the transformer would then be removed to allow air to enter and facilitate draining and the fluid would be pumped into a bulk storage tank. This PCB fluid is transported via bulk tank-trucks to a TSCA-approved incinerator (Tr. 3-42). The drain valve is secured and the cover hatch of the transformer is replaced by a cover plate having a small hole in the center. A fill nozzle from the clean freon tank is inserted in the hole and the unit is then filled with freon. Mr. Oldham described the nozzle as having an automatic shutoff control and as being similar to nozzles on gasoline pumps.

6. After the unit is filled with freon, the original cover hatch is reinstalled and the 18-hour soak period commences. An automatic timer is used to start the time period. Upon completion of the soak period, the process of draining the transformer is repeated and the PCB-contaminated freon is pumped to the PCB-contaminated freon tank (Tr. 3-24).
7. Mr. Oldham explained that, in order to start the still, a control is turned on and a fill valve selected which would drain PCB-contaminated freon into the still. A still alarm or setting prevents the still from being overfilled (Tr. 3-25, 26). The still has heating coils in the bottom and cooling or condensing coils at the top and works on the principle that the boiling point of freon is much lower than the boiling

point of PCBs.<sup>4/</sup> The mixture is heated to the boiling point of freon, the gaseous freon is cooled and returned to the liquid state in the condensing coils, collected in collection trays and transferred to the clean freon tank. Mr. Oldham estimated the capacity of the still as from 25 to 30 gallons and opined that it would take seven or eight hours to distill or process a batch of 600 to 700 gallons of fluid (Tr. 3-27, 28). The still can be operated on either an automatic, continuous feed or a manual feed basis (Tr. 3-29, 30).

8. Mr. Oldham testified that GE's primary reason for purchasing the solvent distillation system was to minimize the production of PCB wastes in the process of decommissioning PCB units (Tr. 3-33, 34). He pointed out that for each gallon of PCB dielectric fluid, which is removed from a PCB transformer, another gallon of PCB liquid is created when the transformer is flushed and that this liquid must be stored and transported for disposal (Tr. 3-34, 42). He stated that the freon flush system reduces the volume of waste by "close to" 50 percent and that this reduction in volume reduced the risks in handling, draining, storing and then transporting these liquids for incineration at TSCA-approved facilities.
9. GE commenced operation of the solvent distillation system at its Chamblee facility on March 16, 1987, and shut the system

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<sup>4/</sup> Mr. Salahuddin Razi, Manager, Manufacturing Engineering at GE's Apparatus Service Center in Chicago, testified that the boiling point of freon is 117.6°F (47°C), while the boiling point of PCBs ranges from 275°C to 420°C (Tr. 4-44, 47).

down on August 13, 1987 (Tr. 3-42, 43). Although he stated that he did not have any records of the exact times the system was turned off and on during this period, Mr. Oldham estimated that the system was operated approximately 12 times and that they flushed approximately 50 transformers involving 970 gallons of fluid.

10. On August 21, 1987, Consumer Safety Officer, Mr. William B. Ainslie, conducted a TSCA section 6 inspection of GE's Chamblee facility (Tr. 2-6; Inspection Report, C's Exh 8). The inspection was conducted in response to a report that GE was operating a freon distillation unit without an EPA permit. Mr. Ainslie presented his credentials to and was accompanied on the inspection by Mr. Bruce Matthias, Manager of the facility. The Chamblee Shop operates seven days a week, 24 hours a day and is a PCB equipment decommissioning facility rather than a reclassification facility. Mr. Ainslie explained that decommissioning means preparing [PCB] equipment for disposal by draining liquids and rinsing the carcasses so that the carcasses would qualify for disposal in a chemical waste landfill (Tr. 2-10). Reclassification, on the other hand, is the process of lowering the concentration of PCBs in a particular piece of equipment and keeping the equipment in use.
11. Mr. Ainslie took a photograph of a portion of the interior of the Chamblee Shop (C's Exh 10). The photo shows what appears to be a clean, well-maintained shop having a concrete floor

and two parallel concrete berms extending the length of the floor in the foreground, which Mr. Ainslie described as concrete pads (Tr. 2-13). Decommissioned equipment [transformers] is shown on the left, a PCB-storage area appears in the center, behind the concrete pads. The storage area contains drums, which Mr. Ainslie testified contained rags and PCB disposal materials. Two cylindrical drums are lying horizontally on a raised area at the far right and the freon distillation unit appears in the upper center of the photo (Tr. 2-14). Mr. Ainslie testified that the far side of one of the cylindrical tanks was marked "askarel." To the left of the freon unit are two large blue, upright tanks, which Mr. Oldham identified as bulk oil tanks for the storage of PCB dielectric fluid drained from transformers (Tr. 3-38). The control panel for the distillation unit is visible to the left of the tanks for clean and contaminated freon. View of the still bottom tank is obstructed by the concrete dyke in which the tanks and the distillation unit were located. The distillation system was not operating at the time of Mr. Ainslie's inspection. Mr. Ainslie was informed that transformer carcasses were sent to a chemical waste landfill for disposal and that all PCB liquids were incinerated at a TSCA-approved incinerator. He found no violations of record-keeping, marking or storage requirements.

12. When Mr. Ainslie asked for records concerning operation of the solvent distillation system, he was provided a single tally



sheet showing material processed (Tr. 2-15, 16). The tally sheet reflects that the freon distillation system commenced operation on March 16, 1987, that operation of the system ended on August 12, 1987, and that a total of 52 transformers and 10,126 gallons were processed (C's Exh 11). The tally sheet was prepared and signed by Mr. Oldham. He testified, however, that in retrieving this information from inventory logs there was an instance where he listed the weight of the transformer (625) rather than the number of gallons of dielectric fluid in the transformer (700 gallons) (Tr. 3-43-46). Additionally, he asserted that the two cylindrical horizontal tanks, one of 500-gallon capacity and the other of 330-gallon capacity which had been received from customers, were listed as having been flushed with 600 gallons of freon, when the tanks were actually flushed with mineral oil. With these corrections, he concluded that the actual number of gallons processed by the freon flush system was 9,601 gallons.

13. Although Mr. Oldham is well-versed in the PCB regulations and conducts training seminars for GE employees as to compliance with the regulations (Tr. 3-6-8), he testified that he had no information as to whether a permit was required for operation of the solvent-recovery system (Tr. 3-58). He stated that no one had informed him that a permit was required and that "we" [at the Chamblee Shop] were operating under the premise that a permit was not required. He indicated, however, that shop management decided to take the freon distillation unit out of

service after a customer, who was touring the facility, inquired whether they had a permit (Tr. 3-57).

14. In July of 1985, EPA granted Quadrex HPS, Inc. authority to use its solvent extraction method to remove PCBs from the interior of drained mineral oil transformers, heat transfer, and hydraulic fluid systems (letter, dated July 5, 1985, GE Exh 2). The approval was based upon the conclusion that the Quadrex extraction solvent method did not present an unreasonable risk of injury to public health or the environment and upon the ability of the Quadrex method to remove PCBs to a level below two parts per million with no detectable PCB emissions to air or releases to water. A two ppm limit was chosen because it was EPA's designated detection limit for PCB's in oil. The Quadrex systems were to be mobile units mounted on trucks. Quadrex was advised to inform its customers that transformers treated by its method and returned to service could not be reclassified unless the dielectric fluid was tested following a minimum of three months of in-service use, which is defined as use under electrically loaded conditions during which the temperature of the dielectric fluid was raised to a minimum of 50°C. See 40 CFR § 761.30(a)(2)(v).
15. Enclosed with the letter referred to in finding 14 was the approval authorization which reflected that PCBs were removed from drained transformers, heat transfer and hydraulic systems using trichloro, trifluoro-ethane (Freon 113) and that PCBs

were removed from the solvent by means of filters and a distillation system. The Quadrex decontamination unit was described as a completely enclosed mobile process which was designed to prevent release of PCBs to the environment. Approval of the system was conditioned on, inter alia, PCB concentrations in the PCB/freon oil or fluid mixture not exceeding 920 ppm in transformers and 3100 ppm in heat transfer and hydraulic systems. Concentrated still bottoms and filtration canisters were to be disposed of at an EPA-approved site.

16. In April of 1986, GE submitted to EPA an application to do R&D work on residual PCBs in askarel transformer carcasses (letter, dated April 22, 1986, GE Exh 4). The application contemplated, inter alia, that ten transformer carcasses would be decontaminated (flush-drained) using R113 (trichloro; trifluoro-ethane) (freon) as the flush or solvent, that the transformers would be disassembled and components cleaned by means of an ultrasonic degreaser and that contaminated freon would be recovered by means of a small still. The primary purpose of the work was to evaluate PCB levels on solid surfaces of askarel transformer components which could not be disposed of by combustion. The work was to be performed at GE's Apparatus Service Shop in Cleveland and was to be completed by February 1, 1987. EPA requested additional information as to the operation of the system by letter, dated May 20, 1986, which was apparently supplied, and approved the

application by letter, dated September 25, 1986 (GE Exhs 5 & 6). The letter granted approval for research and development on an alternate disposal method for PCBs in askarel transformers, relying in part on 40 CFR § 761.60(e) as authority.

17. During the period March 1985 to June 1988, Mr. Joseph DaVia worked in the Chemical Regulation Branch, PCB Disposal Section, in the Office of Toxic Substances, EPA (Tr. 1-232-33). His primary responsibilities consisted of reviewing and evaluating applications [for PCB disposal] which were alternatives to incineration. Mr. DaVia reviewed the GE R&D application referred to in the preceding finding and drafted the letters, which requested additional information and approved the application. On November 19, 1986, Mr. DaVia attended a meeting at GE's Cleveland Apparatus Shop where he was briefed as to progress of the work under the R&D approval and viewed the tear-down or processing of a drained and flushed transformer. In the course of this view, Mr. DaVia was informed that in one part of the shop GE was using the Quadrex system to flush and subsequently recover or separate PCBs from the flush solvent (Tr. 1-236-37). He was unaware of this operation being performed and stated that it was "certainly outside" of the R&D approval.
18. By a letter, dated April 15, 1987, GE was informed that EPA was aware, through the visit referred to in the preceding finding, that GE was, or is, performing some type of PCB

transformer flush/solvent recovery operation using the Quadrex HPS, Incorporated solvent extraction process. This letter was drafted by Mr. DaVia and pointed out that the flush/solvent recovery operation was apparently used to prepare PCB transformers for ultimate disposal in a chemical waste landfill conforming to 40 CFR § 761.75. The letter stated that the Quadrex PCB solvent extraction process was approved on July 5, 1985, by EPA for operation by Quadrex personnel only as an alternate method of PCB disposal pursuant to 40 CFR § 761.60(e). The letter explained that, in accordance with 40 CFR § 761.60(b)(1)(B), PCB transformers may be disposed of in a § 761.75 chemical waste landfill, provided the transformer was drained of all free-flowing dielectric fluid, filled with solvent, allowed to stand or soak for at least 18 hours and again thoroughly drained. GE was informed that PCB liquids were required to be disposed of in accordance with the PCB disposal regulation and that should GE flush PCB transformers with solvent and dispose of the solvent as though it contained the original concentration of PCBs present in the transformer, this would be an authorized activity. Should GE, however, recover the solvent by physically separating PCBs from the solvent for reuse in subsequent transformer flushing operations, a permit would be required for GE to continue this activity. GE was requested to submit a complete description of the GE PCB transformer flush/solvent recovery operation and the present status of the process. GE was further informed

that it was not being singled out for special scrutiny inasmuch as there were presently pending in EPA Headquarters three permit applications to operate solvent flush recovery systems and it was EPA's position that these systems must be permitted as disposal processes.

19. GE responded to EPA's request for information as to the operation of its solvent recovery system by a letter, dated July 9, 1987, signed by the counsel of its Apparatus Service Department, William P. Thornton, Jr. (GE Exh 11). The letter stated that the flush system used at the Cleveland Service Shop for filling drained PCB transformers with freon for the 18-hour soak period specified by 40 CFR § 761.60(b)(1)(B) involves the evaporation, redistillation and reuse of the freon material. The letter further stated that the redistilled freon had been tested and that the PCB concentration, if any, was below detection limits. Impurities, which were drawn-off, were assertedly handled in accordance with regulations and disposed of in a PCB incinerator. EPA's position that physical separation of PCBs from other material is an alternate destruction method required to be permitted under 40 CFR § 761.60(e) was stated to be well known.
20. Mr. Thornton stated, however, that before the freon flush system was placed in operation in Cleveland, he had discussed the matter with EPA personnel in Region V and that, as a result of that discussion, there was an agreement that

physical separation was an alternate disposal method only when used as an alternate to incineration or other approved disposal methods. If the separation process was not used as an alternate to disposal, it need not be permitted under 40 CFR § 761.60(e). Specifically, if the redistilled freon were stored and marked as PCBs, appropriate record-keeping identified it as PCBs and, if the material were ultimately disposed of in an [approved] incinerator, compliance with the letter and spirit of the regulation would have been achieved. The letter recited the beneficial aspects of the freon flush recovery system in the reduction of the quantity, costs and risks of handling, storing, transporting and disposing of PCB liquids. It was pointed out that the freon flush process is no more hazardous than any oil flushing system, at least when all of the material, including the freon is incinerated. While stating that GE had no problem with obtaining a permit, GE emphasized the benefits of the reuse of distilled freon and the prior discussions with Region V and requested reconsideration of EPA's position so that the system could continue to be used while its permit application was filed and considered.

21. EPA responded to the GE letter referred to in finding 19 by letter, apparently dated October 1, 1987 (GE Exh 12). GE was informed that its description of the PCB transformer flush/solvent recovery system indicated that EPA approval of the solvent recovery segment of the system was required

pursuant to 40 CFR § 761.60(e). The EPA letter referred to the prior letter of April 15, 1987, and emphasized that 40 CFR § 761.60(b)(1)(B) provides that PCB liquids, i.e., dielectric fluid and flush solvents, which are removed from PCB transformers shall be disposed of in accordance with para. (a) of this section, that is, in a § 761.70 incinerator or equivalent. GE was informed that if it wished to recover freon solvent containing PCBs for reuse in subsequent flushing operations, this disposal process required approval from EPA in accordance with § 761.60(e). This letter stated that EPA's position in this regard was long-standing and that five companies presently have approval from EPA to operate solvent recovery-type systems. GE was further informed that a permit application and test plan were required to be submitted in order for an alternate method of disposal to be considered. Various guidelines and quality assurance procedures for this purpose were enclosed.

22. On April 14, 1988, GE submitted a formal application and demonstration test plan for nationwide approval to treat Freon 113 containing PCBs (GE Exhs 14 and 15). The application, as amended, was ultimately approved by the Agency on November 14, 1989 (GE Exh 13). The approval letter stated that GE was permitted to physically separate PCBs at concentrations not exceeding 126,000 ppm from Freon 113, subject to listed conditions of approval. Findings included with and supporting the approval, Appendix II, para. 2, state that the GE solvent



distillation system is a completely enclosed process that is designed to prevent any release of PCBs to air, water or to surfaces. Other findings are to the effect that the GE Solvent Distillation System is a closed system, and does not emit harmful materials into the air, water, soils, or other surfaces (Id. para. 11).

23. As part of the process of approving the GE application referred to in finding 16, GE was required to demonstrate the operation of its still and that the laboratory utilized to analyze samples was capable of producing repeatable and reproducible test results. GE was granted approval to conduct such a demonstration, including a pre-demonstration test, by letter, dated June 15, 1989 (GE Exh 17). The pre-demonstration test was authorized in order to facilitate the demonstration and was to be limited to 400 gallons at a PCB concentration of about 100,000 ppm.<sup>5/</sup> Mr. Razi, identified supra note 4, was part of a GE team assembled to perform the tests at the Apparatus Service Center in Chicago (Tr. 4-5, 13, 14). The pre-demonstration test was conducted on June 16, 1989, and was limited to 100 gallons of solution having a PCB

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<sup>5/</sup> Regarding the pre-demonstration test, the letter authorizing the demonstration stated in part:

The pre-demo testing will occur the week of June 12, 1989, and all products will be separated out and stored according to the regulations as PCB wastes until EPA personnel have verified through sampling and analysis that the materials has been reduced to less than 2 parts per million PCB and can be subsequently considered unregulated.

concentration of 55,000 ppm (Tr. 4-23; GE Exh 18, Tab B at 5). During the distilling process, samples were drawn on an hourly basis from what Mr. Razi referred to as the "water separator" or "cold trap," which is connected to the still and, which in turn, is connected by a pipe to the clean freon tank (Tr. 4-25). These composite samples, and their duplicates, were analyzed by gas chromatography, resulting in an average of 1.8 ppm PCB (Tr. 4-26, 27; GE Exh 18, Tab C).

24. The demonstration was conducted during the period June 19 through June 23, 1989, and involved six separate still runs of approximately 400 gallons each (Tr. 4-17-22; Demonstration Test Report, GE Exh 18, Tab C). The last three runs were occasioned by the need for a "second pass" to reduce PCB concentrations to below two ppm (Tr. 4-29-33). PCB concentrations in the contaminated freon ranged from approximately 108,000 to approximately 130,000 ppm. According to Mr. Razi, these high "spiked" values were selected, because EPA insisted that the highest value processed in the demonstration would be the limit for subsequent processing (Tr. 4-39-41). Again samples were drawn hourly from the "cold trap" during the distilling process.
25. Mr. Razi affirmed Mr. Oldham's description (finding 7) of the operation of the still (Tr. 4-18). Although he was not personally familiar with the operation of the distillation system at the Chamblee Shop, Mr. Razi testified that there was no substantial change in the operation of the still pre-permit

and post-permit (Tr. 4-42, 52, 53, 55). The Demonstration Test Report states that during the demonstration the temperature of the heating coils was reduced to 190°F from 225°F and the still bottom dump temperature was reduced to 165°F from 180°F (Id. at 2). Mr. Razi described these changes as minor, asserting that the former change was made so that the boiling of the freon would be less rigorous [vigorous] and that the latter change was made simply to prolong the life of the dump valve, which had a maximum operating temperature in the 185° to 190° range (Tr. 4-44-46, 52). He considered these changes were incremental improvements in the process rather than major changes.

26. On August 16, 1983, EPA issued TSCA Compliance Program Policy No. 6-PCB-2, hereinafter Policy No. 6-PCB-2 (GE Exh 1). Policy No. 6-PCB-2 addressed the question of whether physical separation of PCBs from liquids and solids required EPA approval and answered the question in the affirmative "\* \* if the use or disposal of these liquids and solids avoids, or is an alternative to the disposal requirements that would have applied to the original material before separation" (Id. at 1). Policy No. 6-PCB-2 went on to state that an approval is required for physical separation activities that can be construed to be a part of, or an initiation of a disposal activity. An approval is not, however, required for physical separation activities which process PCBs during authorized

servicing activities and reuse the processed materials in equipment authorized for continued use under the PCB rules.

27. In discussing the rationale for the conclusions in the previous finding, Policy No. 6-PCB-2 acknowledged that EPA, in 1979, had interpreted "disposal" to mean only activities which alter or destroy PCB molecules, while activities which physically separate or concentrate PCBs from liquids or solids were judged not to constitute "disposal" and did not, therefore, require an approval. Examples of such techniques which physically separate PCB from liquids were listed as filtration, distillation and solvent extraction.
28. In 1982, after some experience with the mentioned policy, EPA assertedly realized that this approach had the potential for creating a major avenue for avoiding PCB disposal requirements. EPA reviewed the PCB regulations regarding physical separation and assertedly found that the rules clearly do not exempt PCB processing activities (including physical separation techniques) from the disposal requirements. It was pointed out that, while activities which process or distribute PCBs for purposes of disposal are not subject to processing and distribution in commerce bans, such activities are subject to disposal regulations. For this assertion, § 761.20(c)(2) was cited, which essentially provides that PCBs and PCB Items, having concentrations of 50 ppm or greater, may be processed and distributed in commerce in compliance with the requirements of this Part for purposes

of disposal in accordance with § 761.60. It was therefore concluded that, unless an activity is authorized by the disposal regulations, specific approval for such an activity must be obtained from the Regional Administrator or the Assistant Administrator for Pesticides and Toxic Substances in accordance with § 761.60(e).

29. Policy No. 6-PCB-2 stated, however, that a permit was not required to service electrical equipment for the purpose of reducing PCB concentrations. The Policy noted physical separation techniques can be used to service PCB-containing electrical equipment as long as the processed materials are ultimately returned to electrical equipment in accordance with § 761.30(a). An example of that type of activity was filtering PCBs from the transformers and returning the fluid to the transformer. It was pointed out that, because the processed liquids and solids are returned or reused in regulated equipment, EPA controlled the ultimate disposition of all processed materials and no disposal requirements are circumvented.<sup>6/</sup>

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<sup>6/</sup> Program Policy No. 6-PCB-2 further stated at 2 & 3:

In contrast, a permit is not required to service electrical equipment for purposes of reducing PCB concentrations. Physical separation techniques can be used to service PCB-containing electrical equipment as long as the processed materials are ultimately retained to electrical equipment regulated under the PCB rule. This type of servicing is authorized under 40 CFR § 761.30(a). Filtering PCBs from the dielectric fluid of transformers and returning that fluid to the transformer is an example of this type of activity. Because the  
(continued...)

30. By a letter, dated July 5, 1984, signed by Mr. Roy Clark, Chief of the Pesticides and Toxic Substances Branch, EPA, Region IV, addressed to Mr. John Haines, General Manager of American Industrial Waste, Inc. (AIW), EPA acknowledged receipt of a notice of intent to experiment with PCB [removal] through a distillation process (GE Exh 24). AIW was informed that the described distillation work was considered not to be activity which requires EPA waivers or approvals for the reason that physical separation of PCBs from other liquids or solids were not destruction or disposal activities required to be authorized in accordance with 40 CFR § 761.[60]. This advice was repudiated in a letter to AIW, dated August 14, 1985, which enclosed a copy of Policy No. 6-PCB-2, and stated in part, that through a comprehensive review and evaluation of

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<sup>6/</sup>(...continued)

processed liquids and solids are returned or reused in regulated equipment, EPA controls the ultimate disposition of all the processed materials and no disposal requirements are circumvented.

Without an EPA disposal approval, processed liquids and solids that formerly contained PCBs must be treated as if they still contain PCBs and may not be distributed in commerce without an exemption under section 6(e)(3)(B) of the Toxic Substances Control Act (TSCA). Therefore, it is possible to physically separate PCBs from liquids and solids without EPA approval as long as these liquids and solids are treated (used, stored, disposed of, etc.) as if they still contain their original PCB concentration. The PCB residue which results from physical separation activities, as well as any materials not eventually reused in regulated electrical equipment, must be disposed of in a manner which complies with section 761.60. In the event the separation method results in dilution of the PCBs, the original PCB concentration determines the required disposal method.

PCB removal and disposal processes, it has been determined that the solvent separation and distillation processes used by AIW are indeed activities requiring EPA approval (GE Exh 25). This letter was denominated a "Notice of Non-compliance" (NON).

31. AIW became a division of Ensco Environmental Services, which in turn is a wholly owned subsidiary of Ensco Inc. By letter, dated September 12, 1985, the president of Ensco Environmental Services (EES) replied to the NON referred to in finding 30, requesting reconsideration of the conclusion it was in violation of 40 CFR § 761.60(e) (GE Exh 26). The EES process was described as using clean solvent (trichlorofluoromethane, containing less than 10 ppm PCBs) to flush drained PCB transformers in order to comply with 40 CFR § 761.60(b)(1)(i)(B). Dirty solvent is removed from the transformers and directly pumped to the solvent distillation system. This system was stated to extract clean solvent containing less than 10 ppm PCBs and produce a still bottom that contains 99.99 percent of the PCBs removed from the transformers by the flushing process. The still bottoms were sent to Ensco's PCB incinerator at El Dorado, Arkansas for destruction. Extracted clean solvent was used to flush additional transformers. Approximately ten percent of the solvent in the dirty solvent was assertedly lost to the still bottoms in each distillation cycle.

32. EES contended that its solvent distillation system did not require specific approval from EPA pursuant to § 761.60(e), because the process was not an alternative method of destroying PCBs and PCB items. EES stated that every drop of solvent used to flush PCB transformers at its AIW facility was sent to Ensco's El Dorado facility which was approved for incineration of PCBs. EES pointed out that § 761.60(b)(1)(i)(B) required that PCB transformers be drained and flushed with a suitable solvent and that drained and flushed liquids be incinerated. EES maintained that its transformer flushing and solvent distillation operations conformed with this requirement.
33. Referring to Policy No. 6-PCB-2, EES emphasized that the first sentence of the Policy provided that "(t)he physical separation of PCBs from liquids and solids requires an approval if the use or disposal of these liquids and solids avoids, or is an alternative to, the disposal requirements that would have applied to the original material before separation." Because all of the solvent used to flush PCB transformers was incinerated, EES asserted that its solvent distillation process did not avoid and was not an alternative to the disposal requirements. Because physical separation processes were allowed without EPA approval where EPA controlled the ultimate disposition of all processed material, EES argued that no disposal requirements were circumvented.



34. EES's position as set forth in findings 31-33 was rejected in a brief letter from the Regional Administrator, dated October 8, 1985 (GE Exh 27). The letter pointed out that the regulation (40 CFR Part 761) prohibited most processing of PCBs and that once solvent was contaminated with PCBs by flushing a transformer, the solvent must be disposed of in an authorized manner. Reuse of the solvent was assertedly specifically prohibited unless authorized by a permit issued by EPA. Although EES applied for a permit (letters, dated November 15, 1985 and November 26, 1986, GE Exhs 28 and 29), it apparently continued to operate its solvent distillation system. By letter, dated December 19, 1986, the Regional Administrator informed Ensco that its AIW facility was operating without a permit pursuant to 40 CFR § 761.60(e) and that, unless it ceased operating within 30 days, an injunction would be sought through the U.S. Attorney. On May 13, 1988, EPA issued a complaint against EES, alleging, inter alia, the improper disposition of 740,342 gallons of PCB material from reclaimed solvents through a distillation method and the use of a like quantity of solvent containing PCBs without a permit (GE Exh 32). For these and other alleged violations, it was proposed to assess EES a penalty totaling \$915,000. The matter was ultimately settled for the sum of \$55,000 (Consent Agreement and Final Order, approved February 2, 1988, GE Exh 34).

35. As indicated (finding 19), GE stated in a letter, dated July 9, 1987, that, prior to commencing operation of its freon flush distillation system in Cleveland, the matter had been discussed with Region V personnel in Chicago and an agreement reached that physical separation [of PCBs] was an alternate disposal method only when used as an alternate to incineration or other approved disposal methods. Elaborating on this assertion, Mr. Thornton, in an affidavit submitted in support of GE's motion for an accelerated decision, identified the EPA employee spoken to as Ms. Trish Polton, the date of the conversation as January 25, 1985, and alleged that he specifically inquired of Ms. Polton as to the applicability of Policy No. 6, dated August 16, 1983. According to Mr. Thornton, he was informed by Ms. Polton that EPA would not require a permit to operate the Cleveland system inasmuch as it was not intended as an alternative to incineration of PCBs. On that basis and on the advice of counsel, GE allegedly began operation of its solvent distillation system in Cleveland, Chamblee and elsewhere.
36. GE subsequently learned that the correct name of the Region V employee identified in finding 35 was Ms. Trish Polston and at a pre-hearing conference on March 4, 1991, the ALJ ordered Complainant to make Ms. Polston available for an interview with counsel for GE prior to the hearing. Neither Ms. Polston nor Mr. Thornton were witnesses at the hearing. In a colloquy at the commencement of the hearing, counsel for GE stated that

the mentioned interview had taken place in a brief conference call in which counsel for Complainant also participated and that, following that interview, GE attempted to enter into a stipulation as to the content of the conversation (Tr. 1-8, 9). Counsel for Complainant rejected the proposed stipulation, characterizing it as irrelevant inasmuch as Mr. Thornton was not being called as a witness (Tr. 1-9, 10). Ms. Patricia Polston was quoted as stating that she did not recall any conversations with GE in January of 1985 and as denying ever working in the permitting section of EPA, Region V. Complainant has repeated this characterization of the conversation.<sup>1/</sup> It is clear that the versions of the telephone interview with Ms. Polston as reported by counsel for the parties differ markedly, but are not evidence. The ALJ rejected Complainant's argument that the January 1985 conversation with Ms. Polston as reported by Mr. Thornton was irrelevant, because of GE's failure to call him as a witness,

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<sup>1/</sup> Reply Brief at 14. In an effort to correct what it characterizes as a significant factual allegation without support in the record, counsel for GE assert that there is no basis in the record for the allegation Region V employee Ms. Patricia Polston had "no recollection of such a conversation [with GE]" (letter, dated July 29, 1991). Moreover, counsel assert that EPA's attempt to portray Ms. Polston as "never having worked in PCB permitting section" is a clear distortion of her job responsibilities. Counsel state that, in the mentioned telephone conversation, Ms. Polston made it clear that she worked in the Region V Branch with responsibility for PCB regulations and that one of her responsibilities was to answer telephonic inquiries as to PCB requirements. According to counsel for GE, Ms. Polston attributed her difficulty in recalling any particular conversation to the fact she had been involved in so many PCB inquiries. Assertedly, she acknowledged having numerous conversations with GE officials.

observing that it was relevant, if the determination of a penalty were reached (Tr. I-9). The ALJ also observed that GE's perception or understanding of the advice received from Region V would be in the record in the form of the letter from Mr. Thornton.<sup>8/</sup>

37. Dr. John Smith, Chief of the PCB Disposal Section in the Chemical Regulation Branch Office of Toxic Substances, EPA, qualified as an expert in the use and disposal aspects of PCBs and PCB regulations (Tr. 1-30). To Dr. Smith, the PCB regulations were divided into use and disposal activities and, although the generator or owner usually determined when PCBs should be disposed of, once PCBs were designated for disposal, they could not be used [without an EPA permit or approval] (Tr. 1-31, 32, 58). He testified that PCB transformer disposal is addressed in 40 CFR § 761.60(b) (Tr. 1-33). He pointed out that the mentioned section provides two methods for the disposal of PCB transformers, i.e., incineration or disposal of the transformer [carcass] in an EPA approved chemical waste landfill, provided the transformer was first drained of all dielectric fluid, the transformer was refilled with a flush solvent, allowed to soak for 18 hours and again drained. Dr. Smith emphasized that the PCB dielectric fluid

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<sup>8/</sup> Tr. I-13, 14. Although not stated at the time the mentioned ruling was made, the ALJ may not compel counsel to enter into a stipulation. Counsel for Complainant's version of the telephone interview with Ms. Polston is in the record and counsel for GE's version could have been treated as an offer of proof. GE counsel's letter, dated July 29, 1991, will be so regarded.

and the flush solvent, that is, PCB liquids, were required to be disposed of in accordance with § 761.60(a), i.e., in an incinerator (Tr. 1-34, 36-38). He stated that the only thing which could be done with the PCB liquid other than disposal was to store it for disposal or transport it to a storage or disposal facility.

38. Asked specifically whether § 761.60(b)(1)(i)(B)--the section providing for draining of dielectric fluid from PCB transformers, refilling with flush solvent, soaking for 18 hours and again draining--would allow physical separation of the PCB liquid into its solvent and PCB components prior to complying with paragraph (a) [disposal by incineration], Dr. Smith replied "(o)nly if it's part of the disposal permit" (Tr. 1-38, 39). Referring to § 761.60(e), alternate destruction methods, he opined that this section was written into the regulations to allow for technologies which didn't exist when the regulation was written. These technologies could be used as long as they were safe and met the same kinds of performance standards as incineration. He explained that standard was a destruction or removal efficiency of 99.9999 percent (Tr. 1-40). He defined the practical limit of detection of PCBs in solvent as two ppm. He described the disposal process as addressing incoming material and including its actual disposition. He pointed out that, if something [a PCB liquid] were regulated for disposal, it had to go to a permitted disposal facility and that, if something were done

to that liquid, other than storing it or transporting it for disposal, that something was part of a disposal process (Tr. 1-46, 47, 166-68, 170). He testified that destruction [for the purpose of the regulation] and as part of the disposal process begins at the point where the PCB liquid enters the distillation apparatus.

39. Dr. Smith testified that his office had issued several alternate method permits for PCB disposal by solvent distillation, Quadrex being the first in 1985, a company called PTI was next, Environmental Systems (ENSCO) was another and GE was the fourth (Tr. 1-48). Describing the permitting process, he stated that permits usually specify operating conditions such as PCB concentrations in the feed material, feed rates, incinerator operating temperatures and that these requirements enable EPA to monitor these activities and control the process (Tr. 1-49-56). The purpose was, of course, to prevent release of PCBs to the environment. Average processing time for the issuance of a permit is 12 to 18 months. According to Dr. Smith, his office had always considered solvent distillation as an alternate method of disposal when used as part of a process to dispose of PCB transformers in a chemical waste landfill (Tr. 1-57). He stated that there were some servicing authorizations where it may be possible to use solvent distillation without a permit. He reiterated his conclusion that the PCB universe is divided into disposal generally and use and that servicing is a use

authorization. The transformer had to be effectively in use or capable of being used and could not have been designated for disposal. He opined that solvent distillation of PCB liquid prior to obtaining an alternate method permit would not comply with § 761.60(a) as part of disposal (Tr. 1-58). He further opined that EPA's oversight of PCB disposal would be hampered without a permit and that the purpose of the disposal regulations was to enable PCB disposal to be carefully controlled. He pointed out that PCB concentrations could be reduced to less than two ppm through dilution and that without an alternate disposal permit, EPA would have no control over such activities (Tr. 1-59).

40. Asked whether distilled flush solvent could be reused, Dr. Smith replied in the negative, unless the solvent was effectively deregulated by a permit (Tr. 1-61). He explained that § 761.20(a) prohibited the use of PCBs and PCB liquids in other than a totally enclosed manner. Acknowledging that EPA permits [for solvent distillation systems] stated the systems were totally enclosed,<sup>2/</sup> he testified that designation was confined to the still, that is, the point of entry of the feed material into the still and the point of exit (Tr. 1-61, 125). To Dr. Smith, totally enclosed meant that there were no emissions from the system which were not captured and no release of PCBs to the environment (Tr. 1-61, 62, 131). He

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<sup>2/</sup> This is not strictly accurate as the permits use the term "completely enclosed" rather than totally enclosed (finding 22).

pointed out that § 761.30, use authorizations, specifically authorized servicing and reclassification of transformers, and opined this was because such activities were not totally enclosed.

41. Referring to solvent distillation, Dr. Smith testified that the process was not totally enclosed, because it was necessary to tap into a transformer in order to drain it (Tr. 1-63, 64). This was done a couple of times, first to drain the dielectric fluid and then to drain the flush [solvent]. He emphasized, however, that use authorizations for placing material back into a transformer were dielectric uses, which were for transformers in use or capable of being used and that once a transformer entered a disposal process, use authorizations were not applicable. He testified that flush materials could not be reused, pointing out that § 761.79, authorizing reuse of flush material [until the PCB concentration equalled 50 ppm] was applicable only to containers. He insisted that distilled flush solvent could not be used to flush another transformer without a permit.
42. Testifying under cross-examination with reference to Program Policy No. 6-PCB-2 and in particular to the statement on page 3 (supra at note 6), to the effect that ". . . it is possible to physically separate PCBs from liquids and solids without EPA approval as long as these liquids and solids are treated (used, stored, disposed of, etc.) as if they still contain their original PC concentration," Dr. Smith opined that the



quoted sentence meant the materials were still regulated for disposal and that an exemption was necessary to get out of the disposal loop (Tr. 1-77, 78). Although he acknowledged there was no time limit as to when the PCB residue, which resulted from physical separation activities, must be disposed of in a manner complying with § 761.60, he insisted that any material which was not part of an authorized use was regulated for disposal at the point of generation (Tr. 1-79). In further testimony, Dr. Smith stated that for all practical purposes no PCBs were destroyed in GE's solvent distillation process (Tr. 1-120). By "destruction" in this context, he meant the regulatory definition. He pointed out that, although GE's permit required that all PCBs be incinerated, there would be some residual PCBs, which were not measurable, in the distilled freon (Tr. 1-122). He estimated that ten percent of the PCBs would remain in a drained PCB transformer (Tr. 1-184, 190).

43. Distinguishing servicing activities from disposal, Dr. Smith answered in the affirmative a question as to whether a PCB transformer could be drained, the fluid distilled to produce a distillate heaving a PCB concentration of less than 50 ppm and the distillate used to retrofill the same transformer without a permit (Tr. 1-152-53, 161-62, 169). He stated that "(y)ou may put other fluids back into other dielectric fluids

into a PCB transformer that has been drained."<sup>10/</sup> He testified that for this purpose, distillation was not dilution. (Tr. 1-154). He emphasized, however, that the transformer had to be operating and not designated for disposal. The transformer would still be regulated unless and until it was reclassified pursuant to the regulation. According to Dr. Smith, placing drained distilled fluid from a PCB transformer into another transformer was not an authorized servicing activity.<sup>11/</sup> He maintained this position even though he acknowledged that distilling fluid for use in the same transformer could be accomplished without a permit. Referring to § 761.60(e), Dr. Smith denied that it required chemical destruction of PCBs (Tr. 1-181-82). He testified that § 761.60(e) required disposal equivalent to incineration, that some of the steps in the disposal process

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<sup>10/</sup> Tr. 1-153. He noted, however, that dielectric fluid from an askarel transformer could not [as a practical matter] be distilled, because "(t)here was not that much to distill off" [i.e., the PCB concentration was too high] (Tr. 1-157). He did not know of anyone who had ever tried to distill [such] dielectric fluid.

<sup>11/</sup> Tr. 1-162, 163, 169. Inasmuch as § 761.30(a)(2)(ii) provides in part that "PCB transformers may be serviced (including topping off) with dielectric fluid at any PCB concentration," the rationale for this conclusion is difficult to follow. Dr. Smith explained it on the basis of control, stating that once dielectric fluid was taken out of one transformer and put into another transformer, there was dilution, which was difficult to control (Tr. 1-163-65). Dilution is expressly allowed by the quoted regulation and the control problem seemingly exists even if the distilled fluid is replaced in the same transformer. In either event, the transformer is regulated as a PCB transformer unless and until it is reclassified.

could be destructive, but that all such steps did not have to be destructive.

44. Mr. David Hanneman, an employee of EPA since its inception in 1970 and currently an Environmental Protection Specialist in the Chemical Regulation Branch, Exposure Evaluation Division, Office of Toxic Substances, participated in the development of Program Policy No. 6-PCB-2 (Tr. 1-192-95). He testified that the Policy was issued to state the Agency's interpretation of how physical separation of PCBs would be viewed under the regulations. He pointed out that a [PCB] transformer, which was in use, could be serviced by draining the dielectric fluid, running the fluid through a filter to remove the PCBs and returning the fluid to the transformer (Tr. 1-198). He further pointed out that the filter and the fluid would still be regulated based on the original PCB concentration. Although he stated that distillation was not physical separation, he explained that the same process could be followed by distilling the transformer fluid, provided the fluid was returned to the same transformer (Tr. 1-198-99). He asserted that solvent distillation, where in the flush was returned to a different transformer, was specifically prohibited. Explaining the basis for this distinction, Mr. Hanneman indicated that returning the fluid (solvents) to the same transformer was considered servicing (Tr. 1-204-05). He claimed EPA had always taken the position that a permit was required for using or placing distilled dielectric fluid in

equipment other than that from which it came (Tr. 1-208, 210). In other testimony, he asserted that PCB liquids were either in use or [designated] for disposal and, if the liquids were not being used, the liquids were required to be disposed of based on the [PCB] concentration of the transformer (Tr. 1-213). He explained that distilled fluid [solvent] could be replaced in the transformer from which it was taken only if the transformer is in use (Tr. 1-231).

45. Ms. Constance Jones, a Senior Case Development Officer in EPA, Region IV at the time the complaint herein was filed, was Complainant's witness as to the computation of the proposed penalty (Tr. 2-25-35). Guidance used in calculating the proposed penalty was the 1980 PCB Penalty Policy, 45 Fed. Reg. 59776 et seq. (September 10, 1980) (C's Exh 12). With respect to Count I of the complaint alleging improper disposal of PCB materials, Ms. Jones testified that the amount of material processed, slightly over 10,000 gallons, and the length of time the facility operated, five months, were obtained from the inspector's report (Tr. 2-30, 31). She stated that GE did not have an alternate method disposal permit from Region IV or EPA headquarters for its distillation system pursuant to § 761.60(e). She pointed out that Count II, alleging improper use of reclaimed solvent in violation of §§ 761.20(a) and 761.30, was also based on information in the inspector's report as to the amount of material used and the period the unit operated (Tr. 2-32, 33). She emphasized that reclaimed

or distilled solvent [freon] was considered to be PCBs under the regulation and that use of such material [to flush a transformer] was not specifically authorized by § 761.30.

46. Because connections had to be made [in order to drain a transformer] and the material placed in drums after processing [distillation], Ms. Jones opined that the GE process was not totally enclosed (Tr. 2-34). According to Ms. Jones, the amount of material processed placed the violation in the Major Extent (extent of potential damage) category under the matrix in the Penalty Policy and improper disposal, being a Level I (probability of damage) violation, the gravity-based penalty (GBP) for Count I was \$25,000 (Tr. 2-41, 42; Penalty Assessment Worksheet, C's Exh 13). Because EPA had no specific information as to the number of days the distillation unit was operated, this figure was simply multiplied by five to reach the proposed penalty of \$125,000. Similarly for Count II, the Extent category was major and improper use being a Circumstances Level 2 violation, the gravity-based penalty was \$20,000, which multiplied by five resulted in the proposed penalty of \$100,000. Although Ms. Jones acknowledged that adjustments to the gravity-based penalty were permissible under the Penalty Policy, she testified that in this instance no adjustments were considered to be appropriate and none were made (Tr. 2-43, 44).
47. Under cross-examination, Ms. Jones affirmed that the Extent factor in the Penalty Policy was based on the notion the

greater the quantity [and concentration] of PCBs involved, the more likely it is that [some] harm would result [from the violation] (Tr. 2-50). She also affirmed that disposal violations were considered the most serious and classified as Level I and use violations classified as Level II, because of the probability of the release of PCBs into the environment (Tr. 2-51). She acknowledged, however, that under the TSCA Civil Penalty Guidelines (45 Fed. Reg. 59772) a violation was classified as Level 5 or 6, if there is a small likelihood that damage will result from the violation (Tr. 2-51, 52). Ms. Jones conceded that the Agency did not allege any actual releases of PCBs from the operation of the GE distillation system and that she had no knowledge of any such releases (Tr. 2-52-54). As for potential releases, she maintained that GE's failure to apply for a permit deprived the Agency of the opportunity to review the process and assess the risk. In further testimony, she acknowledged that the Penalty Policy provided for adjustments of as much as 15 percent up or down in the gravity-based penalty depending upon the altitude of the violator and that [statutory] considerations such as "other factors as justice may require" could result in proposed penalties differing by ten or twenty fold, which would, nevertheless, be consistent with the Penalty Policy (Tr. 2-56-59). Although Ms. Jones conceded that the Agency had no knowledge of the number of days GE operated the distillation system and made no effort to obtain such

information, she indicated that the penalty would have been substantially higher, if it were assumed each of the 30 entries on the tally sheet (C's Exh 11) was a separate day of violation (Tr. 2-91-93, 101-03). She acknowledged, however, that some of the quantities on the tally sheet were very small amounts, making it likely these quantities would be combined for distillation.

48. Mr. Glenn J. Kuntz, a former EPA employee and an environmental consultant presently employed at the Plexus Engineering Group in Alexandria, Virginia, is the holder of degrees in biology, environmental engineering and law (Tr. 4-57-61). Mr. Kuntz, who appeared as a witness for GE, qualified as an expert in the PCB Penalty Policy and EPA PCB penalty calculations. In preparation for his testimony, he had reviewed the exhibits submitted by the parties (Tr. 4-65). Based on the fact GE ceased operation of its distillation system in August of 1987 and wasn't informed that a permit was required until October of that year, he opined that it would be appropriate not to assess any penalty (Tr. 4-69-71). Because Mr. Kuntz considered that the disposal and use counts arose out of the identical conduct, he was of the opinion that there was no basis for two counts. (Tr. 4-71, 72). He opined that, if there were a violation, it was disposal. He pointed out Level I [in the Penalty Policy] was for violations representing grave risks of harm to the environment or human health and testified that the disposal herein presented neither a threat

to the environment or health (Tr. 4-73). Asked what Circumstances Level GE's alleged violation would warrant, he considered a high -range Level 2 violation or \$20,000 would be fair (Tr. 4-74, 75). He emphasized, however, that this assumed a Major Extent, which was the same as if 10,000 gallons of material had been spilled on the ground, and doubted that such a characterization of the activity at issue here was fair (Tr. 4-76).

49. Mr. Kuntz pointed out that Step 2 in the penalty calculation is to increase or decrease [the gravity-based penalty] because of culpability and that a key factor in determining culpability is the attitude of the violator (Tr. 4-77). The attitude of the violator is measured by good faith efforts to comply with the regulations, promptness of corrective actions and assistance to EPA in minimizing any harm to the environment caused by the violation. According to Mr. Kuntz. GE met these requirements, because GE provided information as to its process when requested, it shut the facility down before it was notified that a permit was required, there is not even an allegation of any harm to the environment and the process minimized the quantity and risk of waste disposal (Tr. 4-77-79). He concluded that GE was entitled to the reduction of 15 percent specified by the policy, which would reduce the GBP penalty by \$3,000 to \$17,000. Opining that multipliers were appropriate for egregious violations, which were wilful in nature, he did not think any multiplier was warranted in



this instance (Tr. 4-80-83, 109-10). Under cross-examination, Mr. Kuntz conceded that, because of the volume of material involved in the violation, there was no choice but to classify the extent of the violation as "Major" (Tr. 4-92).

#### C O N C L U S I O N S

1. Under the PCB Rule, 40 CFR Part 761,<sup>12/</sup> PCBs and PCB Items are either "in service" or "designated" or "being processed" for disposal. GE's actions in draining PCB transformers and flushing the transformers with freon or other solvent for its customers are part of a disposal process.
2. Although distilling PCB contaminated freon does not constitute "destruction" of PCBs in the ordinary or dictionary sense, it is an act of disposal in the regulatory sense not authorized by § 761.60 and thus requires an alternate method permit in accordance with § 761.60(e). Because GE did not have such a permit, it violated § 761.60 by distilling PCB contaminated freon.
3. Because the distilled freon is assumed, for regulatory purposes, to contain the concentration of PCBs originally contained in the transformer, use of distilled freon to flush a PCB transformer which has been designated for disposal constitutes use of PCBs not authorized by §§ 761.20 or 761.30. Because such use by GE is a separate act from disposal

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<sup>12/</sup> Unless otherwise indicated, references to the regulation are to 40 CFR Part 761 (1986).

requiring separate elements of proof, counts for improper disposal and unauthorized use of PCBs are proper.

4. Only the still in the GE system may be considered totally enclosed.
5. For the violations enumerated above, GE is liable for a civil penalty in accordance with section 15 of the Act (15 U.S.C. § 2615). Risks of harm or gravity of the violations shown here are not those contemplated by PCB Penalty Policy, 45 Fed. Reg. 59776 (1980), and the Penalty Policy is disregarded in determining the penalty.

#### D I S C U S S I O N

##### A. Count 1 - Disposal

Section 6(e) of TSCA (15 U.S.C. § 2605(e)) clearly classifies "disposal" and "use" of PCBs as separate activities.<sup>13/</sup> To

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<sup>13/</sup> TSCA § 6(e) provides in pertinent part:

(e) Polychlorinated biphenyls

(1) Within six months after January 1, 1977, the Administrator shall promulgate rules to--

(A) prescribe methods for the disposal of polychlorinated biphenyls, and

(B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

\* \* \* \*.

See also the proposed regulations prohibiting the manufacturing, processing, distribution in commerce and use of PCBs, 43 Fed. Reg. 24802 (June 7, 1978), Attachment A.

comply with the Act, EPA proposed disposal and marking requirements for PCBs on May 24, 1977 (42 Fed. Reg. 26561, 1977) and finalized such regulation on February 17, 1978, effective April 18, 1978 (43 Fed. Reg. 7150 et seq., 1978). As indicated, note 13 supra, the Agency proposed rules to implement provisions of the Act prohibiting the manufacture, processing, distribution in commerce, and use of PCBs with limited exceptions on June 7, 1978 and finalized such regulation on May 31, 1979 (44 Fed. Reg. 31514 et seq., 1979), effective July 2, 1979. This document integrated the previously promulgated disposal and marking rule.

The summary of the mentioned rule (44 Fed. Reg. 31514) makes it clear that the rule. . . "(2) (p)rohibits the processing, distribution in commerce, and use of PCBs except in a totally enclosed manner after July 2, 1979;" and "(3) (a)uthorizes certain processing, distribution in commerce, and use of PCBs in a non-totally enclosed manner (which would otherwise be subject to the prohibition described above);".

Consistent with the foregoing, 40 CFR § 761.30(a) and (c), § 761.20(a) and (c) after 1982,<sup>14/</sup> prohibited the processing, distribution in commerce, and use of PCBs or PCB Items in other than a totally enclosed manner within the United States or for export from the United States, except for purposes of disposal,

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<sup>14/</sup> Part 761 was recodified to the present designations (47 Fed. Reg. 19527, May 6, 1982).

unless authorized by § 761.31.<sup>15/</sup> Non-totally enclosed use authorizations provided by § 761.31(a), § 761.30 after 1982, include servicing, rebuilding of PCB contaminated transformers and reclassification.<sup>16/</sup> Accordingly, it is clear that the rule restricted non-totally enclosed uses of PCBs to those specifically listed and prohibited any other distribution in commerce and

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<sup>15/</sup> Sections 761.30(a) and (c) provided:

(a) No person may process, distribute in commerce, or use any PCB or PCB Item in any manner other than in a totally enclosed manner within the United States or export any such PCB or PCB Item from the United States unless authorized under § 761.31 of this Subpart. Section 761.30(a) is superseded by § 761.30(c) for processing and distribution in commerce of PCBs and PCB Items on the dates when that section becomes effective.

\* \* \* \*

(c) Effective July 1, 1979, no person may process or distribute in commerce any PCB or PCB Item for use within the United States or for export from the United States without an exemption except that:

(1) PCBs or PCB Items sold before July 1, 1979, for purposes other than resale may be distributed in commerce only in a totally enclosed manner after that date;

(2) PCBs or PCB Items may be processed and distributed in commerce in compliance with the requirements of this Part for purposes of disposal in accordance with the requirements of § 761.10;

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Section 761.20(c) contains exceptions for excluded manufacturing processes and recycled PCBs which were not included in former § 761.30. These exceptions are not relevant here.

<sup>16/</sup> Former § 761.31(a) (1979) is set forth on Attachment B. Although this section has been amended, it's basic thrust is unchanged.

processing of PCBs and PCB items, unless for purposes of disposal in accordance with § 761.10 (§ 761.60 after 1982).

The processing and distribution in commerce bans are the basis for the distinction between servicing permitted by the owner of electrical equipment containing PCBs and a service or repair company. For example, the owner of a PCB transformer could add PCBs to the transformer in the course of servicing, while GE as a service or repair company could not legally do so without processing and distribution authorizations and a yearly exemption issued by EPA pursuant to § 6(e)(3)(B) of the Act.<sup>17/</sup>

The foregoing serves to buttress the conclusion that GE's action in draining PCB transformers and flushing the transformers with freon or other solvent is part of a disposal process. Indeed, GE has acknowledged that it was processing transformers for disposal (Initial Brief at 30).

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<sup>17/</sup> Servicing activities permitted by the owner of a transformer as distinguished from a service company were explained in the preamble to the ban rules proposed on June 7, 1978, 43 Fed. Reg. 24807, Attachment A. These rules were not changed when the regulation was finalized (44 Fed. Reg. 31532, May 31, 1979).

EPA's initially proposed rules<sup>18/</sup> as well as those in effect at the time of the actions referred to in the complaint,<sup>19/</sup> defined disposal broadly as including "actions related to containing, transporting, destroying, degrading, decontaminating or confining PCBs and PCB Items." PCB transformers were received by GE from its customers for processing for disposal. PCB contaminated freon was created when these transformers were flushed with freon in order to qualify the transformers for disposal in a chemical waste landfill in accordance with § 761.60(b). GE's action in distilling this contaminated freon was for the purpose of decontamination and thus clearly within the cited definition of disposal. Because distillation does not destroy PCBs, any

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<sup>18/</sup> The preamble to the proposed rule, 43 Fed. Reg. 26571 (May 24, 1977) stated that "disposal" is defined very broadly to include any action that may be related to the ultimate disposition of a substance, article, or mixture. Accordingly, "disposal" was defined, proposed § 761.2(g), as follows:

(g) "Disposal" means to intentionally or accidentally discard, throw away, or otherwise complete or terminate the useful life of an object or substance. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating, or confining those substances, mixtures, or articles that are being disposed.

<sup>19/</sup> The 1986 regulation (40 CFR § 761.3) defined "disposal" thusly:

"Disposal" means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks, and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, degrading, decontaminating, or confining PCBs and PCB Items.

"disposal" is in the regulatory sense, that is, it reduces the PCB concentration to below the regulatory threshold of 50 ppm and probably to at or below the practical detection limit of two ppm (findings 19, 23, 24 and 38).

With exceptions not applicable here, § 761.60(a)(1) provides that PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70.<sup>20/</sup> Regarding PCB articles, including PCB transformers, § 761.60(b) provides that PCB transformers shall be disposed of in an incinerator which complies with § 761.70 or in a chemical waste landfill which complies with § 761.75, provided that the transformer is first drained of all free flowing liquid, filled with solvent and allowed to stand for at least 18 hours. Resulting PCB liquids, which include PCB contaminated solvents, are to be disposed of in accordance with para. (a), i.e., incinerated. This leaves no room for other methods of disposal. Keeping in mind that the definition of disposal includes decontaminating, e.g., reducing the PCB concentration to below the regulatory threshold of 50 ppm, GE's

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<sup>20/</sup> Section 761.60(a) provides:

(a) PCBs. (1) Except as provided in paragraphs (a)(2), (3), (4), and (5) of this section, PCBs at concentrations of 50 ppm or greater must be disposed of in an incinerator which complies with § 761.70.

The exceptions involve mineral oil and other PCB liquids containing a PCB concentration of 50 ppm or greater, but less than 500 ppm; non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, rags, or other debris and all dredged materials and municipal sewage treatment sludges containing PCBs at concentrations of 50 ppm or greater (§ 761.60(a)(2), (3), (4) and (5)).

argument that no violation occurred, because all PCB liquids were eventually incinerated in accordance with § 761.60(a), is rejected.

The foregoing conclusions are fully supported by the expert testimony of Dr. John Smith, who testified that the PCB regulations are divided into use and disposal activities, that once PCBs are designated for disposal, they may not be used without an EPA permit or approval, and that disposal of PCB transformers is addressed in § 761.60(b), which allows two methods of PCB transformer disposal, i.e., incineration or disposal in a chemical waste landfill (finding 37). The latter method is permissible only if the drain, refill with solvent, soak and redrain procedure specified by § 761.60(b)(1)(i)(B) is followed. Dr. Smith emphasized that the resulting PCB liquids must be incinerated as specified in § 761.60(a) and that the only things which could be done with the PCB liquid other than disposal were to store it for disposal or transport it to a storage or disposal facility. He testified that physical separation of PCB liquid into its solvent and PCB components prior to incinerating the liquids could properly be accomplished only if authorized by a disposal permit (finding 38).

On its face, § 761.60(e) applies only to alternate methods for the destruction of PCBs.<sup>21/</sup> This reading of § 761.60(e) is

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<sup>21/</sup> Section 761.60(e) provides:

(e) Any person who is required to incinerate any PCBs and PCB Items under this subpart and who can demonstrate that an alternative method of destroying PCBs and PCB Items exists and that this alternative method can achieve a level of performance equivalent to § 761.70 incinerators or high efficiency boilers as provided in

(continued...)



supported by Dr. Smith's opinion that the section was written into the regulation to allow for the use of [PCB destruction] technologies which did not exist when the regulation was written (finding 38). This is undoubtedly the reason for the Agency's initial interpretation as stated in Policy No. 6-PCB-2 (finding 27) that alternate disposal [destruction] technologies contemplated by § 761.60 involved only activities which altered or destroyed PCB molecules. This reading of § 761.60(e), which read in isolation is correct, makes forgivable Region IV's advice to AIW that a permit was not required for activities involving the physical separation of PCBs from other liquids.<sup>22/</sup> The record shows, and there is no

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<sup>21/</sup> (...continued)

paragraph (a)(2)(iv) and (a)(3)(iv) of this section, may submit a written request to either the Regional Administrator or the Assistant Administrator for Pesticides and Toxic Substances for an exemption from the incineration requirements of § 761.70 or § 761.60. Requests for approval of alternate methods that will be operated in more than one region must be submitted to the Assistant Administrator for Pesticides and Toxic Substances except for research and development involving less than 500 pounds of PCB material (see paragraph (i)(2) of this section). Requests for approval of alternate methods that will be operated in only one region must be submitted to the appropriate Regional Administrator. The applicant must show that his method of destroying PCBs will not present an unreasonable risk of injury to health or the environment. \* \* \* \*

<sup>22/</sup> Finding 30. The same seemingly could be said for the similar advice GE allegedly received from Region V. It is, however, not clear that Mr. Clark's letter to AIW was written with an awareness of Policy No. 6-PCB-2, while, according to Mr. Thornton (finding 35), he specifically inquired of Ms. Polston as to the applicability of the Policy to GE's solvent distillation system.

dispute, that GE's distillation system does not destroy or alter PCBs or PCB molecules.

Section 761.60(e) may not be read in isolation, however, and in view of the broad definition of disposal as encompassing activities relating to, *inter alia*," destroying, degrading, decontaminating PCBs and PCB Items" (*supra* note 19) and the location of § 761.60(e) in § 761.60 entitled "Disposal requirements," the Agency's apparent reading of an "alternative method of destroying PCBs" in § 761.60(e) as equivalent to an alternative method of "disposal of PCBs" is considered reasonable.<sup>23/</sup> It is, of course, clear that TSCA § 6(e)(1)(A) authorizes the Administrator to prescribe methods for the disposal of PCBs and, any other interpretation of the regulation, absent an amendment or revision thereto, would mean that, other than alternate methods of destroying PCBs when authorized in accordance with § 761.60(e), methods of disposal would be limited to those listed in § 761.60.

There is nothing in Policy No. 6-PCB-2, which would support or require a different result. As indicated previously, the Agency, apparently because incineration in accordance with § 761.60(a) destroys PCBs and because § 761.60(e) literally refers to alternate

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<sup>23/</sup> In the Notice of receipt of GE's application for nationwide approval to dispose of PCBs by use of a solvent distillation system (53 Fed. Reg. 17761, May 18, 1988, GE Exh 14) and in the approval of the application on November 14, 1989 (GE Exh 13), the Agency relied in part on § 761.60(e), apparently regarding disposal as synonymous with "destroying" PCBs. The definition of disposal includes "destruction." Webster's Third New International Dictionary (1986).

methods of destroying PCBs meeting the standards of high performance incinerators, originally interpreted disposal as limited to activities which alter or destroy PCB molecules, thus excluding physical separation activities such as filtration and distillation. This approach was modified after EPA realized that it had the potential for circumventing the disposal requirements and creating unnecessary risks. The potential for circumvention arises, because distillation reduces the PCB concentration to below the regulatory threshold of 50 ppm. Because, as we have seen, the definition of disposal has from the inception of the regulations been sufficiently broad as to encompass physical separation activities, EPA's policy as enunciated in 6-PCB-2 is consistent with that definition.

The only other matter in Policy No. 6-PCB-2 warranting comment is the paragraph on page 3, supra at note 6, which in substance provides that without an EPA disposal approval, processed liquids and solids formerly containing PCBs must be treated as if they still contain PCBs and that it is possible to physically separate PCBs from liquids and solids without an EPA approval as long as these liquids and solids are treated (used, stored, disposed of, etc.) as if still containing their original PCB concentration. Dr. Smith opined that the cited sentence meant that the materials were still regulated for disposal, in effect, that the reference was to authorized servicing activities, for he insisted that any material which was not part of an authorized use was regulated for disposal at the point of generation (finding 42). This

interpretation is reasonable, because it is in accord with the sentence following which provides that the PCB residue, which results from PCB separation activities, as well as any materials not eventually reused in regulated electrical equipment must be disposed of in a manner complying with § 761.60. More importantly, any other interpretation would negate the conclusion in the opening paragraph of the Policy that "(a)n approval is required for physical separation activities that can be construed to be part of, or an initiation of a disposal activity."

GE argues that Policy 6-PCB-2 is a "legislative" rule, creating new or expanded obligations, rather than an "interpretive" rule, and thus is invalid, because it was not promulgated in accordance with notice and comment requirements of the Administrative Procedure Act (Initial Brief at 55 et seq.). This issue was alluded to, but not finally decided, in the order of August 30, 1990, which denied the parties' respective motions for an accelerated decision and opined the better view was that the Policy was an interpretive rule. This was because the Policy purported to interpret existing regulations and thus prima facie complied with the requirement for an interpretive rule as a statement of what an agency thinks a statute or regulation means. See, e.g., National Latino Media Coalition v. F.C.C., 816 F.2d 785 (D.C. Cir. 1987). It is, of course, true that the Policy recites EPA did not initially interpret disposal as including PCB separation activities and the view that disposal included only activities which destroy or alter PCB molecules is in accord with

disposal as contemplated by § 761.60. This limited view of disposal, however, is not in accordance with the broad definition of the term in § 761.3 and in view of the potential for avoidance of PCB disposal requirements [if separation activities were not regulated], the Agency has satisfactorily explained the reason for its change in interpretation. Accordingly, it is concluded that Policy No. 6-PCB-2 does not impose requirements not fairly encompassed within the existing regulation<sup>24/</sup> and is an interpretive rule.

B. Count II - Improper Use

As indicated (supra note 13), TSCA § 6(e) classifies use and disposal as separate activities and this separation is reflected in the regulation. Section 761.20(a) makes it clear that the only authorized uses of PCBs, other than in a totally enclosed manner, are those listed in § 761.30. Section 761.30(a) authorizes use of PCBs at any concentration in transformers and use of PCBs for purposes of servicing including rebuilding these transformers for the remainder of their useful lives subject to listed conditions. This language and the conditions make it clear that use authorizations are limited to transformers in use or in storage for reuse.

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<sup>24/</sup> This conclusion distinguishes the Policy from cases such as *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317 (D.C. Cir. 1988), wherein a VHS model, not cited in the regulation, was a binding criterion used to determine eligibility for delisting hazardous waste.

GE having acknowledged that the transformers of concern here were being processed for disposal, it is necessary to briefly address two of GE's arguments, i.e., that distillation is not dilution and that its system operated in a totally enclosed manner. As to the former, it is clear that dilution of PCBs occurs the moment freon or other solvent is added to a drained PCB transformer and the regulation not recognizing this dilution, i.e., the PCBs are considered as still having the concentration originally contained in the transformer, it is of little moment whether subsequent distillation constitutes further dilution or, as GE argues, concentration of PCBs. The initial dilution not being recognized as bringing PCB concentration below the regulatory threshold, subsequent activities cannot alter that rule. Accordingly, when distilled freon is used to flush a drained PCB transformer, which is being processed for disposal, it is a use of PCBs not authorized by §§ 761.20 or 761.30 and thus, an unauthorized use of PCBs. This is a fact not required to support the count for improper disposal and thus two counts are proper.

"Totally enclosed manner" is defined in § 761.3 as meaning "any manner that will ensure no exposure of human beings or the environment to any concentration of PCBs." Because the acts of draining and flushing a PCB transformer as described by Mr. Oldham (findings 5 and 6) involve connecting, disconnecting, removing and replacing drain hoses, cover plates and fill nozzles, resulting in likely human exposure to PCBs through the air (fugitive emissions) and an attendant possibility of spillage or drippage, it is

concluded that these activities do not ensure no exposure of human beings to PCBs and may not be considered "totally enclosed." Accord, Dr. Smith, findings 40 and 41, and Ms. Constance Jones, finding 46. Although the still may be considered totally enclosed, distilling PCBs drained from PCB transformers being processed for disposal constitutes disposal of PCBs, and, under the statute, whether a process or activity is totally enclosed is relevant only to the use of PCBs.

As we have seen (finding 22), findings accompanying the nationwide approval for GE to treat (physically separate) Freon 113 containing PCBs describe the system as "completely enclosed" and designed to prevent the release of PCBs to air, water or to surfaces. Although any distinction between "completely enclosed" and "totally enclosed" may be more semantical than factual, Dr. Smith testified that alternate destruction [disposal] technologies under § 761.60(e) could be used [approved] as long as these technologies were safe and met the same performance standards as incineration (finding 38). The finding that the GE system was completely enclosed was likely intended to demonstrate that the system was safe. Be that as it may, for the reasons previously stated, only the still may be considered totally enclosed within the cited definition.

#### C. Penalty

Complainant has computed the proposed penalty for improper disposal, using the 1980 PCB Penalty Policy (C's Exh 12), by taking the total amount of PCBs involved in the violation (10,126,

actually 9,601 gallons) in order to reach Circumstances Level 1, Major Extent on the Penalty matrix (\$25,000), and multiplying the result by five, the number of months over which the system operated. Essentially the same method was used in computing the penalty for unauthorized use, multiplying \$20,000, Major Extent, Circumstances Level 1 times five. This, as Mr. Kuntz pointed out (finding 48), was the same as assuming the entire 10,000 (9,600) gallons were spilled on the ground at one time. This, of course, bears no relationship to the facts and greatly exaggerates any actual risk present here. Although Complainant has cited Mr. Kuntz's testimony to support its contention that the volume of material makes it mandatory the extent of the violation be classified as Major (finding 49), Mr. Kuntz's testimony must be considered in the light of his opinion that no multiplier was appropriate in this instance.

The Penalty Policy classifies all improper disposal as Circumstances Level 1 of the penalty matrix, because of the grave risks to human health and the environment such disposal is considered to present. The examples given, however, operating disposal facilities under conditions not complying with regulations and uncontrolled discharges (45 Fed. Reg. 59780) make it clear that the concern is over actual or potential exposures of humans or the environment to PCBs. This concept of disposal bears little relationship to the situation here where the improper disposal arises solely because of the expansive definition of the term in the regulation. The facility where the distillation was



accomplished had a concrete floor and the distillation unit was behind a concrete dike (finding 11). Moreover, GE continued to handle the material as PCBs, e.g., marking, entering the material as PCBs in its records and eventually disposed of the material in compliance with § 761.60(a). Therefore, the risks of any actual or potential discharges or other exposures of PCBs to humans or the environment were remote.

In view of the foregoing, the only risks of any consequence inherent in the violation as committed arise from the fact distillation reduced the PCB concentration to less than the regulatory threshold of 50 ppm, and, most likely to less than the practical detection limit of two ppm. Dr. Smith described the problem as a lack of EPA control over the disposal process (finding 39). Accord, Ms. Constance Jones who testified that GE's failure to apply for a permit deprived the Agency of an opportunity to assess the risk (finding 47). The risk is that, due to the low PCB concentration, the material might be handled and disposed of as non-PCB. Because of the controls exercised by GE, that risk, under any fair assessment of the evidence here, was remote. The Agency's actions here belie any thought the actual or potential risks of damage or harm were considered to be serious, because it was aware GE was operating a solvent distillation system in Cleveland as early as November 1986, it made no inquiry of GE until the following April and did not finally inform GE a permit was required until October 1, 1987 (findings 17, 18 and 21). Moreover, although the record reflects that EPA takes elaborate precautions and an

inordinate amount of time to approve an alternate method permit pursuant to § 761.60(e), no significant changes were made in operation of GE's system pre-permit and post-permit (finding 25).

The Penalty Policy classifies all improper use as Circumstances Level 2, because of the perceived increase/risk presented by such activities. For the reasons set forth above concerning improper disposal, risks of actual or potential exposure from the improper or unauthorized use shown here were remote. The record shows that the distillation system was operated approximately 12 times over an approximate five-month period and, if it be assumed that unauthorized use of distilled freon occurred on the same number of days, application of the Penalty Policy would result in punitive and draconian penalties for what the record reflects are violations presenting nominal risks.<sup>25/</sup> The purpose of penalties is deterrence not punishment.

It is therefore concluded that the Penalty Policy will be disregarded as permitted by the Rules of Practice (40 CFR § 22.27(b)), for the reason that the assumptions as to risks under which the classifications of Circumstances Levels for improper

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<sup>25/</sup> Using the proportional penalty calculation (Table VI of the Policy at 59778) and giving effect to the 20 percent concentration reduction set forth in Table II, because flushing the transformers with freon is an authorized disposal activity, the daily penalty for improper disposal would be \$14,375 calculated as follows: 96,000#, approximate total weight of material ÷ 2.2# in a kg = 43,636 -20% = 34,909 kg ÷ 5,000 kg = 6.9 x \$25,000 = 172,500 ÷ 12 = \$14,375. If no adjustments were made, the total penalty for improper disposal would be \$172,500. Assuming unauthorized use occurred on the same number of days and that the same amount of material is involved, the daily penalty would be 6.9 x \$20,000 = \$138,000 ÷ 12 = \$11,500.

disposal and improper use were made are not reflective of the situation here. A penalty of \$40,000, \$25,000 for Count I and \$15,000 for Count II will be assessed against GE.<sup>26/</sup> Although this amount is approximately 18 percent of the amount proposed by Complainant, it, nevertheless, is a substantial penalty for what the record reflects are nominal risks. It is thus amply reflective of the "gravity" of the violations.<sup>27/</sup>

It should be emphasized that GE's operation of its solvent distillation system was beneficial in that it reduced by approximately 50 percent the quantity of PCB wastes involved in

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<sup>26/</sup> Approximately the same result would be obtained if the violations were assigned Circumstances Level 6 as permitted by the Guidelines for the Assessment of Civil Penalties under Section 16 of TSCA for small or low risk of damage situation (45 Fed. Reg. 59772) and assigning the disposal violation Major Extent (\$2,000) and the use violation Significant Extent (\$1,300). These figures would be multiplied by 12, the number of days the violations are considered to have continued. See, e.g., Ketchikan Pulp Company, Docket No. TSCA-X-86-01-14-2615 (Initial Decision, December 8, 1986) (because of remote risk of damage or harm, improper use assigned Circumstances Level 5 on Penalty Policy matrix). Although it is arguable that, because of the apparent 800 gallon batch size, 9,600 gallons processed in 12 runs, none of the violations warrant a designation more than Significant Extent as to damage potential, some of the freon is lost to still bottoms in each distillation cycle and the use violations involve a lesser quantity than the disposal violations.

<sup>27/</sup> Section 16(a)(2)(B) of the Act (15 U.S.C. § 2615(a)(2)(B)) provides:

(B) 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, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

decommissioning PCB transformers and the attendant risks and costs of handling, storing, transporting and disposing of PCB liquids. This has the effect of encouraging the elimination of PCB usage and facilitating PCB disposal, which after all is the purpose of the statute and regulation. The beneficial aspects of GE's actions are a factor within the purview of "other matters as justice may require" in section 16 of the Act (supra note 27) and thus, another reason for rejecting the large penalty sought by Complainant.

No adjustments to the penalty determined above are considered appropriate. Complainant's argument that GE was on notice a permit was required because of EPA's approval of R&D work (finding 16) and alleged advice from Quadrex at the time GE purchased the distillation systems will, however, be briefly addressed. The primary thrust of the R&D work was the evaluation of PCB concentrations on solid surfaces of components of askarel transformers, rather than physical separation of PCBs by solvent distillation. Although the solvent was reclaimed by distillation, this was merely incidental and there is no indication that such distillation was GE's reason for seeking EPA approval. Moreover, although GE hasn't established that it was advised by Region V that a permit for solvent distillation was not required, the record supports the conclusion GE personnel were operating under the impression an EPA permit was not necessary. This is certainly true as to the Chamblee Shop (finding 13) and is a permissible finding as to the Cleveland Shop, because information as to operation of the Quadrex unit was volunteered to Mr. DaVia (finding 17), which

would hardly be the case, if an EPA permit were thought to be necessary.

Complainant also contends that GE was on notice a permit was required because of permitting assistance allegedly offered by Quadrex at the time the distillation units were purchased (Brief at 10, 11; Reply Brief at 12). The difficulty with this assertion is that there is no probative evidence in the record to support it. Neither the sender nor the recipient of a purported letter supporting this allegation have been identified. More importantly, the document was neither offered nor admitted in evidence. Although Mr. Oldham was permitted to read from the document (Tr. 3-69), GE counsel's objections were well taken and should have been sustained, inasmuch as Mr. Oldham had no knowledge of the document or its content. The paragraph read into the record (Tr. 3-69) by Mr. Oldham is struck.<sup>28/</sup>

By a letter, dated July 24, 1991, GE supplemented its reply brief, citing a recent decision by the D.C. Circuit, Rollins Environmental Services (N.J.) Inc. v. U.S. EPA, 937 F.2d 649 (D.C. Cir. 1991), and arguing that, even if the Agency's interpretation of the regulation were sustained, no penalty assessment can be justified. Rollins involved interpretation of the regulation at 40 CFR § 761.79, which was determined to be reasonably susceptible to

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<sup>28/</sup> The ALJ directed Mr. Oldham to read the document to himself, observing that it would be inappropriate to allow cross-examination on it, if he had never seen it and had no knowledge of its content (Tr. 3-68). Allowing Mr. Oldham to read a portion of the document into the record was contrary to this salutary ruling, because the mentioned conditions were not fulfilled.

the construction placed upon it by the petitioner. Moreover, there was disagreement within EPA as to the interpretation of the regulation and the Office of General Counsel had opined that the regulatory language was equally supportive of two possible constructions, i.e., the Agency's interpretation as stated in the administrative complaint at issue or the interpretation advanced by the petitioner. Under these circumstances, the Court agreed with Judge Hoya who had ruled that there was no justification for assessing a penalty.<sup>29/</sup> Because it has been determined (ante at 53) that the requirement PCB solvent distillation systems be approved by EPA is fairly encompassed within the regulation, Rollins is not applicable here.

O R D E R <sup>30/</sup>

GE having been found to have violated the Act and regulation as charged in the complaint, a penalty of \$40,000 is assessed against it in accordance with section 16 of the Toxic Substances Control Act (15 U.S.C. § 2615(a)). Payment of the penalty shall be made within 60 days of the receipt of this order by mailing a

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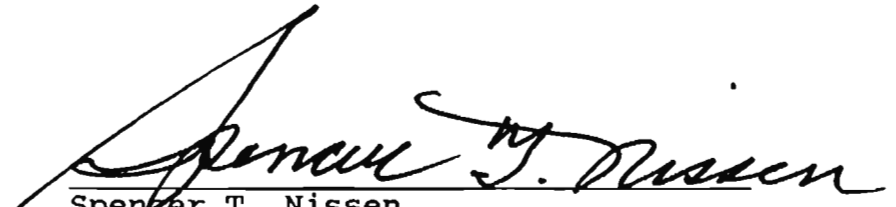
<sup>29/</sup> The only mystifying aspect of Rollins, as the dissent compellingly argued, is that, if it were arbitrary to assess a penalty, it was equally arbitrary to find a violation.

<sup>30/</sup> Unless appealed in accordance with Rule 22.30 of the Rules of Practice (40 CFR Part 22) or unless the Administrator elects sua sponte to review the same as therein provided, this initial decision will become the final order of the Administrator in accordance with Rule 22.27(c).

cashier's or certified check in the amount of \$40,000 payable to the Treasurer of the United States to the following address:

Regional Hearing Clerk  
EPA, Region IV  
P.O. Box 100142  
Atlanta, GA 30384

Dated this 17<sup>th</sup> day of February 1992.

  
Spencer T. Nissen  
Administrative Law Judge

ATTACHMENTS A & B

ATTACHMENT A

The preamble to the proposed regulation, 43 Fed. Reg. 24802, et seq. (1978), provides in pertinent part at 24807:

Section 6(e)(3) does not impose a final ban on the use of PCB's but it does ban all manufacturing, processing, and distribution in commerce. As a result, EPA may authorize a non-totally enclosed use of PCB's for whatever time period it feels is appropriate under section 6(e)(2). However, authorizations for non-totally enclosed manufacturing must end on January 1, 1979, since that is when the total ban on manufacturing begins. An exemption is required to continue any type of PCB manufacturing after that date. For the same reason, authorizations for non-totally enclosed processing and distribution in commerce must end on July 1, 1979.

Note--The term "distribution in commerce" is used to refer to the sale of a PCB. However, it also means the delivery of a PCB in conjunction with a sale or the holding of a PCB after sale for purposes of resale. An example of the latter is a distributor who buys from the manufacturer and then resells to retailers; while the PCB's are in his inventory, they are being held for further distribution in commerce. However, distribution in commerce does not include the holding of PCB's for purposes solely of use by the holder. For the purposes of TSCA, "processing" is limited to that processing which takes place after manufacture of the PCB in preparation for distribution in commerce. "Processing" does not include processing performed by the owner of the PCB subsequent to distribution in commerce for his own use.

The servicing of a PCB transformer is an example of how all of these concepts fit together. If a PCB transformer is removed from service and returned to the owner's own service shop where PCB dielectric fluid is added to it, the servicing could be covered by a use authorization. However, if that same transformer was sent to a transformer service company that added PCB's to the transformer, the servicing would be both processing and distribution in commerce since the PCB dielectric fluid would be sold by the service company to the transformer owner (thus the title to the PCB's would have passed from one owner to another). To continue this activity the transformer service company would need authorizations for both processing and distribution in commerce. In addition, the service company would have to petition for, and receive, an exemption each year to continue this activity after June 30, 1979. Even though the actions performed in other shops are the same, the transformer service company is subject to much more rigorous requirements than the transformer owner.



Section 761.31(a) provided:

(a) Servicing Transformers (Other Than Railroad Transformers). PCBs may be processed, distributed in commerce, and used for the purposes of servicing including rebuilding transformers (other than transformers for railroad locomotives and self-propelled railroad cars) in a manner other than a totally enclosed manner until July 1, 1984, subject to the following conditions:

(1) Regardless of its PCB concentration, dielectric fluids containing less than 500 ppm PCB that are mixed with fluids that contain 500 ppm or greater PCB must not be used as dielectric fluid in any transformer. Dielectric fluid from PCB-Contaminated Transformers may be assumed to have less than 500 ppm PCBs.

(2) PCB-Contaminated Transformers (as defined in § 761.2(z)) may only be serviced (including rebuilding) with dielectric fluid containing less than 500 ppm PCB.

(3) Any servicing (including rebuilding) of PCB Transformers (as defined in § 761.2(y)) that requires the removal of the transformer coil from the transformer casing is prohibited. PCB Transformers may be topped off with PCB dielectric fluid.

(4) PCBs removed during servicing of a PCB Transformer or PCB- Contaminated Transformer or during rebuilding of a PCB- Contaminated Transformer must be captured and either reused as dielectric fluid or disposed of in accordance with the requirements of Subpart B. PCBs from PCB Transformers must not be mixed with or added to dielectric fluid from PCB-Contaminated Transformers.

(5) A PCB Transformer may be converted to a PCB-Contaminated Transformer by draining, refilling, and otherwise servicing the transformer with non-PCB dielectric fluid so that after a minimum of three months of in-service use subsequent to the last servicing conducted for the purposes of reducing the PCB concentration in the transformer, the transformer's dielectric fluid contains less than 500 ppm PCB (on a dry weight basis).

(6) Any PCB dielectric fluid that is on hand to service a PCB Transformer or a PCB-Contaminated Transformer must be stored in accordance with the storage for disposal requirements of Annex III (§ 761.42).

(7) After July 1, 1979, processing and distribution in commerce of PCBs for purposes of servicing transformers is permitted only for persons who are granted an exemption under TSCA section 6(e)(3)(B).

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