UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

OKLAHOMA METAL PROCESSING COMPANY, INC. d/b/a/ HOUSTON METAL PROCESSING COMPANY

TSCA DOCKET NO. VI-659C

and

NEWELL RECYCLING COMPANY, INC.,

Respondents

PARTIAL ACCELERATED DECISION ON ISSUE OF LIABILITY 1

Under consideration are complainant's motion for partial accelerated decision, filed February 12, 1997, Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company's motion for accelerated decision, dated February 21, 1997, and complainant's motion to deny notice of Newell Recycling Company, Inc. to join in the motion for accelerated decision and response to Newell's supplemental brief, filed March 14, 1997.

The Complaint

Oklahoma Metal Processing Company Inc., a New Hampshire corporation, doing business as Houston Metal Processing Company, Inc., and Newell Recycling Company, Inc., a Texas corporation are designated as respondents. Houston Metal Processing operates a facility located at 5225 Fidelity Road in Houston, Texas. Newell Recycling operated and owned the facility from 1974 to approximately September 1982 when it sold the facility to Houston Metal Processing. On September 10, 1992, EPA inspected the facility and collected three soil samples from a soil pile located on the southern half of the facility. The pile of soil had been excavated by Newell Recycling or someone directed by Newell Recycling pursuant to an agreement with Houston Metal Processing in which Newell Recycling agreed to remove lead-contaminated soil from the facility. Capacitors containing PCBs were found in the area where the lead contaminated soil was

being excavated. Tests of the soil samples indicated that Aroclor 1248, a form of PCB, was preesent in all the samples at levels greater that 50 ppm.

The complaint states that PCBs were present in the excavated soil as a result of spills, leaks and other uncontrolled discharges from Newell Recycling's excavation and piling of the PCB-contaminated soil. The complaint states further that spills, leaks and other uncontrolled discharges of PCBs occurred at the facility during the time the facility was owned and operated by Houston Metal Processing. Until at least February 21, 1994, the PCB-contaminated soil pile was not removed from the facility, according to the complaint.

On November 15, 1993, a composite of six individual soil samples was taken by Inchcape Testing Services from each of two soil piles at the facility. One of the piles was the pile previously tested. These samples also, according to the complaint, indicated the presence of PCBs at levels exceeding 50 ppm.

The complaint states a single count, Count I. Count I alleges that Newell Recycling disposed of non-liquid PCBs in the form of contaminated soil at concentrations of 50 ppm or greater by excavating PCB-contaminated soil and placing it in a pile. It is alleged that Newell Recycling failed to dispose of non-liquid PCBs in an incinerator which complies with 40 C. F. R. § 761.70 or in a chemical waste landfill which complies with 40 C. F. R. § 761.75.

The complaint alleges that the existence of the pile of PCB-contaminated soil constitutes a continuing disposal -- as the term disposal is defined in 40 C. F. R. § 761.3 -- of non-liquid PCBs at concentrations of 50 ppm, or greater, in the form of contaminated soil. The complaint alleges that on the date that Newell Recycling began excavating until at least February 21, 1994, Newell Recycling engaged in the continuing disposal of non-liquid PCBs at levels of more than 50 ppm without disposing of them in an incinerator or chemical waste landfill as required by the TSCA rules. The complaint charges Newell Recycling with violating 40 C. F. R. § 761.60 (a) (4) by failing to dispose of non-liquid PCBs at concentrations of 50 ppm or greater in an incinerator or chemical waste dump.

By arranging or contracting with Newell Recycling for the removal of lead-contaminated soil which resulted in the excavation of PCB-contaminated soil and its placement in a pile at the facility, Houston Metal Processing also engaged in the disposal of non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil, according to the complaint. The complaint states that because Houston Metal Processing allowed the soil to remain at the

facility from the date of excavation until at least February 21, 1994, it engaged in a continuing disposal of non-liquid PCBs in a manner contrary to the rules. Houston Metal Processing is charged with violating 40 C. F. R. § 761.60 (a) (4) by failing to dispose of non-liquid PCBs at concentrations of 50 ppm or greater in an incinerator or chemical waste dump.

The complaint alleges that respondents' disposal of PCBs violates § 6 of TSCA which constitutes an unlawful act under § 15 (1) (C) of TSCA. The complainant seeks a penalty of $1,345,000 for the alleged continuing violation from the date of the inspection, September 10, 1992, to February 21, 1994.

COMPLAINANT'S AND RESPONDENTS' MOTIONS FOR PARTIAL ACCELERATED DECISION

Complainant and Houston Metal Processing have separately moved for an accelerated decision on of the issue of liability. The arguments raised by both requests involve the same issues. Complainant relies on the facts in the complaint with the following additional exposition. Houston Metal Processing discovered, in 1984, that areas of its facility at 5225 Fidelity Road, Houston were contaminated with lead and notified Newell Recycling about the contamination. Newell RecycliNg arranged for a contractor to prepare a plan for the removal of the lead-contaminated soil. In 1985, when the lead-contaminated soil was being excavated pursuant to the plan, 41 capacitors containing oil were found buried in the excavation area. Newell Recycling obtained chemical analyses of the oil in the capacitors and it was found to contain PCBs. Houston Metal Processing disposed of the capacitors. The soil excavated by Newell Recycling was piled adjacent to the excavation area but not removed because Newell Recycling and Houston Metal Processing disagreed about whose responsibility it was to remove the piled soil.

On October 19, 1989, the facility was inspected by EPA to determine whether Houston Metal Processing's procedures for handling incoming equipment containing PCBs were in compliance with TSCA regulations. During that inspection the inspector was shown the soil with PCBs. The inspector did not take a sample. In 1992, another EPA inspector inspected the facility. She was shown the pile of excavated soil. She took three samples from the pile. These were the samples cited in the complaint; each of the samples was found to contain PCBs in concentrations in excess of 50 ppm. In response to a January 14, 1994 subpoena, Houston Metal Processing represented to EPA that the tested soil pile remained at the facility. It was following that representation that the complaint was issued on March 30, 1995.

In October 1995, Houston Metal Processing represented to EPA that 495,000 pounds of the PCB-contaminated soil pile were removed to the U. S. Ecology disposal facility in Beatty, Nevada. The complaint cites only the PCBs in the contaminated soil in concluding that the TSCA regulations have been violated.

Complainant states that an analysis of the three soil samples contained Aroclor 1248, a form of PCB, at concentrations of 230 ppm, 190 ppm, and 190 ppm. The categories of PCBs that must be disposed of and the required disposal methods are identified in 40 C. F. R. § 761.60 (a). Pursuant to 40 C. F. R. § 760.60 (a) (4), non-liquid PCBs at concentrations of 50 ppm or greater in the form of contaminated soil are to be disposed of in an incinerator which complies with § 761.70 or in a chemical waste landfill which complies with § 761.75. Complainant argues that because the PCB contaminated soil at the facility was not disposed of in an incinerator or chemical waste landfill, respondents violated 40 C. F. R. § 760.60 (a) (4).

Complainant states that the PCBs in the soil pile at the facility were no longer in service once they had been discharged into soil. Citing In re City of Detroit Public Lighting Department et. al., 3 EAD 514, 517 n.7 (CJO Feb. 6, 1991), complainant points out that once PCBs are no longer in service they must be disposed of properly. Complainant maintains that a disposal violation occurs when soil samples contain PCBs in concentrations exceeding the regulatory threshold of 50 ppm and the PCBs were not disposed of properly. It maintains improper disposal of PCBs may be inferred from where the PCBs were found, citing In re Electric Service Company, 1 EAD 947, 957-8 (CJO Jan. 7, 1985). The samples in this case, complainant points out, contained PCBs in concentrations in excess of 50 ppm and they were found in a pile of soil which is not a proper means of disposal under the rules. Complainant states that the disposal violation continues as long as the PCBs remain out of service and in a state of improper disposal. In re Standard Scrap Metal Company, 3 EAD 267, 270 (CJO August 2, 1990).

Complainant asserts that both Newell Recycling and Houston Metal Processing were responsible for the improper disposal of the PCBs because they both caused or contributed to the improper disposal. According to complainant, Newell Recycling's liability is based on the following facts. Newell Recycling carried out the PCB soil scraping and piling and it exercised physical control over the excavation, movement and placement of the PCB-contaminated soil into the pile with its equipment. Complainant states that these activities caused the physical separation of PCBs from the ground into an accumulation of PCBs in the soil pile. Newell Recycling did not take action to properly dispose of the

PCBs, complainant argues, although Newell Recycling was aware of the PCBs in the excavated soil at least from August 19, 1985, when it obtained chemical analyses and cost estimates for cleaning up the PCBs. Complainant points out that, in addition, Newell Recycling received, in May 1987 and 32 months later, extensive information from its consultant, Lockwood, Andrews, & Newman, Inc., about the extent of PCB contamination at the facility. The information provided to Newell Recycling included an estimate of the volume of PCB-contaminated soil, levels of PCBs and clean-up costs. At the same time, Newell Recycling received demands from Houston Metal Processing to remove and properly dispose of the PCBs. Complainant urges that Newell Recycling's failure to dispose of the PCBs in the soil pile by incineration or in an authorized landfill violated 40 C.F.R. § 761.60 (a) (4) and Section 15(l)(C) of TSCA, 15 U.S.C. § 2614 (1) (C).

Complainant urges that Houston Metal Processing was responsible for the improper disposal of the PCBs for the following reasons: it authorized Newell Recycling to conduct tests and to perform clean-up at the facility; it had the ability to control the excavation and soil accumulation activities which followed the excavation of the buried capacitors; it demonstrated its ability to control the disposal of the PCBs when it took action with regard to 35 of the 41 buried capacitors, removing them to La Porte, Texas for disposal and designating itself as the generator of the capacitors on the June 23, 1989 hazardous waste manifest; it failed to put warning signs or barriers to prevent access to the PCB soil pile; and, as the site owner, it had the ability to manage and control the site, which it ultimately did in September 1995. Complainant maintains that Houston Metal Processing's failure to take action with regard to the PCBs constitutes improper disposal.

Complainant argues that improper disposal of PCBs is a violation which continues until the PCBs are disposed of properly. Complainant supports its argument by pointing to TSCA § 16 which provides for civil penalties for each day the violation of the statute continues. Complainant urges that Congress' provision for continuing penalties supports its view that as long as potential risk or injury continues, and the disposal rule is not followed, the violation continues. The violation continued in this case, complainant maintains, until the PCB contaminated soil was removed to Nevada in 1995. Complainant states that the penalty for the violation alleged in this proceeding is computed from the day the EPA inspector initially inspected the PCB contaminated soil pile and took samples on September 10, 1992 to February 24, 1994, a time when respondents concede the PCBs in the soil pile remained at the facility.

Respondent Houston Metal Processing argues that the only improper disposal of PCBs occurred when the PCBs leaked from the capacitors into the soil. It claims to have had no part in the leaking of PCBs into the soil. The pile of PCB-contaminated soil which it permitted Newell Recycling to make, Houston Metal Processing argues, was a "waste pile" created pursuant to a state approved closure plan to dispose of lead-contaminated soil. Houston Metal Processing believes that until complainant demonstrates that it owned the capacitors or was responsible for their burial, there is no evidence to show that Houston Metal Processing violated the TSCA regulations.

Houston Metal Processing urges, that it could be held liable for improper disposal of PCBs only if the excavation and piling of the soil exacerbated the pre-existing condition at the site, "i. e. contaminate previously uncontaminated areas of the site or create greater potential for migration," citing, Alcan-Toyo America v. Northern Ill. Gas, 881 F. Supp. 342, 345-46 (N.D. I11. 1995). Houston Metal Processing believes that "[t]here is no reason why a soil excavation that is part of a cleanup should be an unlawful TSCA 'disposal'."

Complainant responds that Alcan-Toyo is inapplicable to the disposal of PCBs under TSCA. Complainant urges that Houston Metal Processing's application of the principle of exacerbation from Alcan-Toyo fails to consider the context in which the principle was established. Complainant points out that Alcan Toyo was a private party action for the recovery of response costs in which the court was addressing the issue of relative fault and culpability of the parties pursuant to § 113 (f) (1) of CERCLA. Complainant explains that the definition of disposal in CERCLA incorporates the definition of disposal from the section 1004 of the Solid Waste Disposal Act, 42 U. S. C. § 6903 (3) and is unrelated to the TSCA definition of disposal in §761.3.

Houston Metal Processing argues, no one is liable for improperly disposing of the PCBs in the soil at its facility because the PCBs entered the soil more than five years before this enforcement action was initiated. If there is a continuing impact from a past violation, Houston Metal Processing argues, it does not mean that there is a continuing violation of the TSCA.2/ Houston Metal Processing argues that while discharge of PCBs into soil amounts to improper disposal, excavation of contaminated soil into a pile is not disposal of PCBs pursuant to 40 C. F.R. § 761.3, which provides as follows:

Disposal means intentionally or accidentally to discard, through 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.

Houston Metal Processing asserts that excavation of the PCB-soil is not disposal because it did not "discard, throw away or terminate the useful life of PCBs" as contemplated by the regulatory definition of disposal in 40 C.F.R. § 761.3. The disposal in this case "occurred long before 1985 when the capacitors were buried," according to Houston Metal Processing. Houston Metal Processing claims that the disposal in this case "did not exacerbate the pre-existing condition at the site, i.e. contaminate previously uncontaminated areas of the site or create greater potential for migration."

Complainant argues that Houston Metal Processing is not without responsibility, regardless of who may have originally placed the capacitors and PCBs in the excavated area. Complainant maintains that Houston Metal Processing was the cause of the excavation, piling, and abandonment of the PCBs in the soil pile and at all times, from 1985 to 1995, had control over the property where the PCBs were abandoned. Complainant asserts that if Houston Metal Processing's argument -- that unless it put the PCBs in the soil, it had no responsibility -- were accepted, the PCBs could perpetually remain in a state of improper disposal. Complainant points out that such an outcome would be contrary to the disposal requirements which seek to protect site workers and the public from PCB exposure. Complainant maintains that Houston Metal Processing assumed responsibility for the PCBs at the facility when it became the owner of the facility and that Houston Metal Processing permitted the discarded PCB-contaminated soil to remain exposed to the elements without adequate restrictions to access, and without warning signs. In addition, complainant points out, Houston Metal Processing took further responsibility when it had the soil analyzed on November 5, 1993 and, ultimately, after this complaint was filed, properly disposed of the PCB-contaminated soil.

Houston Metal Processing urges that the prefatory note to 40 C. F. R. § 761.60 (a) indicates that disposal requirements become applicable when PCBs are removed from service. 3/ Houston Metal Processing maintains that the excavation did not remove the PCBs from service because PCBs can be removed from service only once and, in this case, that was when the capacitors leaked PCBs into the soil excavated by respondents. For that reason, Houston Metal Processing requests that the complaint be dismissed.

Complainant asserts that the prefatory note to Subpart D provides that once PCBs are removed from a disposal site, they must be disposed of in accordance with the Subpart D disposal regulations. 4/ The test of determining when that responsibility arises, complainant maintains, is not when the PCBs were originally taken out of service but whether the PCBs are out of service. Complainant urges that the subsequent removal and improper disposal of PCBs is as much a violation of TSCA as the original placement of PCBs in the soil. Any other reading of the rules, complainant argues, would remove any liability for the disposition of PCBs if they had been disposed of previously. This would frustrate the intent of Congress reflected in the Subpart D prefatory note to insure the safe and permanent removal of PCBs, complainant urges.

Newell Recycling opposes the complainant's motion for partial accelerated decision because of complainant's technical failures of proof. It claims that it was not permitted to know how the EPA samples were tested and how the samples were taken from the facility and therefore, it could not determine if the PCBs actually did exceed 50 ppm in the pile. 5/ Newell Recycling urges that complainant has not proven that Newell Recycling hired the contractor who excavated the PCBs, and that complainant exceeds the allegations in the complaint when it argues that Newell Recycling improperly disposed of PCBs when it put them in an open air pile at the facility. 6/ Newell Recycling appears to argue that in order for complainant to find that it did not dispose of the PCBs properly, it would have to prove that Newell Recycling took them out of service or terminated their useful life. 7/

Newell Recycling repeats Houston Metal Processing's views about when the disposal took placeand it states a similar belief that the complaint was untimely unless respondents exacerbated the contamination.8/ However, Newell Recycling believes that even if the violation did continue, the complainant had an obligation to initiate this action within five years of 1989, when, according to Newell Recycling, complainant first heard about the contaminated soil. 9/ In a supplemental "brief," Newell Recycling argues that the "truly responsible parties" were not named in the complaint. One of these "responsible" parties, identified by Newell Recycling, is J.L.D. Investment Company d/b/a Tetrafin Properties, Ltd. which owned the property in 1985 when in Newell Recycling's view improper disposal occurred. The other "responsible" party, identified by Newell Recycling, is the contractor which "actually created the pile." 10/

Newell Recycling represents that Newell Industries, Inc. contracted for clean-up of the soil contaminated with lead at the facility and implies that it had

no responsibility for the matters cited in the complaint. Complainant points out that when Newell Recycling sold the facility to Houston Metal Processing, Newell Recycling assumed any liability resulting from an occurrence prior to the closing date of the sale. It was this agreement which required Newell Recycling to remove the lead-contaminated soil. Complainant's Exhibits 8, 18, and 36 identify Newell Recycling as being the entity which paid for the clean-up, identifies Newell Recycling as being actively engaged in the work at the clean-up site, and credits Newell Recycling with having designed the sampling and analysis program for the site with its contractor. Complainant points out that the excavation and piling of contaminated soil by Newell Recycling were actions taken as part of a plan to eventually dispose of the contaminated soil. Complainant states as follows:

First, the contaminated soil was scraped into a central pile. [Ex. 2, par. 4].

PCB contamination was confirmed, and then the pile was left there. The original closure plan under which the excavation was initiated called for disposal at a hazardous waste disposal facility. [Ex. 11] Subsequent cleanup plans addressing PCBs called for offsite disposal of regulated levels of PCBs. [Ex. 9, 17]. However, rather than completing the requirements of the original closure plan, or following the later recommendations for site cleanup, Newell discarded the PCBs at the Fidelity Road site by leaving them there and taking no further clean up action. Newell's actions in creating the pile, confining the contaminated soil in a central stockpile, and abandoning it are actions meeting the definition of "disposal" in 40 C. F. R. §761.3.

Complainant urges that respondents' claim that they were simply following an approved closure plan and therefore should be free of all responsibility for the piling of PCBs for the 10 year period is without support. Complainant notes that the closure plan provided that the hazardous waste was to be excavated, transported to and disposed at a hazardous waste disposal facility. According to the time table in the closure plan, the soil was to have been removed from the facility by March 1985. C. Exh. 11 at 000063. The closure plan did not address PCBs.

Complainant points out that Newell Recycling's argument that complainant was required to prove intent is not required by the definition of disposal in 40 C. F. R. § 761.3 which defines disposal as intentional or accidental. Complainant notes that Newell Recycling's claim that at one point in the mid-1980s the facility was owned by J.L.D. Investment Company does not change the assessment

of liability against the respondents since liability is not premised alone on ownership of the site.

Newell Recycling argues that the Solid Waste and Emergency Response "Quick Reference Fact Sheet"should guide a decision on what is a disposal in this case. Complainant states that the "Quick Reference Fact Sheet"is directed to the management of investigation-derived wastes from CERCLA field investigation activities. It is intended for the guidance of Superfund field personnel for the management of investigations at Superfund sites, complainant points out. The Quick Reference Fact Sheet, complainant notes, provides that, when material contaminated with PCBs at concentrations of 50 ppm or greater are involved, the TSCA disposal requirements apply.

FINDINGS AND CONCLUSIONS

The allegations in the complaint are not untimely.

The respondents excavated PCB-contaminated soil in 1985, and the soil remained piled at the facility until September 1995. Complainant maintains that the excavating and piling of the soil was a continuing improper disposal of PCBs under TSCA and has calculated a penalty of $1,345,000 from September 10, 1992, the date the EPA inspector took three samples from the soil pile which established that the PCB concentration of the soil pile samples exceeded 50 ppm, to February 21, 1994, a date on which respondents admitted that the contaminated soil remained in the pile. Respondents argue that they did not dispose of PCBs but even if they did, the action in this case first accrued in 1985, or 1989. Consistent with that view, respondents argue that the March 30, 1995 complaint was one year, or ten years, too late because it is barred by the five year statute of limitations. 28 U. S. C. § 2462. 11/ Respondents maintain that the action first accrued in 1985, or sooner, because they believe that that is when the PCBs entered the soil or that is when the complainant knew that the PCBs had entered the soil. 12/ The record contains no reliable evidence about when the PCBs were spilled or leaked into the soil but it can be assumed that it was in 1985 or sooner since from 1985 forward the record reflects that respondents' knew that the soil at issue contained PCBs.

Complainant believes that when it was informed about the PCBs is not relevant to determining respondents' liability because respondents failed to properly dispose of the PCBs from September 10, 1992 to February 21, 1994. It is apparent from the record that the violations preceded and extended beyond those dates but no penalty is sought outside that period. The EAB has examined

similar issues to those posed in this proceeding, in its recent opinion In re Harmon Electronics Inc., RCRA (3008) Appeal No. 94-4 (EAB March 24, 1997). In that case, the EAB stated that a continuing violation accrues when the course of illegal conduct is complete, not when an action to enforce the violation can first be maintained. Harmon, slip op. at 26 (citing, inter alia, United States v. Rivera-Ventura, 72 F. 3d 277, 281 (2d Cir. 1995)("A 'continuing offense' is, in general, one that involves a prolonged course of conduct; its commission is not complete until the course of conduct has run its course... the limitations period for a continuing offense does not begin until the offense is complete....")). The EAB continued, "Given that a continuing violation tolls the running of the five year limitation period in 28 U. S. C. § 2462, it is readily apparent that the date when a violation 'first accrues' is not to be confused with the date when a violation 'first occurs.' " Harmon slip op. at 28.

Pursuant to 15 U. S. C. §2615 (TSCA § 16) any person who violates TSCA shall be liable for "[e]ach day such a violation continues" and each day of the continuing violation will be treated as a separate violation in determining the amount of the penalty. The EAB, interpreting the same language in RCRA § 3008 (g), 42 U. S. C. § 6928 (g), concluded that "these provisions are intended to encompass violations that either continue without interruption from one day to the next or are repeated on a regular or intermittent basis. ... [C]ontemplating daily penalties for a violation of the Act, clearly assumes the possibility of continuing violations." Harmon, slip op. at 29.

The concept of continuing violations is consistent with the concerns of Congress expressed in TSCA. Congress found that the disposal of PCBs "may present an unreasonable risk of injury to health or the environment." 15 U. S. C. § 2601 Congress determined that polychlorinated biphenyls present a significant risk to human health and the environment if not totally enclosed. PCBs manufactured, after January 1, 1977, were required to be totally enclosed in order to "ensure that any exposure of human beings or the environment to a polychlorinated biphenal will be insignificant." 15 U. S. C. §2605 (e). To insure that this will happen § 6 (e) (1) (A) of TSCA requires the Administrator to "prescribe methods for the disposal of polychlorinated biphenyls."

Because the PCBs were not totally enclosed at the Houston Metal Processing facility, they presented a significant risk to human health and the environment. The statute and the rules fail to support respondents' argument that the only concern with PCBs is when they are taken out of service and/or the single act occurs that leaves them exposed to the environment and human

beings who might come in contact with them. The implication of the above provisions of TSCA is apparent: PCBs that are no longer enclosed present a significant continuing risk to human health and to the environment and, of course, the likelihood of harm increases each day that they are exposed.

The regulations cited in the complaint implement the Congressional findings expressed in the statute. Disposal is broadly defined to include not only the act of terminating the useful life of PCBs and actions which intentionally or accidentally discard or throw away PCBs, but also "actions relating to containing, transporting, degrading, decontaminating or confining PCBs and PCB Items." 40.C. F. R. § 761.3. Respondents' interpretation of disposal to include only the initial act of discarding or terminating the useful life of PCBs would be contrary to the language of the definition. Furthermore, such interpretation would be inconsistent with EPA's regulatory scheme of requiring that PCBs be contained and disposed of properly when they no longer are in use, which scheme was implemented pursuant to statutory authorization and findings of Congress that disposal of chemical substances (such as PCBs) may present an unreasonable risk of injury to health or the environment TSCA § 2(a), 15 U.S.C. § 2601(a).

The prefatory note to Subpart D states that PCBs must be disposed of in accordance with the rules in that subpart, which are the rules cited in the complaint, § § 761.60, 761.75 and 761.70. The disposal rules are applicable whenever an action with regard to PCBs comes within the definition of disposal. The reviewing authority of this agency has concluded that where PCBs have been disposed of, but not in accordance with Subpart D, a violation of the disposal requirements of TSCA exists. In re Standard Scrap Metal Company, 3 EAD 267 (CJO August 2, 1990). In that case, as in the present case, soil samples collected at the facility contained PCB concentrations of 50 ppm or more. The CJO stated, "From the unexplained presence of PCBs in the soil, it can be inferred that one or more 'uncontrolled discharges' of PCBs took place. ... PCBs thus disposed of have been *out of service* since the time they were discharged into the soil, thus giving rise to a duty to dispose of the PCB-contaminated soil in the prescribed manner. ... [Respondents] failure to do so ... constitute[s] an ongoing violation of disposal requirements." Standard Scrap Metal at 270-271. In general, once PCBs have been taken out of service for disposal, the responsible party must dispose of the PCBs in accordance with the requirements, and "[f]ailure to do so constitutes the violation, and the violation continues as long as the PCBs remain out of service and in a state of improper disposal." Id. at 270.

The respondents do not dispute that the PCB contaminated soil from which the samples were taken by the complainant remained in an open air pile at the facility from September 10, 1992 to February 21, 1994. The risk to human beings or the environment from exposure to polychlorinated biphenals continued throughout that period because they had not been disposed of as required by § 761.60 (a) (4). Respondents had a continuing obligation to comply with the disposal rule at least from September 10, 1992 to February 21, 1994. 13/

The respondents are responsible for the violations cited in the complaint.

Houston Metal Processing maintains that it was not responsible for the failure to properly dispose of the PCB-contaminated soil at the facility because it was only the facility owner. For that reason, it argues, it is in the same position as the city of Detroit in In re City of Detroit, 3 EAD 514 (CJO February 6, 1991). In that case, PCBs were found in a state of improper disposal on property owned by Detroit. Detroit had purchased the property from Chrysler but had not taken possession of the property at the time the issue of improper disposal of PCBs arose; the CJO observed that Detroit only held title to the land. City of Detroit holds that Detroit had no involvement in the cause of the improper disposal. 3 EAD at 522-523. The decision, however, does not absolve owners of property from all liability for hazardous environmental conditions if they claim to be only property owners. 14/ Owners who have control and possession over a facility are in a different position; they control what happens on the property and are able to control the disposition of toxic substances. See In re Employers Insurance of Wausau, Inc., TSCA Appeal No. 95-6, 1997 TSCA LEXIS I (EAB February 11, 1997)("Parties having actual influence over the disposal activity... or the ability to exert such influence" are within the scope of liability.)

Houston Metal Processing was involved in the events which resulted in the improper disposal of PCBs at the facility from September 10, 1992 to February 21, 1994. The PCB contaminated soil was first discovered in 1985 by Houston Metal Processing. It then demanded, pursuant to the purchase contract for the facility, that the seller, Newell Recycling, remove lead-contaminated soil from the facility. Newell Recycling hired a consultant to develop a plan to remove the lead-contaminated soil and, apparently later, the PCB contaminated soil. In 1985, a contractor under Newell Recycling's direction began excavating the lead-contaminated soil and placing it in two piles. In the course of the excavation, the contractor that Newell Recycling was directing to make the cleanup uncovered 41capacitors. The soil surrounding the capacitors that had been removed contained PCBs.

The correspondence that resulted from this event and the actions of Houston Metals Processing following the piling up of the PCB-contaminated soil on the ground at the facility demonstrates that Houston Metals Processing was not a passive land owner. It discovered the lead contaminated soil, it attempted to have Newell Recycling remove the soil, it undertook the removal of the soil itself after it could not persuade Newell Recycling to do so. Houston Metal Processing acquiesced in the improper disposal and did nothing about the disposal during the period cited in the complaint. The EPA inspector observed that Houston Metal Processing had not even provided signs to warn those who might come in contact with the PCB contaminated soil at its facility. The correspondence between Newell Recycling and Houston Metal Processing was a ten year argument over who would pay the cost of removing the contaminated soil.

Newell Recycling is equally liable because it too controlled the improper disposal of the PCBs at the facility. Newell Recycling undertook an analysis of the scope of the problem and had a plan developed for removal of the contaminated soil. A contractor over which Newell Recycling had control removed the contaminated soil into a pile. Newell Recycling knew that the lead-contaminated soil would need to be removed and it knew that the PCB-contaminated soil which it placed in the pile at the facility was disposed of improperly. The original closure plan under which the excavation was initiated called for disposal at a hazardous waste disposal facility. Subsequent cleanup plans addressing PCBs called for offsite disposal of regulated levels of PCBs. However, rather than completing the requirements of the original closure plan, or following the later recommendations for site cleanup, Newell discarded the PCBs at the Fidelity Road facility by leaving them there and taking no further clean-up action. Newell's actions in creating the pile, confining the contaminated soil. in a central stockpile, and abandoning it are actions meeting the definition of "disposal" in 40 C. F. R. § 761.3. 15/

The complainant has established that there are no remaining issues of material fact or law with regard to respondents' liability for improperly disposing of PCB-contaminated soil in excess of 50 ppm from September 10, 1992, to February 21, 1994 at the facility in violation of 40 C.F.R. § 761.60 (a)

(4). 16/ All of the arguments of the parties not addressed in this decision are rejected because they are not material to the outcome of the case or because they were not adequately supported.

ORDER

ACCORDINGLY, IT IS ORDERED that Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company and Newell Recycling Company, Inc.'s motion for accelerated decision, dated February 21, 1997 IS DENIED.

IT IS FURTHER ORDERED that complainant's motion for partial accelerated decision, filed February 12,1997 IS GRANTED.

IT IS FURTHER ORDERED that complainant's motion to deny notice of Newell Recycling Company, Inc. to join in the motion for accelerated decision and response to Newell's supplemental brief, filed March 14,1997 IS DENIED.

Edward J. Kuhlmann

Administrative Law Judge

April 28, 1997

Washington, D. C.

1/ Appearing on behalf of Complainant is Pat Y. Spillman, Jr., Esq. Appearing on behalf of Respondents are Matthew J. Nasuti, Esq. for Newell Recycling Company, Inc.; and John R. Elridge, Esq., Rebecca E. Klavan, Esq., Constance E. Courtney, Esq. and Mark A. Huvard, Esq., for Respondent Oklahoma Metal Processing Company d/b/a Houston Metal Processing Company.

2/ Houston Metal Processing analogizes the existence of the PCBs in the soil to discharges under the Clean Water Act. It is respondent's belief that the continuing effects of discharges under the Clean Water Act are not continuing violations, citing, United States v. Telluride Co., 884 F. Supp. 404 (D. Colo. 1995). Complainant maintains that the improper disposal of PCBs in this case is not analogous to a discharge of pollutants under the Clean Water Act. First, complainant argues that the reasoning of the court in Telluride about what constitutes a continuing violation is contrary to all other judicial authority. Second, TSCA § 16 specifically provides for penalties in the case of continuing violations while the Clean Water Act does not. This, complainant points out, is a direct expression of Congress that violations could be continuing under TSCA. Third, discharge under the Clean Water Act and disposal under TSCA are defined differently. Complainant's position is that improper disposal under TSCA is not limited by a "temporal or act-specific limitation," and a failure to dispose of PCBs as required does "not end with the act of putting PCBs in the soil."

Complainant argues that the obligation to properly dispose of PCBs continues until they are disposed of properly, regardless of who put them in the soil.

3/ The prefatory note states as follows, in part: ". . . when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations."

4/ The prefatory note continues, in pertinent part, "This subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they must be disposed of in accordance with this subpart."

5/ Newell Recycling asserts that the three samples taken by the inspector should have been four under the SW-846, which it characterizes as an agency directive on sampling. Complainant responds that SW-846 is inapplicable to TSCA and the removal of PCBs. SW-846, complainant points out, applies to analyzing hazardous waste under the Resource Conservation and Recovery Act. Complainant explains that PCBs are not hazardous waste regulated under RCRA.

6/ Newell Recycling believes complainant was required to show that PCBs were released from the contaminated soil pile into the environment. Complainant urges that it must only demonstrate that PCBs were present in concentrations exceeding the regulatory threshold of 50 ppm and that PCBs were not disposed of properly to establish a violation of the disposal rule.

7/ In this regard Newell Recycling attempts to represent that it did not discharge PCBs when it operated the facility from 1980 to 1982. To this end, it submits the affidavit of Thomas Baker, the plant manager for Newell Recycling at the facility. Baker's affidavit, however, does not satisfactorily answer the question which Newell Recycling raised --although it is not at issue in the proceeding-- and sought to answer. He states that we (presumably Newell Recycling) did not knowingly accept, process or spill any PCBs. Baker also states that Newell Recycling did not process any transformers containing PCBs, bury any PCBs, or any equipment containing PCBs on the property. Baker does not say whether he was the manager for the full time that Newell Recycling owned the facility -- which the complaint indicates was from 1974 to September 1982 -- nor does he mention whether respondent accepted the buried capacitors for recycling. Baker does not state whether Newell Recycling could have accidentally disposed of PCBs because of the nature of its business.

8/ Newell Recycling claims that respondents were permitted to pile up the contaminated soil in the contaminated area pursuant to guidance in an EPA memorandum entitled "Guide to Management of Investigation-Derived Wastes." But Newell Recycling concedes that the Guide states that PCBs may have other requirements that might apply and it offers no support for its belief that normal PCB requirements should not apply in this case.

9/ Houston Metal Processing argues that the "claim accrued in 1985 when the pile was created or before." Houston Metal Processing states that complainant was notified by the Texas Department of Health on May 3, 1985 that the soil was contaminated with PCBs.

10/ Newell Recycling maintains that by making the respondents liable for a violation of 40 C. F. R. § 761.60 (a) (4), complainant has conducted illegal rulemaking by expanding the rule beyond its scope, that its application of disposal to this case is arbitrary and capricious, and that its enforcement action has not "been politically thought through."

11/ 28 U. S. C. § 2462 provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

12/ Respondents submit a document entitled "memorandum to the file," dated May 3, 1985, by Robert Ray of the Texas Department of Health in which Ray states that Leonard Mohrmann of TDH contacted Darl Mount in the EPA Dallas office and informed him about the PCBs that respondents had excavated at the facility. HMP Exh. B to Motion for Accelerated Dec. The memorandum does not state how much information was revealed to EPA. Exhibit G to respondent's motion is a written authorization from respondent's counsel, dated September 4, 1987, to respondent's consultants Lock Newman & Andrews to discuss with EPA the PCB and lead contamination existing at the facility but not to discuss any "very sensitive material" without further authorization from counsel.

13/ The respondents and the complainant have devoted considerable space in their filings to discussions of various court cases that they believe are relevant to establishing that improper disposal either continued during the

period alleged in the complaint or was only a single act which did not continue and was, therefore, time barred by §2462. All of the cases relied on by the respondents were considered at length in Harmon Electronics, Inc., *supra,* and, for the reasons given there, they are not controlling in this case. Respondents' reliance on Alcon-Toyo America v. Northern Ill. Gas, 881 F Supp. 342, 345-46 (N.D. Ill. 1995) might be interpreted as an argument in support of their argument that this action is untimely. For the reasons given by the complainant in distinguishing Alcal-Toyo, the case is inapplicable to determining under TSCA whether respondents' failure to dispose of PBCs properly is a continuing violation from September 10, 1992 to February 21, 1994. The holding of the court in Alcan-Toyo was made and applied in a statutory context not presented here.

14/ The EAB held that a person will be held responsible if that person caused (or contributed to the cause of) the disposal, and in cases involving uncontrolled discharges, the person who owned the source of the PCBs at the time of the discharge will be deemed in most cases to have caused the discharge, on the basis that he is generally "the person who had the power to control the handling of the PCBs." 3 EAD at 525, 526.

15/ The respondents state that they were following a closure plan to dispose of lead-contaminated soil. They imply that the closure plan permitted them to leave the contaminated soil in an open pile at the facility. The closure plan to remove lead-contaminated soil did not provide that PCBs or lead-contaminated soil could be exposed to the environment until 1995. The original plan provided for the removal of the lead-contaminated soil from the facility by March 1985. Respondents have not pointed to any government approved plan that would have permitted them to leave PCBs excavated in 1985 in an unprotected pile at the facility until 1995.

16/ Newell Recycling argues that it did not have an opportunity to challenge complainant's testing of the soil. Newell Recycling has had access to the reports of the tests carried out by complainant and to those tests that respondents had taken of the contaminated soil. It has not pointed to any evidence that suggests that the PCB levels in the samples did not exceed 50 ppm.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on April 28,1997.

Shirley Smith

Legal Staff Assistant

For Judge Edward J. Kuhlmann

NAME OF RESPONDENT: Oklahoma Metal Processing Company, Inc. d/b/a Houston Metal Processing Company and Newell Recycling Company, Inc.

DOCKET NUMBER: TSCA-VI-659C

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