

failure to maintain complete records and complete annual documents violated 40 C.F.R. § 761.180 (a) and Section 15 of TSCA, 15 U.S.C. § 2614. Complainant cited the same violations in count II for 1990, in count III for 1989, and in count IV for 1983-1988.

Count V alleges that, at the time of the inspection, respondent had stored combustible material, a cardboard box, within five meters of an unenclosed GE Pyranol PCB transformer, serial number SN H887303, in violation of 40 C.F.R. § 761.30 (a) (1) (viii) and Section 15 of TSCA, 15 U.S.C. § 2614. Amended count VI alleges that respondent failed to file EPA Form 7710-53 with EPA by April 4, 1990. Complainant alleges that respondent was obligated to file Form 7710-53 about its hazardous waste activities pursuant to 40 C.F.R. § 761.205 (b), and Section 15 of TSCA, 15 U.S.C. § 2614.

Following the decision in Lazarus, the parties reassessed their arguments in the motions for accelerated decision and to suppress evidence. The complainant withdrew count IV and reduced the penalty sought from \$62,500 to \$53,500. Complainant continues to assert the violations in counts I, II, and III. Respondent believes that its argument with regard to counts I, II, and III is unaffected by the EAB's decision in Lazarus.

RESPONDENT'S MOTION FOR ACCELERATED DECISION ON COUNTS I, II, III AND VI

Respondent argues that the complainant is barred from collecting penalties for violations alleged in counts I, II, and III because the agency failed to display an OMB control number for § 761.180 (a), as required by the Paperwork Reduction Act, before 1990. It also urges that the agency allowed OMB approval to lapse for periods in 1985, 1990, 1992, and 1993. Respondent argues that count VI is barred because the agency allowed OMB approval for § 761.205 (b) to lapse for periods in 1983 and 1985.

Complainant alleges in counts I, II, and III that respondent did not develop and maintain complete records and did not have complete annual documents on the disposition of its PCB items for the calendar years 1989, 1990, and 1991. 40 C.F.R. § 761.180 (a) required respondent to keep these records. Respondent points to periods when purportedly the OMB control numbers lapsed and it claims that there was not proper display of the control numbers. Respondent maintains that an agency memorandum of June 11, 1993 identifies two lapses in the OMB control numbers.

According to the June 11, 1993 memorandum at Exhibit F page 7, there was a lapse of the OMB control number for 40 C.F.R. § 761.180 (a) from 12/10/92 to 2/5/93 and a lapse in 1985 from 9/30/85 to 12/10/85. Neither of these lapses falls within the time of the alleged violations cited in counts I, II, and III. The second document relied on by the respondent, Exhibit G, is an agency memorandum dated November 3, 1993. Respondent without discourse refers to page 14. That page shows that there was no lapse in displaying the control numbers for 40 C.F.R. § 761.180 (a) and that they were displayed in the CFR.

The June 11, 1993 memorandum also states that there was no display until 1990 in the CFR. The tables that follow the text of the memorandum, however, do not support that assertion and respondent has not identified the editions of the CFR that omitted display of the relevant control numbers. The EAB in Lazarus points out that the relevant OMB rule requires that control numbers had to be displayed in both the Federal Register and the CFR. Reviewing § 761.180 (a), the EAB held that display in the Federal Register of the OMB control number for § 761.180 (a) was not adequate because it did not refer to the rule until the amended notice was published in December 1989. (Lazarus, slip op. at 56.) Respondent's attachments and its pleadings do not demonstrate that the display was inadequate after December 1989. Respondent's request for accelerated decision because of the agency's failure to comply with the Paperwork Reduction Act will not be granted for counts I, II and III since all of those alleged violations were committed during a period when the control numbers had been obtained and properly displayed for all or part of years for which a penalty is sought.

Because the agency had an OMB control number for the periods at issue in counts I, II and III and, after December 1989, the number was properly displayed, the Paperwork Reduction Act poses no impediment to enforcement of counts I and II. Count III seeks enforcement of § 761.180 (a) for the year 1989 and, according to the EAB, the rule was not properly displayed in the Federal Register until December 1989. Count III cites respondent's failure to develop and maintain complete records for 1989 and its failure to have "complete annual documents on the disposition of its PCB items for the calendar year 1989." Section 761.180 provides that "[t]he annual document required for 1989 shall cover the period January 1, 1989 to February 5, 1990." Thus, it is evident that respondent was not required to maintain and develop complete records for most of 1989 (as defined in § 761.180 (a)). Nevertheless, it was required, once defects in the agency's compliance with the Paperwork Reduction

Act had been cured, to comply with the requirement that it maintain annual PCB records for part of the year and the annual document requirement for part of 1989. [\(1\)](#)

Count VI, as amended, alleges that respondent failed to notify EPA of its waste activities pursuant to 40 C.F.R. § 761.205 (b) on form 7710-53 by April 4, 1990. The complainant amended the complaint to show that the respondent had notified the EPA and the State of Ohio on other occasions but had not done so on April 4, 1990 as required by § 761.205 (b). Respondent does not explain how two short lapses in 1983 and 1985 absolve it from complying with § 761.205. Respondent does not claim that the filing required under the rule was unauthorized, or that EPA had not obtained OMB control numbers on the date that the annual document was due and during the period that the report was to cover. Without more, respondent has not shown that the information to be reported occurred during the time that the control numbers had lapsed. Nor has the respondent proved that the agency did not comply with the display requirements of the Paperwork Reduction Act. The form requests only two items of information about PCBs: the TSCA PCB ID number and identification of the type of PCB activity engaged in by the respondent. [\(2\)](#)

RESPONDENT'S MOTION TO SUPPRESS EVIDENCE AND FOR ACCELERATED DECISION

Respondent also moves to suppress all of complainant's evidence obtained from the inspection of respondent's facility because a duly designated representative of the complainant did not obtain the evidence as required by § 11 (a) of TSCA, 15 U.S.C. § 2610 (a), and violated respondent's Fourth Amendment Protection against unlawful searches and seizures. Respondent urges that because all the evidence was illegally obtained, an accelerated decision on the issue of liability should be granted on all counts in its favor.

The arguments that the respondent asserts to suppress the evidence have all been rejected by the EAB in In re Litton Industrial Automation Systems, Inc., New Britain Machine Division, 5 E.A.D. 671 (1995), following respondent's filing. (It is noted that respondent did not inform the presiding officer of the EAB's holding.) The holding of the EAB in Litton requires that respondent's motion to suppress and to grant accelerated decision be denied.

COMPLAINANT'S MOTION FOR ACCELERATED DECISION

Count I of the complaint alleges that on November 30, 1992 the respondent had not developed and maintained annual records and the written annual document log of the disposition of PCBs and PCB items for 1991. Affidavits from inspectors Charlotte E. Hammar and Thomas P. Buchan state that they requested the documents from the respondent when they conducted the inspection on November 30, 1992 but the respondent did not have complete documents. The inspectors made similar requests for annual records and the written annual document log for 1990 and 1989 and the documents for these years were also not complete. The failure to keep the records in 1990 and 1989 are counts II and III. Complainant points out that respondent denies each count.

Hammar and Buchan found that the facility did have a document entitled "Capacitors" and a document entitled "Disposal and Monitoring Report." However, these documents they state failed to provide thirteen items of information required by 40 C.F.R. § 761.180 (a). [\(3\)](#)

Respondent appears to concede that the documents cited by Hammar and Buchan did not comply with the detailed requirements of 40 C.F.R. § 761.180 (a) and did not contain the information that the inspectors found missing. Nevertheless, respondent argues that the inspectors were given access to all of respondent's PCB records and that those records were the sole basis for revised reports which respondent believes complied with § 761.180 (a). Respondent reached this conclusion because when they were submitted to inspector Hammar on December 28, 1992, she did not say that they were inadequate.

It is respondent's view that § 761.180 (a) did not require that the information be maintained in any particular form and therefore if the information existed in some form, no matter how much it was dispersed throughout various documents, it complied with the records and monitoring rule. Respondent's plant manager, Scott Conway, conceded on December 28, 1992 "that the manner in which the required information was organized made [Hammar's] determination of [respondent's] compliance status more difficult." Conway explained that after the inspection he organized the information according to the "structure" of the records and monitoring rule.

Section 761.180 (a) provides that the owner or operator of a facility will maintain at the facility "all annual records and the written annual document log of the disposition of PCBs and PCB items. The written annual document log must be prepared for each facility by July 1 covering the previous calendar year...

." The log must be maintained for three years after the facility ceases using or storing PCBs and PCB items in the quantities prescribed. Annual records (manifests and certificates of disposal) will be maintained for the same period. "The annual records and the annual document log shall be available for inspection at the facility where they are maintained by authorized representatives of EPA during normal business hours, and each owner or operator of a facility subject to these requirements shall know the location of these records." 40 C.F.R. § 761.180 (a).

The rule explicitly lists what annual records are to be maintained and what information is to be included in the annual document. The use of the word document and not documents for the annual document in the rule establishes the nature of the record that must be kept. Section 761.180 (a) has been repeatedly interpreted to mean that a single document that includes all the information must be prepared. Consistent with the language of the rule, it has been expected that the information will be collected in a central place and a single document to simplify the inspection. See City of St. Joseph, Docket No. TSCA-VII-91-T-298, Order on Cross Motions for Accelerated Decision, issued January 24, 1994, at p. 14.

The November 30 and December 1, 1992 "Report on Inspection to Determine Compliance with the PCB Disposal and Marking Regulations" (Complainant's Exh. 1) and affidavits of inspectors Hammar and Buchan list 13 specific missing pieces of information from the records that were to be kept and prepared. Respondent's response to these allegations was to maintain that the information was supplied following the inspection, apparently on December 28, 1992, and that the information was available in other documents. While the eventual compliance with the rule may be weighed in determining the penalty, the unrefuted evidence is that respondent had not developed and maintained complete records and did not have complete annual documents on the disposition of its PCB items for the calendar years 1989, 1990, 1991, as required by 40 C.F.R. § 761.180 (a). Respondent concedes that the purpose of the rule, which is to facilitate inspections of the facility, was thwarted because the documents required by 40 C.F.R. § 761.180 (a) had not been organized in the manner required by the rule. No genuine issue of material fact exists about counts I, II and III and complainant's motion for accelerated decision will be granted on these counts.

Hammar and Buchan represent that they observed stored combustible material within five meters of an unenclosed PCB

transformer. In count V, complainant urges that this violates 40 C.F.R. § 761.30 (a) (1) (viii) and Section 15 of TSCA, 15 U.S.C. § 2614. Respondent denies the allegation in its answer. In its response to the complainant's motion respondent concedes that there was a wooden pallet within five meters of an unenclosed PCB transformer. Plant manager Conway states that he observed the pallet during the inspection. Conway represents that it was not the practice of the respondent to store wooden pallets in the transformer cage but that pallets are continuously "utilized in operations at the facility." Conway believes that the pallet had been present in the cage "for a very short time."

Between the inspectors there is a difference of opinion about what they observed. Inspector Buchan's observation was that wood was stored within five meters of the PCB transformer and inspector Hammar's observation was that there was a cardboard box within five meters of the PCB transformer. Hammar's and Buchan's observations are not necessarily inconsistent and the difference in their affidavits is not material. All the affidavits agree that there was prohibited combustible material within five meters of the transformer. Hammar noted in her January 12, 1993 report on the inspection that Conway removed the box immediately. Because Ms. Hammar's account is contemporaneous with the inspection, there is no reason to assume that her memory and observations were inaccurate.

Respondent's claim that the combustible material was not stored there is unsupported. The material was in a location prohibited by 40 C.F.R. § 761.30 (a) (1) (viii) and there is no evidence that it was in transit, in use or being removed. Based on the observations of the inspectors and Conway, the material was left or stored in an inappropriate place. While Conway states that it was not the policy of the respondent to store combustible materials near PCB transformers, the evidence shows that the policy was not being followed in this instance. In addition, respondent argues that the material was not stored where it was located but it offers no affidavit from a reliable witness about the length of time that the material had been in the prohibited location nor does he point to any plan for its removal. Without some observation or evidence to the contrary, the inspectors could reasonably assume that the combustible material was stored in the location where it was observed. There is no genuine issue of material fact about the allegations in count V and complainant's motion for accelerated decision will be granted.

Amended count VI alleges that respondent failed to file EPA Form 7710-53 with EPA by April 4, 1990. Complainant alleges that

respondent was obligated to file Form 7710-53 about its hazardous waste activities pursuant to 40 C.F.R. § 761.205 (b), and Section 15 of TSCA, 15 U.S.C. § 2614. The amended complaint alleges that respondent "previously" notified EPA and the State of Ohio of its hazardous waste activities under RCRA, that respondent had conducted waste activities during every year from 1983-1991, and that respondent owned and operated PCB storage facilities, during the years 1983-1991, that were subject to the storage requirements of 40 C.F.R. § 761.65 (b) or (c) (7), and that respondent failed to notify EPA of their PCB waste activities by filing Form 7710-53.

The motion for accelerated decision relies in part on the initial complaint, which complainant amended, and the failure of respondent to deny that it owned and operated PCB storage facilities in its amended answer. Respondent admits that it is currently a generator of PCB waste and that it notified the State of Ohio of its hazardous waste activities under RCRA. Respondent points out that complainant's reliance on its admission that it stored PCB capacitors and debris for disposal from January 31, 1991 through April 4, 1991 and its admission that storage constitutes waste handling activities are of no significance since complainant withdrew the allegations when it amended the complaint. Respondent claims that its failure to deny the allegation that it owned and operated PCB waste activities was inadvertent and that when it discovered its mistake it filed an amended answer in which it denied that it conducted PCB waste activities from 1983 to 1991 and denied that it owned and operated PCB storage facilities during the same period. (When the amended answer was filed, complainant stated that it did not oppose the amendment.) [\(4\)](#)

The amended complaint makes a different claim and has produced a different answer. Because of a mistake, respondent failed to deny some key allegations and complainant relied on that mistake to establish the violation. It is now apparent that complainant's reliance was misplaced. While complainant sought and received an opportunity to reply, it never did. Complainant did not try to correct the apparent flaw in the motion regarding count VI when the stay was lifted. In a case like this it would be unfair to rule on the motion to grant accelerated decision on count VI where there was a misunderstanding about what facts had been admitted or denied. It remains to be seen whether complainant can establish the violation in the amended count VI. It should be noted that complainant's reliance on admissions in the original answer is nothing short of puzzling since the allegations in the amended count VI cover a much larger period

and allege a different infraction. It should have been immediately evident that a mistake had been made.

ACCORDINGLY, IT IS ORDERED that respondent's motion for accelerated decision on counts I through IV and VI, filed September 26, 1994 IS GRANTED IN PART, DENIED IN PART and DISMISSED AS MOOT IN PART, as indicated in the decision.

IT IS FURTHER ORDERED that respondent's motion to suppress evidence, and for accelerated decision, filed October 5, 1994 IS DENIED.

IT IS FURTHER ORDERED that complainant's motion for accelerated decision, filed October 19, 1994 IS GRANTED on counts I, II, III and V and DISMISSED as to count VI.

IT IS FURTHER ORDERED that parties jointly notify the presiding officer by November 26, 1997 about time and place for the hearing, after determining the presiding officer's availability with legal assistant Shirley Smith.

IT IS FURTHER ORDERED that complainant file a status report by December 5, 1997 explaining what steps have been taken to settle this case since November 13, 1997.

Edward J. Kuhlmann

Administrative Law Judge

November 13, 1997

Washington, D.C.

1. Respondent in its answer states that it had the annual information required by the rule although it admits that it was not in the form required by the rule. (Resp. Ans. at p. 5.) In fact, according to the answer, respondent was inspected in July 1989 and found to have violated § 761.180 (a). After that inspection, respondent explains in its answer, it "prepared updated records that it believed brought it into compliance with this section ... and mailed those records to the TSCA inspector."

2. Section 761.205 (b) provides that "disposers of PCB waste who have previously notified EPA or a State of hazardous waste

activities under RCRA shall notify EPA of their PCB waste activities ... by filing EPA Form 7710-53 with EPA by no later than April 4, 1990. The notification shall include the EPA identification number previously issued by EPA or the State and upon receipt of the notification, EPA shall verify and authorize the use of the previously issued identification number for PCB waste activities."

3. These were: the facility's address, the facility's U.S. EPA ID Number, the calendar year the documents covered, the facility's PCB Transformer #6 as a PCB Transformer, the facility's quarterly inspections of PCB Transformer # 6, the facility's PCB capacitors, the facility's kilograms of PCBs, the facility's unique ID Numbers for its PCB containers, the facility's disposal of PCB containers, the facility's unique ID Numbers for its PCB manifests, the total weight, in kilograms, of the facility's PCB Transformers remaining in service at the end of the each calendar year, the facility's total number of PCB capacitors in service at the end of the calendar year, the total weight, in kilograms, of the facility's PCB articles remaining in service at the end of each calendar year.

4. The original complaint (dated September 23, 1993) alleged in count VI that at the time of the inspection, complainant found documentation at respondent's facility that from January 31, 1991 to April 4, 1991 respondent had stored PCB debris and PCB capacitors for disposal. It was also alleged that respondent's storage of PCBs constituted PCB waste handling activities. It was further alleged that respondent failed to file EPA Form 7710-53 with EPA prior to engaging in PCB waste handling activities. Respondent admitted these allegations in its original answer. Complainant sought a \$25,000 penalty for respondent's failure to notify.

On August 24, 1994, complainant moved to amend count VI of the complaint because, after further inquiry, complainant determined that respondent had notified both the EPA and the State of Ohio of its hazardous waste activities under RCRA. Complainant then claimed that respondent had not notified EPA of its PCB waste activities by filing EPA Form 7710-53 by April 4, 1990. Initially, complainant claimed a violation of 40 C.F.R. § 761.205 (a) (2) but in the amended complaint the violation cited was § 761.205 (b). That regulation requires that PCB waste generators who have previously notified EPA or a state of hazardous waste activities under RCRA notify EPA of their PCB waste activities. Complainant then expanded the allegations to allege that respondent engaged in PCB waste activities and

storage, not just for a period in 1991, but during the years 1983 to 1991. The amended complaint did not hold respondent liable for notifying complainant before it began waste handling activities before April 4, 1990. In addition, complainant did not alter the penalty it sought for count VI.