UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Michael Schiavone	)	**Docket No. TSCA 01-2005-0061**
	)	
	)	
Respondent	)	

Order on Motions

In this proceeding under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a), EPA's Administrative Complaint alleges four violations of regulations, (Counts I through IV), pertaining to Polychlorinated Biphenyls or, as they are better known, "PCBs." 40 C.F.R. Part 761. The PCB regulations "establish prohibitions of, and requirements for, the manufacturing, processing, distribution in commerce, use, disposal, storage, and marking of PCBs and PCB Items." 40 C.F.R. § 761.1(a). The particular regulations cited involve PCB storage and disposal requirements, the marking of PCBs, the obligation to have an EPA identification number and the duty to notify of PCB waste activity. Before the Court are Respondent Schiavone's Motion for Accelerated Decision, dated March 2, 2006, EPA's Motion to Withdraw Counts I, III, & IV of Complaint, and EPA's Cross-Motion for Accelerated Decision for Count II , dated March 20, 2006.[1] For the reasons which follow, the Court

[1]Various other documents are associated with these motions and were considered by the Court: EPA's Memorandum in support of its cross-motion and opposition to Respondent's Motion for Accelerated Decision; EPA's reply to Respondent's opposition to the withdrawal of Counts I, III, & IV and to Respondent's opposition to EPA's motion for accelerated decision as to Count II; EPA's declaration of Kimberly Tisa, an EPA "PCB Coordinator;" two declarations of Marianne Milette, an EPA engineer, and attachments and exhibits accompanying those declarations; Respondent's Memorandum of Law in support of its motion for accelerated

GRANTS Respondent Schiavone's Motion for Accelerated Decision as to all counts, and **DENIES** EPA's Motion to Withdraw Counts I, III, & IV. These rulings also operate to **DENY** EPA's motion for accelerated decision as to Count II.

EPA's Complaint.

According to the Complaint, on or about May 1, 2002 the Connecticut Department of Environmental Protection ("CTDEP") noted an oil release at the Respondent's facility at 250 Universal Drive North, in North Haven, Connecticut. The oil release extended into abutting wetlands, which are part of the Quinnipiac River. Notified of this, the Respondent, through its environmental consultant, KU Resources, "began to perform cleanup activity under the supervision of the CTDEP, with some additional oversight provided by the EPA." Complaint at ¶ 7. Two oil samples taken showed the presence of PCBs at 45 and 350 ppm respectively. On May 9, 2002 Earth Technology, another contractor hired by the Respondent, added sandbags as additional containment. Thereafter, on June 18 and 28, 2002, CTDEP observed drums with booms/sandbags contaminated with oil from the PCB release. Following that, on September 16, 2002, KU Resources reported that PCBs exceeding 50 ppm were found in two general areas of the facility and Respondent reacted by undertaking other remediation actions. Still later, on May 24, 2004, CTDEP observed free oil product, containing PCBs, migrating off-site, and discharging into the Quinnipiac River Marsh Wildlife Area. Analytical reports for the post-excavation confirmatory samples were provided by KU Resources on March 8, 2005. They showed PCB-1248, PCB 1254, and PCB 1260, at levels "above the CTDEP 10 ppm direct exposure criteria for soil." Complaint at ¶ 15.

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decision; Respondent Schiavone's statement of material facts and accompanying exhibits 1 through11; and Respondent's reply and response to complainant's memorandum and cross-motion for accelerated decision.

Particularly related to the four Counts in the Complaint, a CTDEP inspector at the facility on May 10 and 13, 2005 observed twenty-seven "55-gallon drums resting on the soil without secondary containment." *Id.* at ¶ 16. Each of these drums contained about "50 gallons of water drained from the soil excavated from the [affected site]. [The] *soil* was from an area where [KU Resources, Respondent's contractor] had detected PCB's in excess of 50 ppm in soil in 2002." *Id.* (emphasis added). In its Complaint, EPA reasoned that as the "excavation of [the] soil in 2002 generated 'PCB remediation waste' . . . [and as] the water in the 27 drums was drained from [the] excavated *soil containing* PCBs at a concentration greater than or equal to 50 ppm, [t]he water drained from the excavated soil is thus 'PCB remediation waste' as defined at 40 C.F.R. § 761.3." *Id*. at ¶ 19 (emphasis added). The four counts in the Complaint all stem from EPA's premise that, as the water in the 27 drums was drained from the excavated soil, which soil contained PCBs at a concentration greater than or equal to 50 ppm, then such water drained from the excavated soil is PCB remediation waste. Briefly, the Counts charge: (I) the 27 drums, as PCB remediation waste, and as "PCB Containers," which in turn are "PCB Items . . . [which] were not placarded with information indicating the date the PCB Items were removed from service, in violation of [40 C.F.R.] § 761.65 (c)(8)."; (II) that the drums were not posted with the required "M L"[2] in violation of 40 C.F.R. § 761.40(a)(10); (III) that the 27 drums did not have an adequate roof or walls to prevent rain water from reaching PCB items, in violation of 40 C.F.R. § 761.65(b)(1); and (IV) that the 27 drums were in storage for disposal without having an EPA identification number in violation of 40 C.F.R. § 761.202(b)(1)(i).[3]

Respondent Schiavone's Motion for Accelerated Decision.

On March 2, 2006 Respondent Schiavone moved for accelerated decision on all counts in the Complaint. Schiavone's challenges to the Counts all stem from the "Applicabilty" provisions for Part 761, PCBs. It notes that within these provisions, Section 761.1(a) states that the Part "establishes prohibitions of, and requirements for, the . . . use, disposal, storage, and marking of PCBs and PCB items." Schiavone seeks to utilize the regulatory alternative within that same "Applicability" section to the water stored in the 27 drums. Respondent notes that in its Answer it raised a *Special Defense*, namely that 40 C.F.R. § 761.1(b)(4)(iv) applies to each of the 27 drums of groundwater. That section provides:

> Any person disposing of multi-phasic non-liquid/liquid or liquid/liquid

[2]The "M_L" mark cautions individuals that an item contains PCBs and that PCBs are toxic.

[3]Although not listed as a separate count, EPA added at the end of Count IV that the Respondent failed to notify that the 27 drums were stored at the facility, in violation of 40 C.F.R. §761.205. This was not within the description heading for Count IV which states "Failure to Receive an EPA Identification Number." From its subsequent description summarizing the provisions alleged to have been violated, EPA appears to treat the two sections cited within Count IV as a united violation, listing it as "40 C.F.R. § 761.202(b)(1) / 761.205," but describing it only as a failure to have the EPA identification number.

> mixtures must use the PCB disposal requirements that apply to the individual phase with the highest PCB concentration except where otherwise noted. ***Alternatively***, *phases may be separated and disposed of using the PCB disposal requirements that apply to each separate, single phase material*.

40 C.F.R. § 761.1(b)(4) (emphasis added).

Respondent maintains that this section applies foursquare to the 27 drums of water, as it applied the alternative offered by the regulation, separating the phases into liquid and non-liquid, and then disposed of the water in the drums "using the PCB disposal requirements that appl[ied] to each separated, single phase material." 40 C.F.R. § 761.1(b)(4)(iv). Schiavone notes that it did nothing that would prevent it from availing of this alternative, as it did not dilute the phases by adding more water to the water that was already in the drums.[4]

Accordingly, Schiavone's defense is that it employed this provision, first by following its requirements, which permit one to separate the liquid phase from the non-liquid phase, and then by using the PCB disposal requirements that applied to each separate, single phase material. Noting that 40 C.F.R. § 761.65, entitled "Storage for Disposal," states that *it applies to* the storage for disposal of PCBs at concentrations of 50 ppm or greater and *PCB Items* with PCB concentrations of 50 ppm or greater, Schiavone maintains that the limitations of that section's applicability necessarily defeat Counts I and III as both are part of the Section 761.65, "Storage for Disposal," provisions. Count I, failure to date PCB items, is based on 40 C.F.R. § 761.65(c)(8), while Count III, failure to properly store PCB items, is based on 40 C.F.R. § 761.65(b)(1).

[4]Section 761.1(b)(5) warns that "[n]o person may avoid any provision specifying a PCB concentration by diluting the PCBs, unless otherwise specifically provided." As Schiavone described it, a description factually unchallenged by EPA, "[t]here was no dilution. No water was added to the water. No water was added to the soils. No soils were added to the soils. No soils were added to water." Respondent's Memorandum in Support of Motion for Accelerated Decision at 6. Nor does EPA allege that Schiavone engaged in any prohibited diluting.

Respondent contends that the same fate applies to Count IV, which cites 40 C.F.R. §§ 761.202(b)(1)(i),[5] for the failure to receive an EPA identification number. Schiavone states that the sections cited in Count IV apply only to wastes covered by 40 C.F.R. § 761.65. As 40 C.F.R. § 761.65 does not apply to the cited drums, Count IV cannot survive either. Last, Schiavone asserts that Count II cannot survive either, as there can be no *storage* area for PCB waste if the PCB waste is itself below the regulated concentration. Schiavone Motion for Accelerated Decision at 3.

In employing the regulatory alternative by separating the phases by separating the non-liquid phase, (i.e. the soil), from the liquid phase (i.e. the water) and, having done so, applying the PCB disposal requirements that applied to each phase, Respondent emphasizes that the focus here is not with the *soil* phase. Rather, it is the *water* in the drums that forms the basis for the four Counts in the Complaint. As it is undisputed that the water in the drums was sampled and found to contain an average of less than 7 parts per *billion* PCBs, Schiavone contends that none of the cited violations apply because the regulations provide that the storage for disposal requirements apply where the PCB concentrations are 50 parts per *million* or greater.

As noted, Schiavone emphasizes that the PCB regulations offer an alternative, with 40 C.F.R. § 761.1(b)(4) permitting one to separate multi-phasic PCBs. Schiavone Memorandum in Support of Motion for Accelerated Decision, ("R's Memorandum") at 5. Making use of that alternative, it asserts that upon separating the groundwater from the soils, "it became proper to apply the appropriate regulations for PCB disposal to each separated, single phase material." *Id.* Once a phase, in this case the separated water in the drums, is found to have PCBs at less than 50 ppm, consequences result, as Counts I and III, based on the "Storage for Disposal" provision at 40 C.F.R. § 761.65, apply only where the PCB concentration is at or above 50 ppm. The consequences continue because, if the storage for disposal requirements do not apply, one can not logically assert that there is a need to mark, notify or date such drums, and there is no need to mark the drum storage *area* for drums that do not themselves need to be marked. *Id.*

[5]Count IV also cites 40 C.F.R. § 761.205, which deals with notification of PCB waste activity. Like 40 C.F.R. § 761.202, the other section cited for Count IV, it falls within Subpart K – PCB Waste Disposal Records and Reports.

The last alleged violation, Count IV, invokes 40 C.F.R. §§ 761.202(b)(1) and 761.205 and is self-described by EPA as the "[f]ailure to receive an EPA identification number." Complaint at 6. Schiavone looks to 40 C.F.R. § 761.205(c)(2) which provides that generators of PCB waste are to notify EPA of their PCB waste activities only if they have a PCB storage facility that is subject to the storage requirements of section 761.65(b) or 761.65(c)(7). It asserts that because the Storage for Disposal provision only applies where PCB concentrations are at least 50 ppm, 40 C.F.R. § 761.205(c)(2) does not apply. Schiavone reasons that as there is no duty to notify EPA of their PCB waste activities, since the PCB concentration in the water in the drums was below 50 ppm, Count IV's claim that it had to obtain an EPA identification number cannot apply either. One can hardly need an identification number if there is no duty to notify EPA of one's PCB waste activity in the first place.[6]

EPA's Motion to withdraw Counts I, III, & IV and its Cross-Motion for Accelerated Decision as to Count II.

[6]Schiavone also notes that in EPA's *Revision to the PCB Q & A Manual (September 2001)*, EPA's answer, in Question # 3, pertaining to the regulation of the aqueous phase in a multi-phasic solution where the aqueous phase's PCB concentration is ≥ 3 ppb, advises that where phases are separated, each phase is regulated *using the PCB disposal requirements that apply to each separated phase.* Thus, the Q & A is consistent with the instructions provided in the PCB Applicability section. *See* 40 C.F.R. § 761.1(b)(4)(iv). Respondent cites several other examples from the same *Q & A Manual*, each of which affirm that one may separate the waste into phases and that EPA's regulatory concerns arise when the PCB concentration is ≥ 50 ppm.

EPA responded to Schiavone's Motion in two ways. First, it moved to withdraw three of the four Counts, an effort which, if the motion were granted, would have the effect of leaving only Count II in the Complaint. Second, it moved for its own accelerated decision as to Count II. In seeking to drop Counts I, III and IV, EPA implausibly asserts that it was not motivated by Schiavone's Motion for Accelerated Decision, but rather that "based upon information disclosed and discussions during Alternative Dispute Resolution, it [] decided to exercise its prosecutorial discretion not to pursue those counts."[7] Motion to Withdraw at 1.

Regarding the one count that EPA still defends, Count II's assertion that the Respondent did not comply with 40 C.F.R. § 761.40(a)(10), EPA contends that the Respondent is merely trying to graft the language from a separate subpart of the PCB regulations to the regulation in issue.[8] It notes that the regulation lists items requiring the M_L mark and that item number 10

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[7]In fact, in EPA's Reply to Schiavone's Opposition to EPA's Motion to withdraw Counts I, III and IV, EPA declares that it does not concede Schiavone's arguments, reiterating that it "could [have] cho[sen] to pursue those counts, [but that] it [continues to] exercise[] its prosecutorial discretion in moving to withdraw them." EPA Reply at 5. EPA then, belatedly, while continuing to seek the withdrawal of three of the four counts, proceeds to rhetorically defend the regulations applicability to the facts. Its arguments in support of the regulations' applicability, in spite of its continued desire to have the Counts withdrawn, are that the storage for disposal regulations are based upon the PCB concentrations "as found." According to EPA, using the "as found" concentrations of PCBs "removes the possibility that wastes that have been in contact with PCBs in excess of the 50 ppm standard will be managed poorly." *Id*. EPA then suggests, without any facts to support the claim, that the "reasoning behind this basis is borne out in this matter." It infers, again without any evidence, that there was something nefarious about the delay between the time the drums were sampled and the results released. Last, EPA maintains that it has "long interpreted the storage for disposal regulations at 40 C.F.R. § 761.65 to govern PCB contaminated water that contains PCBs in excess of 0.5 parts per billion." *Id*. at 4. From there, EPA's travels take it to 40 C.F.R. § 761.79(b)(1)(iii), the decontamination standard of 0.5 ppb, which applies for the *unrestricted* use of PCBs in water. The problem with this approach is that this case is not about the unrestricted use of PCBs in water and EPA's contentions do not face up to the words of 40 C.F.R. § 761.1(b)(4)(iv).

[8]The Declarations submitted by EPA, two from Marianne Milette and one from Kimberly Tisa, (as referenced in footnote 1), do not advance EPA's contentions on the critical issues. Ms. Milette's first Declaration merely advises that she has photographs showing the 27 drums were stored in an area without having the "M_L" mark, the allegation forming the basis for Count II. To that, Ms. Milette adds that the report from Respondent's contracted employee, David Kerschner, shows the presence of PCBs in the water in the drums. Milette's March 15, 2006 Declaration at 2. Milette's second Declaration asserts that "EPA has long interpreted the storage for disposal regulations . . . to govern PCB-contaminated water that contains PCBs in excess of 0.5 parts per billion . . . ." Milette's April 4, 2006 Declaration at 1. Milette's undoing for this "long interpreted" view is that it rests upon 40 C.F.R. §761.1(b)(5)'s proscription that no one can avoid the PCB regulations by diluting PCBs. Milette acknowledges in her declaration that this proscription is itself limited, as it allows that the prohibition against dilution is not absolute,

from that list applies to "[e]ach storage area used to store PCBs and PCB Items for disposal." It then refers to 40 C.F.R. § 761.3, the "Definitions" section, apparently for the proposition that a "PCB Container" refers to a container that has been in contact with PCBs and that a "PCB Item"means an item that contains or has, as a part of it, any PCBs. EPA then notes that it is uncontested that the composite samples came from the drums and that, although the water sampled all had PCB levels far below 50 ppm, the samples still showed that the "drums contained 'PCBs' and constituted 'PCB Containers' and 'PCB Items' as defined by 40 C.F.R. § 761.3. Citing 40 C.F.R. § 761.79(b), it then asserts the disposal of water containing PCBs is regulated if the water has more than 0.5 ppb PCBs. EPA further states that by Respondent's actions, separating the groundwater from the soil and placing that water in drums, meets the definition of 'disposal' because they constitute actions related to containing or confining PCBs. It asserts that as the marking regulations do not limit their application to PCB items having PCB concentrations at or above 50 ppm and as the definitions of 'PCBs,' 'PCB Items,' 'Disposal,' and 'Storage for Disposal,' also do not limit themselves to PCB concentrations at or above 50 ppm, and that as "it is undisputed that Respondent stored and then disposed of 'PCB Items' without

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conceding "*unless otherwise specifically provided*." *Id.* Nevertheless, Milette asserts that all waste must be managed in its "as found" concentration. Ms. Milette refers to 40 C.F.R. § 761.61(a)(5)(iv) which speaks to disposal of liquid PCB remediation waste and to 40 C.F.R. § 761.79(b)(1)(iii), which provides that the decontamination standard for *unrestricted use* for PCBs in water is 0.5 ppb, and asserts that these regulations mean that any water with more than 0.5 ppb PCBs are *also* regulated at the same level under the disposal regulations cited in this case. Milette's April 4, 2006 Declaration. As for EPA's Ms. Tisa, her declaration focuses on the assertion that the Respondent has not provided a PCB remediation plan, in accordance with 40 C.F.R. §761.61 and an assertion built upon the alleged failure to comply with that regulation, namely that such PCB Remediation Plans by "standard practice" have a threshold for regulation at 5 ppb. Further, Ms. Tisa asserts that to her knowledge no one has disputed the appropriateness of the 0.5 ppb threshold. Neither Ms. Milette's nor Ms. Tisa's declarations carry the day. As to Ms. Milette, the Court notes that her declaration avoids explaining what 40 C.F.R. § 761.1(b)(4) means. The provision must mean something and Ms. Milette implicitly recognizes this because in citing 40 C.F.R. §761.1(b)(5) she concedes that the provision itself announces that while no one may avoid the PCB regulations by diluting PCBs, it adds its own limitation to that proscription by providing "*unless otherwise specifically provided*." Had EPA intended to *never* permit dilution such a limitation would have been meaningless. Further, putting aside for the moment the limitation contained within §761.1(b)(5), there is no basis for the Court to elevate that regulation above the regulation cited by the Respondent 40 C.F.R. § 761.1(b)(4). As to Ms. Tisa's declaration, the Court views her expressions as distractions from the issue before it. It is noted that her reference to §761.61 and the assertion that the Respondent lacked a remediation plan has never been among the violations alleged by EPA in the Complaint. Further, Ms. Tisa's state of awareness as to whether others have disputed the appropriateness of the 0.5 ppb threshold in such plans is of no value in resolving the issue at hand. Similarly her assertion that it is "standard practice" in such plans to have a threshold for regulation at 5 ppb is not useful to the resolution of the issues.

affixing the proper markings to that storage area," liability for Count II has been established.

Schiavone's Reply to its Motion and Response to EPA's Memorandum and Cross-Motion for Accelerated Decision.[9]

[9] Respondent notes that EPA did not file a response to its Motion for Accelerated Decision. Instead, EPA moved *only* to withdraw Counts I, III, and IV, while filing its own cross-motion for accelerated decision as to Count II. Respondent has objected to EPA's reference to the ADR process in its memorandum in support of EPA's cross-motion for accelerated decision. Respondent contends that EPA's reference, in footnote 1 of its memorandum violates Federal Rule of Evidence 408 or the Dispute Resolution Act of 1990. EPA's entire reference to the ADR process, which process preceded the present motions, states: "While Complainant believed it had good cause to include Counts I, III, & IV upon filing the Complaint, based upon information disclosed and discussions during Alternative Dispute Resolution, it has decided to exercise its prosecutorial discretion not to pursue those counts." EPA Memorandum at 1 (emphasis added). As the EPA reference merely notes that the process occurred, not *what* occurred, this minor reference violates neither the Federal Rules of Evidence nor the Dispute Resolution Act because it reveals nothing about the substance of those discussions.

In its Response to EPA's cross-motion for accelerated decision for Count II, involving whether 40 C.F.R.§ 761.40(a)(10) applies to the 27 drums of groundwater, Respondent notes that while EPA has asserted that the drums were stored for disposal and not properly marked, this overlooks that the cited section applies to qualifying drums. It contends that EPA's argument depends upon a determination that § 761.40(a)(10) is independent of § 761.65. This, Respondent asserts, is difficult to do as § 761.65 addresses storage for disposal, while § 761.40 deals with marking requirements. Response at 3. In support of its position, Respondent notes that when EPA presented its PCB rule it noted that "PCB wastes generally are regulated for disposal under TSCA at concentrations of 50 ppm or greater." It notes that the EPA Administrator's expressed concern is also with PCBs at that concentration. 40 C.F.R.§ 761.20.

Respondent submits that EPA's attempt to withdraw Counts I, III, and IV is simply an attempt to sidestep the "Storage for disposal" provisions at 40 C.F.R. § 761.65. It also notes that in EPA's Memorandum it avoided discussion of Subpart D – Storage and Disposal, entirely. Respondent contends that this avoidance is attributable to the lack of a rational basis to explain how 40 C.F.R. § 761.65, Storage for disposal, does not apply, while simultaneously asserting that the § 761.40(a)(10) kind of storage for disposal does apply. Respondent maintains that, to make sense, Subpart D must govern Subpart C. The consequence of such a construction would be that § 761.40(a)(10) does not apply. Schiavone points out that if EPA's construction is adopted, though containers such as theirs would be exempt under § 761.65, even a container with only traces of PCB would have to be stored in a § 761.40(a)(10) storage area. Respondent's Reply at 5. Thus, Respondent asserts that EPA's position creates two kinds of storage for disposal, that in § 761.65 which only applies to PCBs at concentrations of 50 ppm or greater, and a second storage for disposal, that in § 761.40(a)(10), where PCBs at concentrations of less than 50 ppm does apply. Schiavone submits that this is not logical as EPA's own PCB Q & A Manual announces that where PCBs contain less than 50 ppm they are unregulated for disposal. Nowhere, Respondent observes, do the regulations provide that where PCBs are *unregulated for disposal*, (i.e. PCBs at concentrations at or below 50 ppm) that they still must be *stored for disposal* in a § 761.40(a)(10) disposal area.

Speaking to the one count which EPA still defends, Schiavone frames the issue as "whether 40 C.F.R. § 761.40(a)(10) applies to the 27 drums of groundwater with contents of < 7 ppb." Schiavone Reply and Response at 2. It notes that, under the cited regulation, EPA's claim is that the drums were "stored for disposal" but that the storage area for the drums was not properly marked. In citing the marking requirements of § 761.40, Schiavone contends that EPA has ignored § 761.65, which deals with storage for disposal and that it is that section, § 761.65, which governs the drums.

Schiavone also notes that the introductory comment to the "PCB Mega Rule," 40 C.F.R. Part 761, EPA noted that "**PCB wastes generally are regulated for disposal under TSCA at concentrations of 50 ppm or greater . . . .**"[10] *Id.* at 3. (emphasis in Reply and Response). The

[10]While Respondent Schiavone acknowledges that the introductory comment noted that

regulation itself echoes this principle: EPA's concern over PCBs pertains to situations where the concentration is 50 ppm or more. 40 C.F.R. § 761.20. The larger point made by Schiavone is that while the soils involved exceeded the PCB concentration level, Schiavone was fully compliant with the regulatory requirements. An important aspect of Schiavone's defense stems from 40 C.F.R. § 761.1(b)(4). That subsection, found within "Section 761.1 Applicability," notes that "PCBs can be found in liquid, non-liquid and multi-phasic (combinations of liquid and non-liquid) forms. *A person should use the following criteria to determine PCB concentrations to determine which provisions of this part apply to such PCBs*." 40 C.F.R. § 761.1(b)(4) (emphasis added).

DISCUSSION

1. EPA's attempt to withdraw Counts I, III, & IV.

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there are exceptions to the 50 ppm or greater concentration regulatory threshold, where, for example, one is attempting to avoid the regulations by diluting the waste, it notes that dilution is not involved here, as the "wastes were properly separated under the regulation." *Id*. at 3.

EPA states that it "has decided to exercise its prosecutorial discretion not to pursue [Counts I, III, & IV]." EPA Motion at 1. It notes that once an answer has been filed a "complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(d). The Respondents note that EPA opted only to withdraw Counts I, III, & IV, providing no alternative response to Respondent's Motion for accelerated decision for those counts. It notes, correctly, that Schiavone's Motion remains alive for all counts unless the Court grants the EPA motion to withdraw those counts.[11]

The Court does not credit EPA's claim that the Alternative Dispute Resolution ("ADR") discussions motivated its motion to withdraw Counts I, III, and IV. The timing of EPA's motion, occurring only *after* Schiavone's March 2, 2006 Motion for Accelerated Decision and the fact that while the ADR process ended on February 16, 2006, EPA's motion to withdraw all but one of the counts did not occur until March 20, 2006, pointing to the conclusion that it was Respondent's Motion for Accelerated Decision that spurred EPA's decision to seek the withdrawal. In the exercise of its discretion and because the Court concludes that it is more appropriate to address the cited regulations together, EPA's motion to withdraw Counts I, III, and IV is **DENIED**. As Schiavone observes, the effect of EPA's failure to respond to the merits of the Respondent's Motion for Accelerated Decision is not without consequence, as the facts asserted in Respondent's Motion are to be taken as true. 40 C.F.R. § 22.20(a), the applicable section within the Consolidated Rules of Practice, 40 C.F.R. Part 22, provides that the standard for rendering an accelerated decision, allows that such a decision may be rendered "as to any or all parts of the proceeding . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." That is the situation here – there are no material facts in dispute and judgment on matters of law are all that remains for resolution.

2. Determination regarding Respondent Schiavone's Motion for Accelerated Decision for all counts.

While many of the TSCA regulatory provisions can be complex, the provision at hand is not one of them. The provision cited by the Respondent, 40 C.F.R. § 761.1(b)(4)(iv), provides an alternative disposal procedure. Although that provision provides that one disposing of multi-phasic non-liquid/ liquid or liquid/liquid mixtures is to use the PCB disposal requirements that apply to the individual phase with the highest PCB concentration, it goes on to provide an alternative disposal procedure. That alternative allows the phases to be separated. Once that is done, and the phases are separated, the PCB disposal requirements are applied *to each separate, single phase material*. The undisputed facts are that the Respondent employed the alternative of separating phases, by separating the soil from the groundwater, and creating a liquid and a non-liquid phase. Having done that, it then disposed of the phases according to the applicable requirements for each phase. Thus, by the explicit terms of the regulation, once one opts for the

[11]Schiavone also contends that, even if EPA's Motion to withdraw is granted, the arguments made by Respondent remain valid as to the remaining count.

alternative of separating the phases, the disposal requirements are determined by examining the PCB concentrations applicable to each separated phase.

With this in mind, and remembering the uncontested fact that the highest PCB levels found in the liquid phase samples (i.e. the water in the drums) was 11 ppb,[12] Respondent correctly observes that 40 C.F.R. § 761.65, entitled "**Storage for disposal**," provides that "[the] section applies to the storage for disposal of PCB's at concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50 ppm or greater. It is undeniable that Counts I and III are confined by the applicability limitations of Section 761.65. The effect of this can be simply stated: if the particular PCB concentrations are less than 50 ppm, the section is completely inapplicable. As the water in the drums was far below the regulatory trigger level of 50 ppm, the Counts dependent upon 40 C.F.R.§ 761.65 cannot stand. In this case those are Count I, citing 40 C.F.R. § 761.65 (c)(8) and Count III, citing 40 C.F.R. § 761.65(b)(1). Accordingly, both of those must be dismissed.

Count IV, the last of the three counts which EPA would have preferred to have been

[12] The average PCB results from the water samples were 6.18 parts per *billion.* As noted, one sample yielded 11 parts per billion, while two others had results of 7 ppb and 0.55 parts per billion. It should be remembered that the Storage for disposal provision applies to concentrations at or above 50 parts per *million.* The difference between parts per million and parts per billion is, no pun intended, no small matter. A part *per million* means there is *one* particle of a given substance for every 999,999 other particles, whereas a part *per billion* means that same one particle exists for every 999,999,999 other particles. In conceptual terms that are easier to visualize, the difference between a part per million versus a part per billion, is comparable to a drop of ink in a 40 gallon drum of water and the same drop in an Olympic-sized swimming pool, or the difference between one dollar and a thousand dollars. Thus, it takes *one thousand* parts per billion to equal *one* part per million.

withdrawn, cites 40 C.F.R. §§ 761.202(b)(1) and 761.205. As mentioned *supra*, this Count was described by EPA as the "[f]ailure to receive an EPA identification number." Complaint at 6. Schiavone looks to 40 C.F.R. § 761.205(c)(2) which provides that generators of PCB waste are to notify EPA of their PCB waste activities only if they have a PCB storage facility that is subject to the storage requirements of Section 761.65(b) or Section 761.65(c)(7). It asserts that because the Storage for Disposal provision only applies where PCB concentrations are at least 50 ppm, 40 C.F.R. § 761.205(c)(2) does not apply. Schiavone reasons that as there is no duty to notify EPA of their PCB waste activities, since the PCB concentration in the water in the drums was below 50 ppm, Count IV's claim that it had to obtain an EPA identification number cannot apply either.

The Court notes that both sections cited in Count IV, § 761.202(b)(1) and § 761.205, are part of Subpart K, entitled "PCB Waste Disposal Records and Reports." The former provides, in pertinent part, "[a]ny . . . storer . . . of PCB waste *who is required to have an EPA identification number under this subpart* must notify EPA of [its] PCB waste handling activities [and] . . . shall not . . . store, dispose of . . . PCB waste without having received an EPA identification number from the Agency." The latter cited section provides for notification of PCB waste activities for those engaged in "PCB waste handling activities" by filing a particular EPA form, but the section goes on to provide that for these requirements to apply, the PCB waste activities must be within those described in subsection 761.205(c)(1). Paragraph (c)(1) in turn provides that only PCB waste activities described in 761.205 (c)(2) trigger the need to notify EPA and receive the identification number. Following the trail further, paragraph 761.205 (c)(2) applies only if such PCB generators "own or operate PCB storage facilities subject to the requirements of **§§ 761.65(b) or (c)(7)**." However, consultation with those paragraphs merely informs that they apply to owners or operators of facilities used for the storage of PCBs and PCB Items designated for disposal, in the case of § 761.65(b), (which has its own further exceptions) and, in the case of § 761.65(c)(7), it advises that there are circumstances when PCB containers can be larger than those specified in § 761.65(c)(7). At the end of the day, the trail for all subsections and paragraphs within 40 C.F.R. § 761.65 returns to the section's start and the overarching limitation for that section which provides that it only "applies to . . . PCBs at concentrations of 50 ppm or greater." This makes sense as, from a practical standpoint, one can hardly need an identification number if there is no duty to notify EPA of one's PCB waste activity in the first place. Accordingly, the Court finds that Count IV must also be dismissed.

Last, the cited section for Count II asserts that the drums were not posted with the required "M_L" mark, in violation of 40 C.F.R. § 761.40(a)(10). The Count adds "[a]s noted in paragraph 20, the 27 drums are classified as 'PCB Items' as defined in 40 C.F.R. § 761.3. The 27 PCB items were being temporarily stored for disposal in an area that was not posted with the required M_L mark in violation of C.F.R. § 761.40(a)(10)." Complaint at 5. In pertinent part, the cited section, 761.40(a), "Marking requirements," provides that "(a) Each of the following items in existence on or after July 1, 1978 shall be marked as illustrated in Figure 1 in § 761.45(a): The mark illustrated in Figure 1 is referred to as M_L throughout this subpart." Subsection (a)(10) succinctly provides "Each *storage area* used to store PCBs and PCB Items for disposal." (emphasis added).

However, the issue is not whether the drums were marked according to subsection (a)(10) but whether the subsection applies to the drums at all. As 40 C.F.R. § 761.20, "**Prohibitions and exceptions**," states, the Administrator found that:

> [T]he manufacture, processing and distribution in commerce of *PCBs* in concentrations of 50 ppm or greater and *PCB Items* with PCB concentrations of 50 ppm or greater present an unreasonable risk of injury to health within the United States.

As Schiavone points out, EPA does not explain why the drums were stored for disposal under Section 761.40(a)(10), but not so stored for disposal under Section 761.65. Schiavone submits that Subpart D - Storage and Disposal, governs Subpart C, Marking of PCBs and PCB items, with the consequence that, given the fact that the water in the drums averaged 6.18 ppm, Section 761.40(a)(10) does not apply. Respondent Schiavone's Counsel makes the point that, under EPA's view, though exempt under the storage for disposal regulation, Section 761.65, EPA would require that any container with any amount of PCBs, even if the amount was only a trace, would have to be *stored* in a Section 761.40(a)(10) storage area.

The Court concludes that Count II must fail, as there can be no *storage area* for PCB waste if the PCB waste is not itself regulated. The reasoning applied begins with the observation that the "Storage for disposal" provisions only apply where PCBs are at a concentration of 50 ppm or greater. Again, as the water in the drums was *below* that concentration, all standards within that section, 40 C.F.R. § 761.65, must fail. It follows ineluctably that, as the *storage for disposal* regulations do not apply to the water in the drums, one cannot be cited for having an unmarked *storage for disposal area*. The consequence of that determination is that Count II, invoking 40 C.F.R. § 761.40(a)(10), can not apply.

In making these determinations, the Court is aware of EPA's assertion that the "storage requirements for PCB Remediation Waste [have always been] based upon the PCB concentrations of the 'as found' material." By that assertion, EPA means that it is the concentration of the original waste that controls and in this case that means the concentration of the excavated soils. To support this position, EPA notes that 40 C.F.R. 761.1(b)(5), which it calls the "anti-dilution provision," prohibits avoiding any provision specifying a PCB concentration by diluting the PCBs. However the Court observes that this provision goes on to add that this prohibition against avoiding a PCB concentration by diluting PCBs has an exception to the ban against diluting where it is otherwise specifically provided. Therefore the ban against diluting PCB concentration is not absolute, where a specific provision allows such a practice.[13]

[13]While EPA also calls attention to the Preamble to the Final Rule governing the Disposal of PCBs and to the "anti-dilution provision," describing it as banning the avoidance of PCB disposal requirements by having the "concentration . . . reduced or shifted from one material or environmental medium to another by adding a dilu[t]ent, or separating or concentrating the PCBs," the analysis cannot end there. The same Preamble adds that "[a]ny specific variances

from the anti-dilution provision, such as for certain PCB remediation waste, [are set forth in] subpart D of Part 761." The preamble then notes that there are "*several variances* from the anti-dilution provision" but that these provisions simply "recogniz[e] that where PCBs have already been released, the critical disposal issue is to mitigate the damage from the release." *Id.* (emphasis added). The Court notes that is the situation here, as the PCB had already been released.

EPA also refers to its "*PCB Q & A Manual*," contending that the manual shows that the anti-dilution provision applies to PCB remediation waste. In the example cited by EPA, PCB remediation waste is generated from a cleanup spill having a source of at least 50 ppm PCBs but the PCB remediation waste soil stockpiles are all measured at less than 50 ppm PCBs. The question in the manual is whether the storage requirements for the PCB remediation waste still applies to that soil. The manual's answer to the example is that the PCB remediation waste is regulated based on the concentration at which the soil is found. Thus, the manual concludes that the test is whether the "*as found*" concentration is at least 50 ppm. However, the underlying concern for this "as found" measure, per the example, is the concern that the concentration could have been mixed with clean soil. Thus the example notes that one may not mix the contaminated soil, as it was originally found, with clean soil, as this would distort the true original condition or state of the contaminated soil. Accordingly, the cited example is distinguishable from the case at hand since the example assumes that there was an alteration to the original condition: clean soil being added to contaminated soil. In contrast, there is no evidence here that clean water was added to the water in the drums.

Conclusion.

With EPA originally having taken the position that, as to the 27 drums of water, regarding the assertion of Count I that 40 C.F.R. § 761.65(c)(8) was violated, but that in fact that regulation's requirement to date PCB items did not apply, and that, regarding the assertion of Count III, that 40 C.F.R. § 761.65(b)(1) was violated, but that in fact that regulation's requirement to properly store PCB items did not apply, and that, regarding the assertion of Count IV, that 40 C.F.R. §§ 761.202(b)(1) was violated, but that in fact the regulation's requirement to receive an EPA identification number did not apply, EPA can hardly maintain that, with none of those provisions applying, that, per 40 C.F.R. § 761.40(a)(10), one still must mark *the storage area* for the 27 drums, as per Figure 1 in 40 C.F.R. § 761.45(a), with the label cautioning that the area contains PCBs requiring special handling and disposal in accordance with 40 C.F.R. 761 and with the label further advising that, in case of an accident or spill, one is to call the Coast Guard National Response Center. Regulatory interpretations must make sense as a whole.[14] Given that under these circumstances, there was no duty to date the PCB items, no duty to properly store them, and no duty to obtain an identification number, it makes no sense to conclude that the storage area still must be marked, while the items themselves are below the level of regulatory concern.

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William B. Moran
United States Administrative Law Judge

July 19, 2006
Washington, D.C.

[14] *Dantran, Inc. v. U.S. Dept. of* Labor, 171 F.3d 58 (1st Cir. 1999), Chowdhury *v. Ashcroft*, 241 F.3d 848, (7th Cir. 2001), *Viraj Forgings, Ltd. v. U.S.*, 350 F. Supp. 2d 1316 (Ct. Int'l Trade 2004).