

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Environmental Protection Services, Inc.,) **Docket No. TSCA-03-2001-0331**
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: March 7, 2006
Washington, D.C.

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I. Introduction

This case involves the commercial storage and disposal of Polychlorinated Biphenyls, commonly known as “PCBs.” PCBs are regulated by Section 6(e) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2605(e). Except for certain limited exceptions, not applicable here, Section 6(e) “sets forth a detailed scheme to dispose of PCBs, to phase out the manufacture, processing, and distribution of PCBs, and to limit the use of PCBs.” *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1271-1272 (D.C. Cir. 1980) (fn. omitted).

The term “PCBs” includes “any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance.” 40 C.F.R. 761.3 (1999). In more practical terms, “PCBs are chemically stable, fire-resistant compounds that have been used since the 1920s in electrical equipment (e.g., transformers, capacitors) and as plasticizers, adhesives, and textile coatings. Once released into the environment, PCBs are extremely persistent (they resist biological degradation) and tend to bioaccumulate in the fatty tissues of humans and other animals.” *Rogers Corporation*, 9 E.A.D. 534, 536 (EAB 2000) (citations omitted), *rev’d sub nom on unrelated grounds, Rogers v. EPA*, 275 F.3d 1096 (D.C. Cir. 2002). Because PCBs are “nonflammable liquids that are highly resistant to electrical current,” their use in transformers and capacitors aid “in the storage of electrical charge without creating the fire hazard that would occur if a flammable filler were used.” *Environmental Defense Fund v. EPA*, 598 F.2d 62, 66 (D.C. Cir. 1978).¹

“When Congress enacted TSCA in 1976, it singled out PCBs for special attention (the only chemical/class of chemicals so treated) in recognition of evidence showing PCBs to be both widespread and highly toxic. Congress placed explicit restrictions on the manufacture, processing, distribution, and use of PCBs in the United States. *See* TSCA § 6(e)(2)-(3), 15 U.S.C. § 2605(e)(2)-(3). Congress also explicitly directed EPA to promulgate regulations prescribing acceptable methods for disposing of PCBs and for marking PCBs with warning and instructional labels. *Id.* § 6(e)(1), 15 U.S.C. § 2605(e)(1). Congress made it unlawful for any person to fail or refuse to comply with any requirement set forth in EPA’s PCB rules. *Id.* § 15(1)(B), 15 U.S.C. § 2605(1)(B).” *Rogers Corporation, id.* at 536-537.

Consistent with this congressional directive, the Administrator for the Environmental Protection Agency promulgated the PCB rules contained in 40 C.F.R. Part 761 (“Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution In Commerce, And Use Prohibitions”) (1999). These Part 761 regulations were promulgated pursuant to Section 6(e) of TSCA and they contain the PCB storage and disposal regulations involved in this case. As noted, non-compliance with these PCB regulations is expressly prohibited by TSCA Section 15.

¹ Respondent’s president, Keith Reed, described PCBs as being “a very good dielectric fluid,” with good insulating properties for voltage, as well as good cooling properties. Tr. 22 (Vol. VI).

15 U.S.C. § 2614.²

II. Statement of the Case

This is a civil penalty enforcement case brought by the U.S. Environmental Protection Agency (“EPA”) against Environmental Protection Services, Inc. (“EPS”), pursuant to Section 15 of the Toxic Substances Control Act. 15 U.S.C. § 2614. EPA charges EPS with three counts of violating TSCA. The alleged violations involve the failure to comply with the PCB waste storage and disposal provisions contained at 40 C.F.R. Part 761 (1999). EPA seeks a civil penalty of \$151,800 for these three violations. 15 U.S.C. § 2615. *See* Compl. Br. at 64.³

The TSCA charges against EPS are set forth in the government’s Second Amended Complaint.⁴ In Count I, EPA alleges that on July 15, 1999, respondent stored at its facility 32 PCB transformers with a total weight of 10,898 pounds. Complainant further alleges that on November 2, 1999, EPS stored at its facility 16 PCB transformers with a total weight of 15,360 pounds. EPA maintains that pursuant to respondent’s *EPA Approval to Commercially Store PCBs* (the “TSCA PCB Commercial Storage Approval” or “TSCA Storage Approval”), the Maximum Storage Capacity (“MSC”) for PCB transformers at its facility on both July 15 and November 2 was 5,000 pounds. Accordingly, EPA charges that by storing PCB transformers in excess of its approved Maximum Storage Capacity on these two dates, EPS violated 40 C.F.R. 761.65(d) (1999) and TSCA Section 15. 15 U.S.C. § 2614.⁵

² TSCA Section 15 in part states:

It shall be unlawful for any person to –

(1) fail or refuse to comply with (A) any rule promulgated or order issued under section 2603 of this title, (B) any requirement prescribed by section 2604 or 2605 of this title, (C) *any rule promulgated or order issued under section 2604 or 2605 of this title*, or (D) any requirement of subchapter II of this chapter or any rule promulgated or order issued under subchapter II of this chapter;

15 U.S.C. § 2614 (emphasis added).

³ The \$151,800 is the base penalty requested by complainant. As discussed, *infra*, EPA believes that EPS should be sanctioned for not turning over certain material during discovery, thereby warranting an increase in the penalty to \$173, 525. *See* Compl. Br. at 103.

⁴ In the Second Amended Complaint, EPA had requested a civil penalty of \$386,100.

⁵ In its post-hearing brief, complainant identified the PCB transformers involved in the November 2 inspection as weighing 15,330 pounds, and not the 15,360 pounds alleged in the

In Count II, EPA alleges that on July 9, 1999, EPS stored at its facility 26,367 pounds of PCB capacitors. EPA maintains that the Maximum Storage Capacity, *i.e.*, the MSC, for PCB capacitors as provided in respondent's applicable TSCA PCB Commercial Storage Approval was 1,000 pounds. Accordingly, EPA charges that EPS's PCB capacitor storage on July 9 was in violation of 40 C.F.R. 761.65(d) (1999) and TSCA Section 15. 15 U.S.C. § 2614.

Finally, in Count III, EPA charges another Section 15 TSCA violation, 15 U.S.C. § 2614, this time relating to respondent's operation of its scrap metal recovery oven. EPA alleges that on 11 days in March, September, and October of 1999, during the disposal of "drained PCB-contaminated transformers," EPS failed to operate the primary chamber of the scrap metal recovery oven in accordance with the time and temperature requirements of 40 C.F.R. 761.72(a)(3) (1999).⁶

In its Amended Answer to the Second Amended Complaint, EPS denies these charges of violation. Respondent also raises two affirmative defenses. First, EPS argues that the complaint should be dismissed because it is the product of EPA's prosecutorial misconduct. In that regard, EPS submits that it is being "inappropriately targeted and selectively singled out for inspections and enforcement" because it has complained to EPA Headquarters and to the Inspector General's Office, among others, about the Agency's failure "to enforce applicable environmental laws" against a competitor PCB disposal company. Ans. ¶ 38. Second, EPS submits that 40 C.F.R. 761.72(a)(3), the scrap metal recovery oven regulation involved in Count III, is invalid because it was not promulgated pursuant to the notice and comment rulemaking provisions of the Administrative Procedures Act.

A hearing in this matter was held on June 17-20, 2003, and August 18-22, 2003, in Wheeling, West Virginia, and on September 8-11, 2003, and June 29-30, 2004, in Philadelphia, Pennsylvania.⁷

Second Amended Complaint. The actual weight of the items identified by EPA in its brief, however, total 15,320 pounds. In that regard, Item 1 (barcode 300346) weighed 510 pounds and not 520 pounds. Also, Item 2 was misidentified as barcode 340346. The correct barcode for Item 2 is 340088. *See* Compl. Br. at 17 & CX 11 (Attach. 3). These minor errors have no bearing on the resolution of Count I.

⁶ In the Second Amended Complaint, EPA alleged 12 days of non-compliance. In its post-hearing brief, EPA reduced the number of days of non-compliance from 12 to 11. Compl. Br. at 36 n.12.

⁷ Some of the hearing dates included sessions closed to the public because the testimony concerned privileged Confidential Business Information, or "CBI." In that case, a full and complete hearing transcript was provided to the parties and to the undersigned, as well as to the EPA Regional Hearing Clerk, the keeper of the official record. A redacted transcript not containing CBI is available to the public. *See* 40 C.F.R. Part 2 & 40 C.F.R. 22.5(d).

As explained, *infra*, EPS's motion to dismiss Count III of the Second Amended Complaint is denied, and respondent's affirmative defense of selective prosecution is rejected. Further, it is held that EPA has established the TSCA violations charged in all three counts. Accordingly, a civil penalty of \$151,800 is hereby assessed against EPS for the violations.

III. Procedural History

This case has an extensive procedural history that warrants highlighting. EPA filed its initial Complaint in this matter on June 29, 2001, alleging three violations of TSCA, in particular, violations of the PCB regulations. EPS filed an Answer denying these charges on August 15, 2001. On September 6, 2001, this case was placed on the Alternative Dispute Resolution ("ADR") docket and a neutral administrative law judge was assigned. ADR proved unsuccessful and the neutral recommended that it be terminated on October 24, 2001. By Order of Designation from the chief administrative law judge, this matter was placed on the undersigned's docket on October 25, 2001.

Thereafter, an Order Setting Prehearing Procedures was issued on October 25, 2001. This Order directed the parties to provide hearing related information such as identifying prospective witnesses, including expert witnesses, and exhibits. On November 21, 2001, an order was issued granting respondent's motion to stay the submission of the prehearing exchanges pending the resolution of several unrelated motions that it had filed.

Next, on January 9, 2002, an Order Granting Motion to Amend Complaint was issued. This order permitted EPA to correct a typographical error contained in the Penalty Calculation Section of the original Complaint. On January 29, 2002, EPA filed its First Amended Complaint. EPS filed an Amended Answer on February 8, 2002. In the meantime, a new Order Setting Prehearing Exchange Filing Dates was issued on January 16, 2002.

On February 15, 2002, the prehearing information filing date essentially was stayed due to a medical emergency involving respondent. Thereafter, the parties filed a Joint Motion To Stay Administrative Proceeding For A Limited Time Period. In this motion, the parties represented that "there is a strong likelihood that a potential settlement of the matter can be reached." On June 12, 2002, the motion to stay was granted and the parties were given until August 23, 2002, to discuss settlement. Upon the parties' request, this date subsequently was extended to September 30, 2002.

Thereafter, in a joint status report dated September 30, 2002, the parties stated that they were unable to settle this case and they asked that the case proceed on the litigation track. Nonetheless, in a subsequent letter dated October 8, 2002, counsel for respondent stated that "EPS wanted to report to Your Honor that the parties were very close to reaching an agreement in principle with regard to most of the claims alleged in the Complaint." Counsel stated further that EPS was still continuing its efforts to resolve all outstanding issues. Counsel for complainant appears to have shared this optimism, stating in a December 12, 2002, status report that the parties were still in settlement discussions and that it was their intention "to reach a final

settlement of the matter by January 15, 2003.”

The parties, however, were unsuccessful in their efforts to settle the matter. As a result, a number of events then took place in this case as it moved toward hearing. One of them was the discovery phase which began in February of 2003 and continued on through May of 2003. Another development was EPA’s filing a Second Amended Complaint on April 23, 2003, changing the description of “PCB transformers” in the Complaint as it relates to Count III to “PCB-contaminated transformers.” EPS filed an Amended Answer and the case finally proceeded to hearing on June 17, 2003. As noted, there were four phases to the hearing portion of the case, with the last phase concluding on June 30, 2004.

IV. Facts

A. Respondent’s Facility

Since 1989, Environmental Protection Services, Inc., has operated an electrical equipment storage and disposal facility in the city of Wheeling, West Virginia. Keith Reed, the company’s president, testified that the majority of this storage and disposal business involves non-PCB material. Tr. 10-13 (Vol. VI). This case, however, concerns that portion of respondent’s business which involves the storage and disposal of PCB waste and PCB-contaminated material, *i.e.*, material having a PCB concentration between 50 and 499 parts per million).

In that regard, EPS receives at its Wheeling facility PCB “transformers” and “capacitors,” primarily from the utility industry. CXs 1, 2 & 56.⁸ EPS stores electrical equipment that it will dispose of on-site (the PCB-contaminated material), as well as electrical equipment that it ultimately will ship to an EPA-approved TSCA disposal site because the equipment contains greater than 500 ppm. Resp. Br. at 4, *citing* RX 508.

EPS provides an overview of this operation in a company brochure titled, “The Environmentally Safe Alternative For Non-PCB, PCB-Contaminated And PCB Waste.” The brochure in part reads:

Each year utility companies, industrial firms and electrical contractors bear the legal responsibility for the safe disposal of obsolete electrical equipment. This non-PCB, PCB-Contaminated

⁸ A “PCB Transformer” is an electrical unit with 500 parts per million (“ppm”), or greater, PCBs, and it is used for changing current. Tr. 242-243 (Vol. I). A “PCB Capacitor” is an electrical device usually containing two or more plates separated by an insulating fluid (*i.e.*, polychlorinated biphenyls) and it essentially is used for the storage of an electrical charge. Tr. 252-253 (Vol. I).

and PCB waste presents a difficult and potentially expensive set of problems.

Environmental Protection Services leads the industry for removing the liability associated with the disposal of PCBs.... EPS provides a fully documented “Cradle-to-Grave” disposal process. All material is carefully tracked from the time it leaves the customer’s site by our unique tracking system. After the removal of all PCBs, a Certificate of Disposal is issued for each piece of equipment....

When the equipment is loaded on a truck at the customer’s site, a barcode tag is placed on each item. Using this tag and a set of barcode readers through the facility, EPS is able to track each item through the entire process. Detailed records are kept as each piece of equipment progresses through the facility. All of this data is gathered electronically for permanent record keeping.[⁹]

EPS processes equipment of all PCB levels. From distribution and power transformers, circuit breakers, switches, bushings and reclosers to gas pipes, valves, tanks, and regulators, EPS can handle you disposal needs....

CX 56.

B. The TSCA PCB Commercial Storage Approval

In order to carry out the PCB-related business activities identified in the company’s brochure (CX 56), EPS had to first obtain from EPA a TSCA PCB Commercial Storage Approval. Respondent made such an application to the EPA Regional Administrator for Region III on December 29, 1992, pursuant to 40 C.F.R. 761.65. CX 1.¹⁰ This application for

⁹ This “Cradle-to-Grave” manifest tracking system developed by EPS involves “a unique six-digit barcode identifier that became associated with each separate transformer or other piece of electrical equipment that EPS processed so that it could maintain a complete history of the unit from the time the unit entered EPS until it was processed, either through the scrap metal recovery furnace or by other processes and shipped for disposal at an approved TSCA site.” Resp. Br. at 2-3, *citing* Tr. 200 (Vol. II), 15-17 (Vol. IV) (Confidential Business Information, or “CBI” portion of transcript), & CX 42.

¹⁰ The EPS Wheeling facility is located in the State of West Virginia, which is included within EPA Region III. The principal EPA offices of Region III are located in Philadelphia, Pennsylvania.

commercial storage approval included EPS's proposed Maximum Storage Capacities for various types of PCB wastes,¹¹ a closure plan for the facility, and a financial assurance mechanism to provide for adequate funding for closure of the Wheeling facility in an environmentally sound manner, should that need arise. CX 1. Closure refers to "the end of a useful life of a facility," meaning that all contamination and all hazardous and toxic substances are removed from the facility. Tr. 87 (Vol. I).

In response to this permit application, the EPA Region III Regional Administrator issued a TSCA PCB Commercial Storage Approval to EPS on November 10, 1993. RX 508 (R000003). This TSCA Storage Approval was issued pursuant to Section 6(e)(1) of the Toxic Substances Control Act, 15 U.S.C. § 2605(e)(1), and the PCB regulations of 40 C.F.R. Part 761. This TSCA PCB Commercial Storage Approval was set to expire on October 1, 1998. *See* CX 66. On April 9, 1998, prior to this expiration date, EPS requested that EPA Region III issue a five-year renewal of its TSCA PCB Commercial Storage Approval. CX 66. In this renewal request, respondent stated that it "ha[d] not changed its work practices, operation or any other procedures described in the original permit" and that "[a]ll storage of PCB items has remained the same." *Id.*

On September 29, 1998, the Regional Administrator for EPA Region III issued to EPS an "Approval to Commercially Store Polychlorinated Biphenyls (PCBs)." CX 2. This TSCA Storage Approval took effect immediately and its terms and conditions governed respondent's PCB storage operation when the events of this case took place. This Approval provided that it was to expire on October 1, 2003, "unless revoked, suspended, or terminated in accordance with the Conditions of Approval stated herein." CX 2 at 3. It is noteworthy that the Maximum Storage Capacity for "PCB Transformers" to be stored at respondent's Wheeling facility was established at 5,000 pounds and the Maximum Storage Capacity for "PCB Capacitors" was established at 1,000 pounds. *Id.* at 5.

C. The Scrap Metal Recovery Oven

In addition to operating a PCB commercial storage facility, as explained in the company's brochure (CX 56), and as testified to by the company's president, EPS operates a scrap metal recovery oven at its Wheeling facility. According to its president, Keith Reed, EPS operates one of only four or five scrap metal ovens in the United States that are permitted to burn "PCB-contaminated scrap." Tr. 151 (Vol. IV). Again, PCB-contaminated material has a PCB concentration between 50 ppm and 499 ppm. The purpose of respondent's scrap metal recovery oven is to burn off any residual oils or any combustible materials associated with the transformer's internal components. Tr. 58 (Vol. II).

¹¹ "For each PCB storage area, and the facility overall, the owner or operator must identify the extent of PCB storage that will occur relative to other wastes, and the maximum projected inventory that ever will be handled at one time." 54 Fed. Reg. 52716, 52738.

In order to operate this scrap metal recovery oven, EPS had to first obtain an air pollution control permit from the State of West Virginia, Division of Environmental Protection. CX 26. As allowed by this permit, respondent burns PCB-contaminated waste. Tr. 212-213 (Vol. VIII). The operation of this scrap metal recovery oven is subject to the regulatory specifications set forth in 40 C.F.R. 761.72(a) (1999). The provisions of Section 761.72(a) are intended to ensure the proper destruction of PCBs.

According to an affidavit authored by company president Keith Reed, EPS's scrap metal recovery oven is comprised of a primary and a secondary combustion chamber.¹² In the primary combustion chamber, articles are heated to a temperature below the melting point of aluminum. The articles are kept at that temperature for several hours. Any residual PCBs present are vaporized at these temperatures. The primary combustion chamber operates under a slightly negative pressure, or draft, so that combustion gases do not escape, but instead are passed into the furnace's secondary chamber. RX 508. The secondary combustion chamber "operates at the same combustion conditions as a PCB incinerator." In this secondary chamber, any remaining volatilized PCBs and other combustion products formed in the primary chamber are destroyed. Tr. 79 (Vol. II); RX 508.

D. The EPA Inspections

1. The Government's Decision to Inspect the EPS Facility

EPA conducted the first of its two inspections of the EPS Wheeling, West Virginia, facility on July 15, 1999. How and why EPA came to inspect EPS is of critical importance in resolving EPS's claim of selective prosecution, discussed, *infra*. The results of the EPA inspections are also key to resolving the charges of violation listed in the three-count Second Amended Complaint.

The facts show that EPA decided to inspect the EPS facility upon learning that respondent sought to change the "financial assurance" provisions contained in its TSCA PCB Commercial Storage Approval. This financial assurance mechanism is intended to secure the environmental cleanup of the facility in the event that the commercial storer of PCB regulated material is unable to meet its environmental cleanup responsibilities.

The applicable "[f]inancial assurance for closure" provisions are found at 40 C.F.R. 761.65(g) (1999). Section 761.65(g) states that "[a] commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that he owns or operates." This section further states that the facility owner or operator may choose among a number of the financial insurance mechanisms, such as a "closure trust fund," a "surety bond guaranteeing

¹² Keith Reed is a transformer design engineer. He was accepted as an expert in the areas of (1) combustion of dielectric fluid, including PCBs, and (2) the design and operation of scrap metal ovens as defined in 40 C.F.R. 761.72 (1999). Tr. 12 (Vol. VI), 202, 226 (Vol. VIII).

payment into a closure trust fund,” a “surety bond guaranteeing performance of closure,” a “closure letter of credit,” “closure insurance,” and the “financial test and corporate guarantee for closure.” Sections 761.65(g)(1)-(8).

In September of 1998, EPS informed EPA that it desired to change its financial assurance for closure of its PCB commercial storage facility from a “trust fund” to an “insurance policy.” EPS’s communication with EPA concerning the company’s interest in changing its financial assurance mechanism is explained in an EPA Region III memorandum titled, “Inspection for Environmental Protection Services, Wheeling, WV.” This memorandum was prepared by Bobbie Wright, an Environmental Scientist with the Toxics Programs and Enforcement Branch, and it was prepared for Aquanetta Dickens, the EPA Branch Chief. In the memorandum, Wright expressed concern over EPS’s financial assurance proposal, concluding that respondent’s requested change was reason to conduct an inspection of its Wheeling facility. Wright stated:

EPA has expressed serious concerns regarding EPS and their extreme rush to release trust fund dollars. An inspection is warranted to verify the following:

1. EPS’s maximum containment capacity as per their permit requirements.
2. EPS’s compliance with the time requirements for transporting waste off-site.

CX 7 (Attach. 1).

As noted in the Wright memorandum, EPS’s financial assurance mechanism request caused a significant measure of concern within EPA Region III. As a result, the Region contacted EPA Headquarters in Washington, D.C. for guidance. Tr. 17-18 (Vol. XII). Ultimately, the EPS proposal to change its financial assurance mechanism was rejected. “EPS was informed that the policy contains problems that would need to be revised/deleted before EPA could consider accepting such a financial assurance mechanism for closure of a PCB Commercial Storage facility.” Accordingly, EPA recommended that “the existing trust fund remain in place.” CX 7, Attach. 1.

Charlene Creamer, the Region III PCB Coordinator at that time, played a key role in evaluating EPS’s request to change its financial assurance mechanism, as well as in the Region’s subsequent decision to conduct an inspection of respondent’s facility. Creamer’s responsibilities included reviewing companies’ financial assurance mechanisms, as well as deciding which PCB storage facilities were to be inspected. Tr. 13-15, 17-19 (Vol. XII).

Creamer recommended an inspection of the EPS Wheeling facility in order to determine the facility’s storage capacity and ensure that they had the right financial mechanism for closure. Tr. 13, 15, 17-21 (Vol. XII). Another key Region III individual involved in the decision to

inspect the EPS facility was Aquanetta Dickens, Chief of the Toxics Programs and Enforcement Branch for Region III. Dickens was Creamer's immediate supervisor in 1999. Tr. 20-21, 104-105 (Vol. XII). Creamer and Dickens discussed the EPS financial mechanism for closure status, and Dickens agreed with Creamer that respondent's Wheeling facility should be inspected. Tr. 108 (Vol. XII).

2. The July 15, 1999, Inspection

On July 15, 1999, EPA conducted its first inspection of the EPS facility in Wheeling, West Virginia. This inspection was performed by Inspectors Scott McPhilliamy and Scott Rice, both out of the EPA Wheeling Field Office. Tr. 237 (Vol. I), 91 (Vol. II). Consistent with the concern expressed in the Bobbie Wright memorandum, *supra*, Inspector McPhilliamy explained that they went at the EPS facility to compare the actual quantity of material being stored with the Maximum Storage Capacity allowed in respondent's then applicable TSCA PCB Commercial Storage Approval. Tr. 238 (Vol. I).

Inspector McPhilliamy testified that during this inspection he observed PCB transformers in the storage area of the facility. These transformers were intact and were in a non-leaking condition. Also, no one was working on them at the time of inspection. The inspector took a photograph of these stored PCB transformers (CX 8) and he was able to count their number "within reason." McPhilliamy concluded that there were approximately 32 transformers. Tr. 243, 246-247 (Vol. I).

Inspector Rice testified that the manner in which the 55-gallon drums were being stored by EPS prevented EPA from determining how many transformers were actually being stored. Tr. 96 (Vol. II). Accordingly, McPhilliamy requested from EPS information regarding the PCB transformers observed in the storage area on July 15. This information was subsequently provided by respondent and it is designated as Complainant's Exhibit 9. EPS's response lists 36 transformers with a total weight of 10,898 pounds. Tr. 249-251 (Vol. I); CX 9 .

3. The November 2, 1999, Inspection

EPA conducted a second inspection of respondent's Wheeling facility on November 2, 1999. This inspection was again conducted at the request of EPA Region III's PCB Program and it again was performed by Inspectors McPhilliamy and Rice. Tr. 258-259 (Vol. I). Rice explained that they were requested to check respondent's transformer storage against its allowable Maximum Storage Capacity as set forth in the TSCA PCB Commercial Storage Approval. In addition, the inspectors were to collect operational data from the primary and afterburner chambers of EPS's scrap metal recovery oven. Tr. 97 (Vol. II).¹³

¹³ In a October 6, 1999, memorandum, Region III PCB Coordinator, Charlene Creamer, stated that the November 2 inspection of EPS was due to the company's "storage exceedences" discovered during the July 15, 1999, inspection, financial assurance issues relating to this

On the November 2 inspection, McPhilliamy and Rice conducted another inventory of the PCB material that was in storage. As was the case during their July 15 inspection, the transformers that they observed were intact and were not leaking. Also, no one was working on the transformers at the time of inspection. The weight of the transformers observed on November 2 totaled 29,920 pounds. Tr. 265-267 (Vol. I); CX 11 (Attach. 3).

With respect to the scrap metal recovery oven, on November 2, 1999, Inspectors McPhilliamy and Rice also requested from respondent temperature data as well as data for other parameters such as oxygen, carbon monoxide, and carbon dioxide recorded during the burn cycles in the EPS furnace. Tr. 97-98 (Vol. II). This data was requested for three one-week periods in 1999, all of which were randomly selected by EPA.¹⁴ EPS provided EPA with the requested information several days after the inspection. Tr. 268-270 (Vol. I), 11-13 (Vol. II).

E. The Second Amended Complaint

Based upon the inspections of July 15 and November 2, 1999, EPA ultimately issued the present three-count Second Amended Complaint against EPS. As noted, Counts I and II involve the storage of waste PCB transformers and waste PCB capacitors, respectively, in excess of the Maximum Storage Capacity allowed in respondent's TSCA Storage Approval. Count III involves the operation of the scrap metal recovery to burn PCB-contaminated material.

V. Discussion

A. Liability

1. Count I (The Waste PCB Transformer Storage Violation)

In Count I, EPA claims that EPS violated TSCA Section 15, 15 U.S.C. § 2614, by failing to comply with 40 C.F.R. 761.65(d) (1999) on July 15, 1999, as well as on November 2, 1999.¹⁵

storage, and public inquiries over whether respondent was operating a scrap metal recovery oven or a smelter. CX 60.

¹⁴ Data was requested for March 22-26, September 26-October 2, and October 24-31, 1999. Tr. 271 (Vol. I).

¹⁵ Section 15 of TSCA provides that it is unlawful to fail, or to refuse, to comply with any rule promulgated pursuant to TSCA Section 6 ("Regulation of hazardous chemical substances and mixtures"). 15 U.S.C. § 2605. TSCA Section 6(e), which specifically addresses Polychlorinated Biphenyls, requires that the Administrator of EPA promulgate regulations concerning the processing, distribution in commerce, use, or disposal of PCBs. 15 U.S.C. § 2605(e). The Administrator promulgated the PCB regulations of 40 C.F.R. Part 761 (1999), which is the subject of all three counts in this case, pursuant to TSCA Section 6(e).

The violation at issue in Count I allegedly resulted from respondent's storing waste PCB transformers, in quantities exceeding the Maximum Storage Capacity limits established in its applicable TSCA PCB Commercial Storage Approval. As explained below, EPA has proven this PCB waste storage violation.

a. EPS is a Commercial Storer of PCB Waste

The term "PCB waste" is defined as "those PCBs and PCB Items that are subject to the disposal requirements of subpart D of [Part 761]." 40 C.F.R. 761.3 (1999). Subpart D of Part 761 is titled "Storage and Disposal." It includes the provisions of Section 761.65(d) ("Approval of commercial storers of PCB waste") that are the subject of Count I.

Also, the term "commercial storer of PCB waste" is defined as:

... the owner or operator of each facility that is subject to the PCB storage unit standards of § 761.65(b)(1) or (c)(7) or meets the alternative storage criteria of § 761.65(b)(2), and *who engages in storage activities involving either PCB waste generated by others or that was removed while servicing the equipment owned by others and brokered for disposal.*

40 C.F.R. 761.3 (emphasis added). It is not in dispute that both the PCB transformers at issue in Count I, and PCB capacitors at issue in Count II, are considered "PCB waste."

Keeping the above definitions in mind, the record evidence in this case establishes that respondent is a commercial storer of PCB waste. For example, in 1992, EPS applied to the EPA Regional Administrator for Region III for approval as a commercial storer of PCB waste. CX 1. Respondent did so in accordance with 40 C.F.R. 761.65(d) (1999).¹⁶ The company received its Approval to Commercially Store PCB Waste from the EPA Regional Administrator in 1993. With respect to PCB transformers, EPS was authorized to store up to 5,000 pounds, the amount that respondent had requested in its application.¹⁷ This Approval to Commercially Store PCB Waste was renewed by the Regional Administrator for Region III in 1998, and it was in effect at the time that the events in this case took place. CX 2.

In addition, the testimony of respondent's president, Keith Reed, further shows that EPS was in the business of disposing of PCB waste. Reed testified that EPS provides "assurance and

¹⁶ 40 C.F.R. 761.65(d)(3)(vi) (1999) provides that the application for commercial storage approval shall include "[t]he owner's or operator's estimate of maximum PCB waste quantity to be handled at the facility."

¹⁷ Respondent also requested that it be allowed to store 1,000 pounds of PCB capacitors. The capacitors are the subject of Count II.

insurance to utilities and other companies that [respondent] would handle their PCBs in a proper way.” Tr. 13 (Vol. VI). Reed also testified that an EPS “audit report” was provided to potential customers, whom he described as “major utilities.” Tr. 34 (Vol. X). The “Operational Overview” of this audit report is most instructive as to the nature of respondent’s business. It states in part:

ENVIRONMENTAL PROTECTION SERVICE, INC [*sic*] a fully licensed “USEPA PCB Commercial Storer” is a Corporation established for the specific purpose of providing major Power Companies, Municipalities and Industries across the United States with an environmentally safe avenue for the processing of non regulated and regulated electrical equipment. In addition, Environmental Protection Services has a US EPA permit to chemically treat PCB oil greater than 50 ppm PCB....

CX 59 at 1.¹⁸

Finally, as argued by EPA, Complainant’s Exhibit 64 (Confidential Business Information) “reveals that the utility company customers send their PCB-contaminated transformers to EPS with hazardous waste manifests with the utility company’s names filled out on the generator lines of the manifests.” Compl. Br. at 10. EPA further persuasively points out that, after disposing of these transformers, respondent sends “certificates of disposal to the generators.” This action completes the “Cradle-to-Grave” disposal process described by company president Keith Reed. *Id.*, citing Tr. 42-24 (Vol. X) & CX 56. Thus, under the established facts of this case, EPS qualifies as a commercial storer of PCB waste.

b. The Maximum Storage Capacity for Waste PCB Transformers at the EPS Wheeling Facility was 5,000 Pounds

A critical inquiry with respect to the violation alleged in Count I concerns the Maximum Storage Capacity (referred to as the “MSC”) for waste PCB transformers that was in effect at respondent’s Wheeling facility during the EPA inspections of July 15 and November 2, 1999. EPA argues that the MSC in effect was 5,000 pounds. Compl. Br. at 8. EPS argues that *after* the July 15 inspection, but *before* the November 2 inspection, the MSC was increased to 100,000 pounds. Resp. Br. at 5, 8 & 13. Respondent maintains that this increase occurred as a result of its July 19, 1999, notification to EPA that the company would be substantially increasing its

¹⁸ Complainant’s Exhibit 59 provides an account as to the nature of respondent’s business similar to the account provided in Complainant’s Exhibit 56, the EPS brochure titled, “The Environmentally Safe Alternative For Non-PCB, PCB-Contaminated And PCB Waste,” discussed, *supra*.

PCB storage capacity. *See* CX 52; RX 28 (R006068).¹⁹

As to this important issue, EPA is correct that the Maximum Storage Capacity for waste PCB transformers at respondent's Wheeling facility was 5,000 pounds, at any one time, when the two inspections occurred. This fact is well-established by the record evidence. In that regard, the initial TSCA PCB Commercial Storage Approval issued to EPS by Region III's Regional Administrator on November 10, 1993, provided that the MSC for PCB transformers at respondent's facility was 5,000 pounds. (This is exactly the amount that respondent had requested.) *See* CX 1.²⁰ Prior to this TSCA Storage Approval's October 1, 1998, expiration, EPS requested that it be renewed by the EPA Regional Administrator without change. CX 66. Thereafter, the Regional Administrator renewed respondent's TSCA PCB Commercial Storage Approval on September 29, 1998. This new permit was effective through October 1, 2003, clearly encompassing the events of this case. CX 2 at 3. Like respondent's initial permit, the renewed permit provided that the MSC for PCB transformers was *5,000 pounds*. *Id.* at 5.

Despite this commercial storage permit renewal, EPS nonetheless argues that by letter dated July 19, 1999, it had unilaterally modified its PCB waste storage permit by increasing the Maximum Storage Capacity of PCB transformers at its facility from 5,000 to 100,000 pounds.²¹ This argument is clearly contrary to the permitting procedure articulated in 40 C.F.R. 761.65(d) (1999). Indeed, Section 761.65(d)(1) speaks in terms of commercial storers of PCB waste filing an application for storage approval with the EPA Regional Administrator. Subsection (d)(2) goes on to state that the Regional Administrator "shall grant written, final approval to engage in the commercial storage of PCB waste" upon the applicant's satisfying certain regulatory requirements. Subsection (d)(4) also speaks in terms of the written approval being "issued by the Regional Administrator." In fact, this is the procedure that EPS followed in obtaining its two commercial PCB storage permits from EPA and, in fact, is consistent with the very terms of the TSCA Storage Approvals. *See* CX 1 & CX 2 at 3-4. At no time did the Regional Administrator approve the MSC increase to 100,000 pounds. Tr. 30 (Vol. XII).

In addition, aside from the clear regulatory language giving the EPA Regional Administrator (and not the storage company being regulated) the "final approval" as to the provisions of a company's PCB commercial storage permit, acceptance of respondent's

¹⁹ In its brief, respondent cites to various deposition transcripts to support its assertions, including its position as the applicable Maximum Storage Capacity. Unless formally admitted into the record, however, deposition testimony may not be cited either to prove or to disprove any fact at issue.

²⁰ The Regional Administrator can only approve for commercial storage the maximum amounts of PCB waste as to which the owner or operator can provide financial assurance sufficient to close the facility in an environmentally sound manner. 40 C.F.R. 761.65(d)(4)(iii).

²¹ Of course, even if this argument were accepted, it would apply only to EPA's inspection of November 2, 1999, and not to the earlier July 15 inspection.

argument on this issue would be inconsistent with the “financial assurance” provisions of 40 C.F.R. Part 761. It would be inconsistent, to say the least, to require a commercial storer of PCB waste to maintain an EPA-approved financial assurance mechanism to guarantee environmental cleanup in a sound manner, only to allow that same storer unilateral authority to increase its Maximum Storage Capacity, and thereby jeopardize the adequacy of the financial assurance.

In sum, the plain language and context of 40 C.F.R. 761.65(d) could not be clearer -- *i.e.*, that TSCA PCB Commercial Storage Approvals (and the terms therein) are issued exclusively by the EPA Regional Administrator. EPS’s claim that it can unilaterally modify the terms of an EPA-approved permit is contrary to the clear regulatory scheme of Part 761 and is rejected. Acceptance of respondent’s argument would result in the chaotic situation where a permittee is free to arbitrarily change key permit provisions concerning the storage of PCB-contaminated material *after* careful review and approval of its permit application by the Regional Administrator. Such a procedure, as advanced by EPS in this case, makes no regulatory sense.

c. EPS Exceeded the Maximum Storage Capacity for Waste PCB Transformers

The next inquiry is whether EPA has shown, by a preponderance of the evidence, that EPS exceeded the applicable 5,000-pound MSC on both July 15 and November 2, 1999, for the storage of waste PCB transformers. That inquiry is answered in the affirmative.

The evidence supporting the PCB transformer storage violation charged in Count I was collected by EPA Inspectors McPhilliamy and Rice as part of their July 15 and November 2, 1999, inspections of respondent’s Wheeling, West Virginia, facility.²² McPhilliamy testified that they conducted the inspections at the request of the EPA Regional office’s PCB Program. Tr. 237, 258-259 (Vol. I). He explained that the purpose of the two inspections was “to look at the maximum storage capacities and compare the quantity of material that was in storage at the time to those quantities that were listed in their approval.” Tr. 238, 259 (Vol. I), 97 (Vol. II).

Inspector McPhilliamy described the July 15 inspection as follows:

Oh, I believe we saw the facility from the area where -- the inside area where the transformers are unloaded to the area where the transformers are prepared for entry into the oven where they are disassembled. I’m sure we saw the oven. I recall we saw the area where the units come out of the oven are -- not disassembled, but sorted into the -- into the various recycle bins.

We looked at the tanks that were in use for storage of liquids at the facility. I believe we saw most of the facility. It’s

²² Both McPhilliamy and Rice are seasoned PCB inspectors. Tr. 237 (Vol. I), 91 (Vol. II).

not that large of a facility that -- it's pretty easy to see most of it.

Tr. 241-242 (Vol. I).

On both the July 15 and November 2 visits to the EPS facility, the inspectors visually checked respondent's PCB transformer storage area. The transformers were intact and in a non-leaking condition and they were contained within a "diked" area. Tr. 243, 247, 266 (Vol. I). As noted, during the July 15 visit, the inspectors took a photograph of the PCB transformer storage area. Tr. 243-244 (Vol. I). This photograph is identified as Complainant's Exhibit 8. With respect to this photograph, McPhilliamy testified that he observed 55-gallon drums and transformers. He also stated that he observed in the photograph yellow labels which he described as "6-by-6-inch" PCB labels indicating PCB concentrations greater than 500 parts per million. Tr. 244-246 (Vol. I). McPhilliamy was able to count the transformers in storage, "[w]ithin reason." Tr. 246 (vol I). He counted "approximately 32" transformers. Tr. 247 (Vol. I).

The inspectors then requested information from EPS regarding the waste PCB transformers actually being stored at the facility. Tr. 237-247, 258-259 (Vol I). Inspector McPhilliamy stated, "I asked for a count of the actual number of PCB transformers that were in storage and the respective weights of those units." Tr. 250 (Vol. I).

On July 21, 1999, EPA received respondent's answer to McPhilliamy's transformer storage information request. Complainant's Exhibit 9 is the document provided by EPS to EPA and it lists 36 PCB transformers as being stored on the facility during the July 15, 1999, inspection, along with the weight of each unit. All 36 transformers on this list are identified by their unique six-digit EPS barcode number. *See* CX 56. The transformers listed on Complainant's Exhibit 9 have a total weight of 10,898 pounds. As explained by Inspector McPhilliamy, this weight is more than double the Maximum Storage Capacity allowed for in EPS's TSCA PCB Commercial Storage Approval. Tr. 248-252 (Vol. I); CX 2. Because Inspector McPhilliamy had requested transformer weight from EPS, he had no reason to believe that the data provided by EPS was for something other than the PCB transformers that he observed in storage. *See* 24, 29 (Vol. II). Accordingly, the foregoing data provided to EPA establishes a violation of 40 C.F.R. 761.65(d) (1999).

During the November 2, 1999, inspection, "EPA counted approximately 34 units." Tr. 266 (Vol. I). As was the case on July 15, the units in storage on November 2 were "intact" and in a "nonleaking" condition. *Id.* Also, as was the case with respect to the July 15 inspection, McPhilliamy and Rice requested information from respondent regarding the items being stored on November 2. This information was subsequently provided by respondent and it is identified as Complainant's Exhibit 11 (Attachment 3).

Of the 45 units identified by EPS on this list, EPA determined that 16 units were PCB

transformers in storage at respondent's facility on November 2.²³ The weight of these 16 transformers is 15,320 pounds. *See* n.3, *supra*. This is substantially in excess (more than three times the allowable amount) of the applicable MSC which provides for a maximum PCB transformer storage of 5,000 pounds. Thus, as was the case regarding its inspection of July 15, EPA established that EPS stored waste PCB transformers at its Wheeling facility on November 2 in violation of 40 C.F.R. 761.65(d) (1999).

EPS strongly disagrees that the above facts establish a storage violation. It argues that the EPA inspection was inadequate and that the inspectors failed to make the basic investigative inquiries that one would expect them to make. For example, respondent asserts:

Significantly, during the investigation neither McPhilliamy nor Rice asked any questions regarding the disposition or planned disposition of a single piece of electrical equipment that they found in EPS's commercial storage area on July 15, 1999. Rather they simply inventoried the equipment by type without regard to the disposition of the equipment.

Resp. Br. at 6.

EPS also notes that the inspectors: "did not take any oil samples from the items in storage to determine the PCB concentrations of electrical equipment being stored, nor did EPA perform any weight measurements;" "did not question whether the units were being commercially stored or whether the units were actual waste or in-service electrical equipment;" "did not ask EPS during the inspection whether any of the units in the storage area were owned by EPS or if EPS considered itself to be the generator of any units that were in storage on the day of the inspection," and "did not inquire either during or after the inspection whether the units in storage on July 15, 1999, were to be processed in accordance with § 761.20(c)." Resp. Br. at 7-8 (citations omitted).

At first blush, respondent's arguments appear to have some appeal. The immediate issue, however, is not whether complainant performed the storage inspections to respondent's liking, or to its expected degree of thoroughness. Instead, the immediate issue is whether, under the facts of the case, the EPA inspections were sufficient to establish a *prima facie* case of violation. This tribunal concludes that they were. In that regard, EPS is a commercial storer of PCB transformers. EPA suspected that EPS was storing waste PCB transformers in excess of its Maximum Storage Capacity. Based upon the inspectors' observations of the Wheeling facility storage area, and based upon the storage information provided by respondent, EPA determined

²³ The 16 items identified on Complainant's Exhibit 11 (Attach. 3) bear descriptive references such as "T" for transformer, "Pad" for pad mounted transformer, and "pole" for polemount transformer. Tr. 107-109 (Vol. X); *see* Compl. Br. at 17, citing CX 64 (CBI) in explanation that "T" stands for "transformer."

that EPS exceed its MSC on both July 15 and November 2, 1999. The record evidence supports EPA on this point. In other words, complainant has established a prima facie case of violation on the basis of this evidence. EPS may cite to certain areas of inquiry which, if made by the EPA inspectors, would have resulted in a more complete record. Nonetheless, the fact that these inquiries were not made in no way detracts from the prima facie showing of a violation which the complainant did make. In short, the facts of this case establish a violation of 40 C.F.R. 761.65(d), notwithstanding respondent's arguments to the contrary.

d. Respondent's Other Defenses

EPS raises a number of additional defenses to the MSC violation charged in Count I. These defenses are addressed below.

(i). The Section 761.20(c)(2) Exception

Respondent argues that 40 C.F.R. 761.20(c)(2) (1999) provides for a commercial storage approval exception and that this exception applies "to the commercial storage area at the EPS facility." Resp. Br. at 14-15. In that regard, Section 761.20(c)(2)(I) allows for the processing, and distribution in commerce for disposal, of PCBs at concentrations ≥ 50 ppm, or PCB Items with PCB concentrations ≥ 50 ppm, "if they comply with the applicable provisions of this part." Section 761.20(c)(2)(I) further states, "Processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval." This is the regulatory exception upon which EPS relies.

EPS's articulation of its Section 761.20(c)(2)(i) argument, however, is somewhat unclear. Nonetheless, given EPS's citation to certain testimony of EPA witnesses Charlene Creamer (Region III PCB Coordinator), Dr. John Smith (expert witness), and Inspectors McPhilliamy and Rice, respondent appears to be arguing that the Section 761.20(c)(2)(i) exception applies here because, with respect to the waste PCB transformers, it was engaged at the Wheeling facility in the "self-implementing decontamination procedures" of 40 C.F.R. 761.79(c) (1999). *See* Resp. Br. at 15; *see also*, Tr. 234 (Vol. III). This argument was anticipated by EPA and is addressed fully in complainant's main brief. *See* Compl. Br. at 20-28.

EPS's Section 761.20(c)(2)(i) argument must fail. We begin with a look at the regulatory language. Section 761.20(c)(2)(i) is found in 40 C.F.R. Part 761, subpart B ("Manufacturing, Processing, Distilling in Commerce, and Use of PCBs and PCB Items") (1999). Section 761.20 is titled, "Prohibitions and exceptions." Within this framework, Section 761.20(c)(2)(i) provides a narrowly drawn exception, applying only to those processing activities that "facilitate storage or transportation for disposal." The preamble to this regulation illustrates the narrowness of this exception. It provides:

Processing for disposal activities which are primarily associated with and facilitate storage or transportation for disposal are disposal, but do not require a TSCA disposal approval. Examples

include, but are not limited to, *removing PCBs from service (e.g. draining liquids); pumping liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility; dismantling or disassembling serviceable equipment pieces or components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.*

63 Fed. Reg. 35392 (emphasis added).

The facts of this case do not establish that respondent's activities relative to the waste PCB transformers that are the subject of Count I satisfy the regulatory exception. As pointed out by EPA, the facts show otherwise. In that regard, EPA compiled a list of 16 PCB transformers (identified by barcode numbers) being stored at respondent's Wheeling facility on November 2, 1999. This list identifies the number of days that the transformers were in storage as of the EPA inspection of November 2. This evidence shows that, as a matter of fact, the subject transformers were in "storage" and were not being processed for storage or transportation incident to disposal as respondent maintains. The PCB transformers and the number of days that they were stored are as follows:

| <u>Barcode</u> | <u>Days in Storage</u> |
|-----------------------|-------------------------------|
| 300346 | 39 |
| 340088 | 79 |
| 292916 | 119 |
| 311068 | 36 |
| 292929 | 60 |
| 325927 | 69 |
| 714914 | 70 |
| 292928 | 64 |
| 337884 | 76 |
| 337885 | 76 |
| 337882 | 76 |
| 279583 | 127 |
| 301003 | 119 |
| 302404 | 7 |
| 361480 | 7 |
| 318522 | 7 |

See Compl. Br. at 25-26; *see also*, CX 11 (Attach. 3).

In addition, the testimony of Inspectors McPhilliamy and Rice provides further support for EPA's position that the waste PCB transformers observed during the inspections of July 15 and November 2, 1999, did not qualify for the exception appearing at Section 761.20(c)(2)(i).

Inspector McPhilliamy testified that the PCB transformers that he viewed were in storage and he described them as being intact and non-leaking. Also, McPhilliamy did not observe any EPS employees working on the transformers to decontaminate them. In fact, the transformers were not even disassembled. Tr. 243, 247, 266 (Vol. I). The inspector added that he was not informed by EPS that the transformers pictured in Complainant's Exhibit 8 (taken on July 15) would be "processed." Tr. 60 (Vol. II).

Inspector Rice added it was necessary to request a list from the facility as to the transformers in storage because the manner in which they were being stored prevented the inspectors from making an accurate count. Tr. 96 (Vol. II). Furthermore, the photograph taken by the inspectors during the July 15, 1999, inspection (CX 8) substantiates the testimony of McPhilliamy and Rice. See Tr. 244 (Vol. I). Together with the testimony of the EPA inspectors, this photograph shows transformers in storage, and not transformers involved in processing activities to facilitate storage and transportation for disposal.

(ii). EPA's Alleged Inconsistent Guidance

Respondent next argues that "EPA provided completely inconsistent guidance to EPS regarding the effectiveness of the EPS July 19, 1999, notification increasing MSCs in its PCB commercial storage approval." Resp. Br. at 15. Here, respondent submits that EPA provided no response to this July 19 notification, in its view, effectively waiving any objection. EPS submits, therefore, "that any reasonable person, who had submitted a formal, clear notification that complied with the requirements of §761.65(g)(9) (using variants of the word 'notify') and received no acknowledgment or corrected response from EPA, would assume that its notification was both in accordance with the regulations and accepted by EPA." Resp. Br. at 17.

In addition, EPS again advances the merits of its argument that simply informing EPA of an increased MSC at the Wheeling facility was legally sufficient to amend its TSCA PCB Commercial Storage Approval. It notes that the PCB regulations include the word "notify," but not the word "approve." (In making this claim, respondent asserts that it was able to increase its MSC due to an improved situation regarding its financial assurance mechanism.) Resp. Br. at 17-18. Finally, EPS states that it had assumed that its Maximum Storage Capacity had been increased after its July 19 notification to EPA when, in June of 2000, the Agency designated EPS as a disposal site for PCB wastes generated as part of a remediation project under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.* According to EPS, EPA thereafter allowed the company to receive 97,000 pounds of PCB transformers from a company by the name of Earth Tech. Resp. Br. at 18.

These arguments must fail. The method for obtaining approval of a Maximum Storage Capacity for PCB transformers has been discussed, *supra*, and this issue has been resolved in favor of complainant. EPS's "guidance" argument is misplaced inasmuch as 40 C.F.R. 761.65(d) (1999) provides a clear road map showing that the approval of a TSCA PCB Commercial Storage Approval lies with the EPA Regional Administrator. Respondent cannot

avoid liability for the violation alleged in Count I on the ground that EPA did not promptly inform it that its unilateral MSC increase argument (which is contrary to the plain language of the regulation) was wrong.

Respondent's CERCLA argument also must fail. The testimony of EPS's Vice President, Scott Reed, does not establish that the company was approved by EPA to accept PCB transformers under CERCLA. Certainly Reed mentions an approval to accept 97,000 pounds of PCB transformers, but he does so only in passing, shedding very little light on this subject. Given the regulatory prescribed procedure under TSCA for permission to commercially store waste PCB transformers, and given respondent's past compliance with that procedure, the argument that at some point in time respondent also may have been allowed to accept PCB transformers under CERCLA is not tantamount to a defense to the storage violation charged in Count I.

(iii). The Fair Warning Argument

Here, respondent essentially argues that "EPA failed to provide EPS fair warning of its interpretation of 40 C.F.R. 761.20(c)(2) before it decided 'to use a citation' 'for making its interpretation clear' to EPS." Resp. Br. at 19. Respondent's fair warning argument is inapposite to the facts and legal issues raised in this case. This matter, at least as far as Count I is concerned, is about a waste PCB transformer storage violation. EPA has established that violation. EPS has not established that any exception provided by Section 761.20(c)(2) applies to this case that would serve as a defense to the violation charged. Respondent's current argument as to EPA's alleged failure to inform it as to the Agency's interpretation of Section 761.20(c)(2) is too far removed from the issues tried here to be of any meaningful significance.

(iv). The "Informed by all Applicable Regulations" Argument

Respondent styles this argument as follows: "EPS's PCB Commercial Storage Approval must be informed by all applicable regulations in effect at the time it was issued, including 40 C.F.R. 761.20(c)(2)." Resp. Br. at 20. Exactly what this caption means seems to be aided by respondents subsequent explanation that "EPS has only been charged with a violation of § 761.65(d) in Count I and Count II," and there "is no express reference to 'Section 761.65(d)' contained in EPS's [TSCA] Approval." Resp. Br. at 22, citing CX 1.

In other words, EPS seems to be arguing that EPA cannot bring the present enforcement action for the waste PCB transformer storage violation (and the waste PCB capacitor storage violation for that matter) because the specific regulation violated, Section 761.65(d), was not specifically mentioned in respondent's TSCA Storage Approval to Commercially Store PCB Waste. This argument is frivolous. It completely ignores the statutory scheme of the Toxic Substance Control Act, and the implementing regulatory scheme of 40 C.F.R. Part 761, which addresses the "manufacturing, processing, distribution in commerce, and use prohibitions" of Polychlorinated Biphenyls. Acceptance of respondent's argument would severely impair the enforcement of TSCA and the PCB regulations of Part 761.

(v). The “Approval to Store” Argument

Similar to the argument raised above, EPS maintains that there can be no violation here because “EPA provided no evidence to support an allegation that a single unit on site during either inspection was being commercially stored.” Resp. Br. at 23. As explained earlier, it has been found that EPS is a commercial storer of PCB transformers and that it stored such items in excess of its applicable Maximum Storage Capacity. Accordingly, this argument is rejected.

(vi). The Financial Assurance Argument

The argument advanced here is that respondent’s financial assurance fund, established in accordance with 40 C.F.R. 761.65, was at all times sufficient for closure of the facility. Resp. Br. at 24. Even if EPS is correct in this assertion, and there has not been an adequate showing that it is, this argument is beside the point.²⁴ Count I deals with excessive storage of waste PCB transformers, not with the adequacy of a financial assurance mechanism. That simply is not the issue here.

(vii). EPS’s “Owner and Generator” Argument

Finally, EPS argues that it cannot be found liable for the waste PCB transformer storage violation alleged in Count I because it is the owner of the transformers. Resp. Br. at 25. Respondent states, “[u]nder its contracts with all of its clients, EPS becomes the owner of all equipment that it transports to its Wheeling facility at the time the equipment is picked up for transportation at the client’s site.” Resp. Br. at 26 (citation omitted).

EPS’s argument that it is the owner of the PCB transformers involved in this case is contrary to evidence. First, respondent applied to the EPA Regional Administrator for permission to commercially store PCB transformers. In fact, it sought this status more than once. On both occasions, the Regional Administrator granted the requested permit, setting the Maximum Storage Capacity (the “MSC”) for the PCB transformers at 5,000 pounds. This was the specific MSC weight sought by respondent. Despite this scenario, EPS now argues that it was in fact the owner of the PCB transformers that it collected and that the TSCA PCB Commercial Storage Approval was never really needed. This argument now raised by EPS is totally inconsistent with its actions in seeking and maintaining an EPA-approved permit to store waste PCB transformers.

Second, it already has been found that EPS is a commercial storer of waste PCB transformers. This basis for this finding is well-summarized by EPA as follows:

²⁴ In any event, as noted by EPA in response, the continued adequacy of respondent’s trust fund financial assurance cannot be guaranteed as “interest rates can just as easily go down, and disposal costs can go up.” Compl. R.Br. at 3.

An examination of C. Ex. 64 (CBI) reveals that the utility company customers send their PCB-contaminated transformers to EPS with hazardous waste manifests with the utility company's names filled out on the generator lines of the manifests.

Respondent, as the disposer, sends certificates of disposal to the generators [Tr. 43 (Vol. X)] as further described in Respondent's brochure. C. Ex. 56 [Tr. 42 (Vol. X)]. EPS, as the disposer, provides to the generators of PCB waste "a documented 'Cradle-to-Grave' disposal process." C. Ex. 56 [Tr. 41 (Vol. X)].

Therefore, all of the PCB-contaminated transformers as alleged in Count I were being commercially stored prior to disposal, and the Maximum Storage Capacities in Respondent's TSCA Approval applied to such materials.

Compl. Br. at 10.

2. Count II (The Waste PCB Capacitor Storage Violation)

This count concerns respondent's Maximum Storage Capacity to store PCB capacitors at its Wheeling facility. As discussed with respect to Count I, EPS is a commercial storer of PCB waste. Respondent's TSCA PCB Commercial Storage Approval allows for the storage of 1,000 pounds of PCB capacitors at any one time. CX 2.²⁵ The evidence in this case shows that on July 9, 1999, EPS was storing 26,367 pounds of PCB capacitors at its facility. As noted by EPA, this is more than 26 times the capacitor storage allowed in respondent's MSC. Accordingly, EPA has established that EPS violated 40 C.F.R. 761.65(d) (1999), as alleged in Count II.

The facts surrounding this violation begin with the EPA inspection of July 15, 1999. Inspector McPhilliamy testified that there were no capacitors in storage when he and Inspector Rice visited the facility on that date. After the inspection, however, McPhilliamy obtained a manifest from respondent indicating that on July 9, 1999, there were 26,367 pounds of PCB capacitors that had been shipped from its Wheeling facility. Tr. 253 (Vol. I); CXs 7 & 10. McPhilliamy added, "[a]fter I received the manifest indicating ... the 26,367 pounds, I did return a call to Mrs. Reed just to confirm that number." Tr. 254 (Vol. I). Based upon this confirmation, EPA determined that a PCB capacitor storage violation occurred -- *i.e.*, a violation of Section 761.65(d).

Keith Reed, the company president, testified that the capacitors had been received from American Electric Power, an EPS customer located in the State of Indiana. Respondent's Exhibit 515 shows that 229 capacitors were shipped from American Electric Power to EPS on

²⁵ As noted, a PCB capacitor contains is an electrical device essentially used for the storage of an electrical charge. It uses polychlorinated biphenyls as an insulating fluid. Tr. 252-253 (Vol. I).

June 29, 1999. The capacitors were described by Reed as “power factor correction capacitors” from an electrical substation. (These capacitors are designed to feed current back to a motor.) Tr. 43-44 (Vol. IX). The capacitors were part of a “capacitor bank” which consists of three phases, or individual banks, “wired up, interconnected, and mounted” on an aluminum frame. These capacitor banks are loaded in the field by a crane onto a 45-foot trailer bed for transport to EPS. Reed described a capacitor bank as a “gigantic rack.” Tr. 45, 67 (Vol. IX).

Keith Reed also explained how these 229 capacitors were handled upon their arrival at the Wheeling facility. He testified:

So upon arrival at EPS, we have overhead cranes. They were unloaded. And then we had -- we have people that start working in taking these apart and breaking them down into their individual components, just the capacitors by itself. So that’s the process that was taking place.

And then eventually after receipt, it was determined because they were not labeled PCB capacitors or non-PCB capacitors plus they didn’t have the -- the fluid labeled on them, EPS did -- took a GC test and sent it out, a sample of one of the capacitors.^[26] And it was determined that it was a PCB capacitor.

So then the capacitors, then, were skidded up because originally, if they were non-PCB capacitors, they would have been processed at EPS. But they were out on skids and then shipped out to a TSCA incinerator.

Tr. 46-47 (Vol. IX).

Reed added that upon their being tested, the capacitors sent by American Electric Power were shown to be “pure PCBs.” Tr. 47 (Vol. IX). In other words, the capacitors had a PCB concentration of over 500,000 parts per million. Tr. 46 (Vol. IX); RX 515. Because respondent cannot burn PCB materials at 500 ppm, or greater, in its scrap metal recovery oven (it can only burn material with a PCB concentration between 50 and 499 ppm), EPS chose to ship the capacitors to a TSCA-approved disposal facility owned by Safety-Kleen. Tr. 46-47 (Vol. IX); CX 10. Prior to their being shipped to Safety Kleen, however, these PCB capacitors were commercially stored by EPS in violation of its TSCA PCB Commercial Storage Approval, and thus in violation of 40 C.F.R. 761.65(d) (1999).

The violation proven by EPA in Count II is relatively straightforward. Manifests

²⁶ A “GC” test was described as a gas chromatography test for analyzing the different aroclors of PCBs. Tr. 14-15 (Vol. XI).

provided by respondent (RX 515) show that it commercially stored 26,367 pounds of PCB capacitors when its commercial storage permit allowed for only 1,000 pounds to be stored at any one time. *See* CXs 7 & 10. EPS, however, argues that the facts of this case do not support the finding of a Section 761.65(d) violation. Respondent submits that “[t]he effect of EPA’s failure to take fluid samples, determine PCB Concentrations, weigh the units, determine whether EPS was the generator of the waste, and determine whether the capacitors were processed to facilitate the transportation to another site for disposal, is that EPA filed its Complaint against EPS without any supporting evidence.” Resp. Br. at 29.

Respondent’s argument is rejected. The testimony of Inspector McPhilliamy and Keith Reed, along with Complaints Exhibits 7 and 10, and Respondent’s Exhibit 515, is sufficient to establish a *prima facie* case that the alleged PCB capacitor storage violation occurred. Respondent has not rebutted this *prima facie* showing of violation.

In addition to arguing that EPA is short on facts so as to establish the Section 761.65(d) violation alleged in Count II, respondent also raises several legal arguments to the effect that the charged violation cannot be sustained. These legal arguments, discussed below, are rejected.²⁷

a. EPS’s “Transportation” Related Arguments

EPS argues that its “operations include activities that are described in the definition of the term ‘transfer facility.’” Resp. Br. at 29. Section 761.3 defines a “transfer facility” as:

... any transportation-related facility including loading docks, parking areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB waste, rather than for actual transport activities. Storage areas for PCB waste at transfer facilities are subject to the storage facility standards of § 761.65, *but such storage areas are exempt from the approval requirements of § 761.65(d) ... unless the same PCB waste is stored there for a period of more than 10 consecutive days between destinations.*

40 C.F.R. 761.3 (1999) (emphasis added). Thus, attaining the status of “transfer facility” is critically important to respondent’s defense given the exemption provided by 40 C.F.R. 761.65(d)(5) (1999). Section 761.65(d)(5) provides:

²⁷ EPS begins by stating, “[r]espondent hereby incorporates the arguments set forth in paragraphs I.B.1 through I.B.5 regarding Count I as applicable to the facts surrounding Count II.” Resp. Br. at 29. To the extent that these arguments have been rejected insofar as Count I is concerned, they are likewise rejected insofar as they involve Count II.

Storage areas at transfer facilities are exempt from the requirement to obtain approval as a commercial storer of PCB waste under this paragraph, *unless the same PCB waste is stored at these facilities for a period of time greater than 10 consecutive days between destinations.*

40 C.F.R. 761.65(d)(5) (1999) (emphasis added).

EPS submits that its Wheeling operation meets the above definition of “transfer facility” and, as such, the exemption to the commercial storer provisions of Section 761.65(d)(5) applies. In other words, according to respondent, the Maximum Storage Capacity contained in its TSCA PCB Commercial Storage Approval does not apply to the PCB capacitors involved here.

Respondent’s argument must fail, however, for the reason that it is contrary to the facts established at the hearing. While EPS is correct in asserting that several EPA witnesses testified that its facility “can be a transfer facility as well as a disposal facility under the PCB regulations” (Resp. Br. at 29-30), and while EPA concedes that point (Compl. R.Br. at 4), respondent’s activities regarding the PCB capacitors at issue in Count II were those of a commercial storer, and not those of a transfer facility.

As argued by EPA, the fact of the matter is that EPS failed to show that the PCB capacitors were being “held during the normal course of transportation.” See Compl. Br. at 31. This is a key requirement that must be satisfied for the exemption of Section 761.65(d)(5) to apply. Here, respondent completely failed in its attempt to show that the capacitors were in any way connected to being in transport. What the record does show is that respondent received the PCB capacitor banks from American Electric Power, broke them down in preparation for disposal on-site, and then sampled them as part of the disposal process.²⁸ Only upon discovering that the PCB capacitors contained 500,000 ppm did the company initiate efforts to transport the capacitors off-site to Safety-Kleen for proper TSCA disposal. These actions are not at all indicative of PCB waste being “held during the normal course of transportation.”²⁹

Moreover, whether the capacitors were stored for not more than 10 consecutive days, as EPS asserts (Resp. Br. at 30), is of no significance given the fact that the capacitors were *not* being held during the normal course of transportation. What is significant is the fact, as argued

²⁸ Inspector McPhilliamy testified that a typical-sized capacitor weighs 110 pounds and that it would ne have to be dismantled in order to be transported. Tr. 63-64 (Vol. II).

²⁹ The preamble to this rule casts additional light on an already clear directive. It states, “[t]he 10-days of consecutive storage limitation is allowed to provide trains, trucks, and other transport vehicles a period in which to unload the PCB waste until the PCB waste can be loaded onto the next connecting transport vehicle.” 54 Fed. Reg. 52720. This is not what took place at the EPS Wheeling facility in connection with the PCB capacitors.

by EPA that EPS is not listed on the manifest (RX 515) as a transporter. Compl. Br. at 32. As complainant notes, “[t]he fact Respondent was listed and signed as the ‘designated facility,’ and not as a second ‘transporter’ on the manifest from AEP [American Electric Power] at Box 13, is further evidence that Respondent was not operating a transfer facility in regard to the PCB waste capacitors at issue.” *Id.*

Finally, EPS argues that “[t]he capacitors were processed to facilitate transportation for disposal in accordance with the PCB commercial storage approval exemption under 40 C.F.R. 761.20(c)(2).” Resp. Br. at 31. Thus, respondent maintains that the 1,000 pound limit contained in the MSC does not apply.

Section 761.20(c) provides, in part:

(2) Any person may process and distribute in commerce for disposal PCBs at concentrations of ≥ 50 ppm, or PCB Items with PCB concentrations of ≥ 50 ppm, if they comply with the applicable provisions of this part.

(i) Processing activities which are primarily associated with and facilitate storage or transportation for disposal do not require a TSCA PCB storage or disposal approval.

40 C.F.R. 761.20(c)(2) & (i) (1999).

The preamble to this regulation provides some examples of the processing activities contemplated by Section 761.20(c)(1). Both EPS and EPA cite to this language to support their respective positions. Resp. Br. at 32; Compl. Br. at 34. The preamble states:

Processing for disposal activities which are primarily associated with and facilitate storage or transportation for disposal are disposal, but do not require a TSCA disposal approval. Examples include, but are not limited to, removing PCBs from service (e.g. draining liquids); pumping liquids out of temporary storage containers or articles into drums or tank trucks for transportation to a storage facility or disposal facility; dismantling or disassembling serviceable equipment pieces or components; packaging or repackaging PCBs for transportation for disposal; or combining materials from smaller containers.

63 Fed. Reg. 35392.

Upon review of the above passage, EPS concludes, “[c]learly, the dismantling of the capacitor banks and repackaging of the capacitors for shipment to a licensed PCB disposal site are not only similar to those activities cited by EPA, they are the *exact* activities.” Resp. Br. at

32 (emphasis in original). EPA, however, concludes that “[t]he actions EPS took with respect to the capacitor bank are not analogous to any of the examples stated in the above Preamble.” Compl. Br. at 34.

While the parties may differ over the similarity of the EPS operation to the activities illustrated in the preamble, it is the testimony of Keith Reed that is dispositive of this issue. Reed testified that “if they were non-PCB capacitors, they would have been processed at EPS.” Tr. 46-47 (Vol. IX). The fact of the matter is that they were PCB capacitors. The only reason that these PCB capacitors were not processed at the Wheeling facility is because they tested at 500,000 parts per million. The overall testimony of Reed in describing the receipt at the facility of the 229 capacitors from American Electric Power was not that the capacitors were being broken down to facilitate their transportation for disposal off-site. Rather, his testimony shows that they were being broken down to be sent to respondent’s own scrap metal recovery oven.

The conclusion that the capacitors were not being processed to facilitate transportation for disposal is further supported by the testimony of Reed that it usually takes two to three employees eight to ten hours to dismantle the rack of capacitors. Tr. 67-68 (Vol. IX). Essentially, this is a one day job. Yet, the capacitors remained at respondent’s Wheeling facility for approximately 10 days. There has been no explanation by respondent accounting for this delay in the transportation of the PCB capacitors to Safety-Kleen for disposal. In sum, on the basis of Keith Reed’s overall testimony, it is the finding of this tribunal that EPS did not process the capacitors to facilitate storage or transportation for disposal as contemplated by 40 C.F.R. 761.20(c)(1).

3. Count III (The Scrap Metal Recovery Oven Violation)

a. Respondent’s Motion to Strike is Denied

Consistent with the affirmative defense raised in its Amended Answer, EPS has filed a separate motion to strike Count III of the Second Amended Complaint on two grounds. One ground is that the 2-1/2 hour burn requirement of 40 C.F.R. 761.72(a)(3) is “arbitrary and capricious” because “there is no rational connection between the specific time requirement in the Rule and the effective decontamination of PCB-contaminated articles.” Mot. at 1. The other ground is that EPA failed to comply with the “notice and comment” provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. § 553. *Id.* As one might expect, respondent’s motion is opposed by EPA. For the reasons that follow, the Motion to Strike Count III is *denied*.

In opposing respondent’s motion, EPA cites TSCA Section 19, 15 U.S.C. § 2618, for the proposition that “[a]s a threshold matter, the U.S. Courts of Appeals have exclusive jurisdiction

of pre-enforcement review of petitions challenging the validity of the regulation at issue in this case.” Compl. Resp. at 2.³⁰ Having acknowledged this threshold matter, EPA goes on to state that “review of a regulation should rarely be entertained in an administrative forum.” *Id.* This last statement accurately summarizes the holdings of the Environmental Appeals Board on this issue and, given the particular facts surrounding EPS’s present regulatory challenge, this standard of review proves fatal to respondent’s motion.

We begin the analysis with the Board’s holding in *Norman J. Echevarria et. al.*, 5 E.A.D. 626 (EAB 1994). That case involved, in part, a constitutional challenge by respondent to certain asbestos work practice standards. There, the Board stated:

As a “general rule ... challenges to rulemaking are rarely entertained in an administrative proceeding.” ... The general rule applies even when a party asserts that a rule is unconstitutionally vague.... The decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances.

5 E.A.D. at 634 (citations omitted).³¹ See *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 194 (EAB 1997) (case involving another constitutional challenge where the Board held there is a “strong presumption against entertaining challenges to the validity of a regulation in an administrative proceeding”).

The Board’s subsequent decision in *Woodkiln Inc.*, 7 E.A.D. 254 (EAB 1997), similarly indicates the narrowness of its view as to when a challenge to the validity of a regulation may be raised in an administrative enforcement proceeding. In *Woodkiln*, the Board reaffirmed its prior rulings in *Echevarria*, *supra*, and *B.J. Carney*, *supra*. In so doing, the Board observed:

In *Echevarria*, our reliance on Clean Air Act § 307(b) was guided by several qualifications that are not explicitly reflected in the ALJ’s Initial Decision in this case. We recognized, for instance, that no absolute prohibition against our entertaining

³⁰ In response, EPS argues that the phrase “other than in an enforcement proceeding” contained in TSCA Section 19(a) provides for the regulatory challenge that it presently seeks before this administrative tribunal. Resp. Supp. Mem. at 2-3. EPS, however, misreads EPA’s argument. Complainant is not asserting that regulatory challenges can never be asserted in an administrative enforcement action. Instead, as discussed above, EPA is suggesting that such challenges can be raised, but almost never.

³¹ Interestingly, the Board went on to comment, “ordinarily, the only way for a regulation that is subject to a preclusive review provision to be invalidated is by a court in accordance with the terms of the preclusive review provision.” *Id.*

challenges to the validity of final Clean Air Act regulations follows from the specific language in section 307(b) itself, which “only makes direct reference to preclusion of judicial review, not administrative review.” *Echevarria*, 5 E.A.D. at 634. We nonetheless acknowledged that we have adhered to a presumption of non-reviewability based, to some degree, on considerations of “practicality” (*id.*) and “administrative efficiency” (*id.* at 635). We made clear that, under established Agency precedent, “challenges to rulemaking are rarely entertained in an administrative proceeding”; that “[t]he decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances.” *Id.* at 634.... But we acknowledged that, notwithstanding the statutory preclusion of untimely petitions for judicial review, the presumption against our entertaining an untimely administrative challenge might be overcome in “an exceptional case,” such as where a challenged regulation has been effectively invalidated by a court but has yet to be formally repealed by the Agency. *Id.* at 635 n.13....

7 E.A.D. at 270 n.16 (citations omitted).

Measuring the particular facts of this case against this standard articulated by the Environmental Appeals Board, EPS clearly falls short in its attempt to show that this administrative enforcement proceeding is a proper forum for challenging 40 C.F.R. 761.72(a)(3).

First, EPS had ample opportunity to comment on the involved regulation at the time of rulemaking. In that respect, EPA cites to a pleading submitted in this case by EPS which suggests that the two and one-half hour burn requirement of Section 761.72(a)(3) should not have come as a surprise to respondent. In a Motion for Request for Production of Documents, dated May 7, 2002, EPS represented:

Upon reviewing EPA’s proposed specifications for processing PCB-contaminated electrical equipment, EPS contacted John Smith (EPA PCB disposal specialist) and Tony Baney (Chief Chemical Regulation Branch for TSCA (PCBs)). In a meeting held at EPA headquarters, EPS advised EPA that the proposed specifications would not be effective when processing PCB-contaminated electrical equipment. EPA advised that if the object of recycling was to recover the valuable raw material ... the proposed conditions would lead only to a molten mass of mixture of steel, copper and aluminum.... Based upon EPS’s expertise, EPA requested that EPS submit recommendations to help EPA formulate appropriate regulatory specifications.... *Ironically, based on EPS’s own experiences, a typical burn time in the*

primary furnace of two and a half-hours (2-1/2) was suggested. EPS's recommendations to EPA are documented in EPS's letter, dated February 20, 1989 to Denise M. Keehner, Chief Chemical Regulation Branch....

* * * * *

Prior to the adoption of EPA's MegaRule, the normal time for these units was typically a half-hour burn cycle. As part of EPS's requirements with utility customers and vendors that purchased the raw metals, EPS was required to conduct PCB wipe tests on the metals to ensure such units were PCB free.... Thus, the 2 1/2 [hour] burn time is based on a typical burn cycle for polemounted transformers.

Exhibit 4 (pp. 25-27) to Compl. Resp. (Emphasis added).

Second, even though respondent chose not to challenge the PCB regulations appearing at 40 C.F.R. Part 761, the fact of the matter is that other companies did file challenges to the TSCA regulations. See Compl. Resp. at 4, citing *Central and South West Services, Inc., et al. v. United States Environmental Protection Agency*, 220 F.3d 683 (5th Cir. 2000), *petitions for reh'g and reh'g en banc denied*, 237 F.3d 633 (5th Cir. 2000) (holding in part that EPA's decision not to exclude certain transformers identified by a petitioner from the "assumption" rule was not arbitrary and capricious). This shows that if other companies were able to challenge Section 761.72(a)(3), there is no reason why EPS should not have been able to do likewise. It also shows that even though respondent did not petition for review of the scrap metal oven regulations, it nonetheless did benefit from the regulatory challenge sought by others within the regulated community.

Finally, the facts surrounding EPS's awareness of the TSCA rules at the time of their promulgation paints an even less sympathetic picture for respondent. For instance, in EPA's response to EPS's motion to strike Count III, complainant attaches a declaration of Andrea E. Medici (Exhibit 1), an attorney in the EPA Office of General Counsel, showing that in 1998, Keith Reed was aware that several petitioners had challenged the PCB regulations pursuant to Section 19 of TSCA. Exhibit 1 at ¶¶ 4 & 5. Regarding a telephone conversation with Reed on September 10, 1998, Medici declared, "Mr. Reed told me, among other things, that his company EPS was already in compliance with the new requirements of 40 C.F.R. § 761.72. He also noted that the affected regulated community "should have known" about the provisions at issue because the provisions had been discussed in proposals as early as 1991 (referring to the Advance Notice of proposed Rulemaking, 56 *Fed. Reg.* 26,738, June 10, 1991), thereby at a minimum raising questions about the need for additional notice and opportunity for public comment." Exhibit 1 at ¶ 6.

In sum, the facts discussed above do not rise to the level of compelling circumstances, as

contemplated by the Board, so as to allow EPS to substantively challenge Section 761.72(a)(3) in this proceeding. Indeed, it is unlikely that EPS could have met even the most lenient standard for obtaining administrative review of a promulgated regulation. For example, more than five years had elapsed from the time that this regulation was promulgated to the time that EPS decided that something should be done about it. Moreover, respondent's only motive for challenging the regulation at this late date is the fact that it was cited by EPA for its violation; but for this litigation there is no indication in the record that EPS would have brought any concerns about the time and temperature requirements of Section 761.72(a)(3) to the attention of EPA. Finally, the facts that respondent knew when it decided to challenge the regulation five years after its promulgation appear to be essentially the same facts that it knew at the time of promulgation, but did nothing. To now allow respondent's belated challenge, under the circumstances of this case, would clearly run afoul of the regulatory review guidelines set forth by the Environmental Appeals Board in *Echevarria* and its progeny. Also, as a practical matter, allowing such a challenge would be chaotic to the rulemaking process by eroding, after all these years, Section 761.72(a)(3)'s sense of finality. Accordingly, EPS's motion to strike Count III must be denied.

b. The Merits of Count III

This count involves respondent's operation of its scrap metal recovery oven. In this furnace, respondent may burn PCB-contaminated material up to 499 parts per million. Tr. 223 (Vol. VIII); CX 59.³² The scrap metal recovery oven is comprised of a primary and a secondary chamber, also referred to as an afterburner. Tr. 222-224 (Vol. VIII). The primary chamber has been described by one of respondent's furnace operators as a "big box," approximately 11-1/2 feet by 10-1/2 feet, and 22 feet deep. This box, also described as a "cart," is where the material to be burned is loaded by crane. This cart serves as the burning area of the furnace. Tr. 208-209 (Vol. I).

The six-digit number barcodes are taken off all items when they are processed to be burned. Before the burn occurs, the barcodes are entered into a computer, as well as written by the furnace operator on the Furnace Data Sheets. Tr. 219-220, 224 (Vol. I). Chuck Ernest, a furnace operator for EPS, offered the following description of a burn:

Well, you have -- you have cans, which is the carcass or the outer part of the transformer; the inside of the transformer, which is the coils, copper coils, aluminum, or you could have, like, silicon steel, which is wrapped with the copper coils, it's inside, it's part of the transformer itself. Different -- I mean, you can burn all that at the same time. I mean, it's not- - you don't have to burn one specific thing at a time. It can be various -- various burns.

³² EPS has an air permit from the State of West Virginia for the operation of its scrap metal recovery oven. CX 26.

* * * * *

What they do is they'll take the transformer out of the can -- cut -- they will cut the coil. Okay? So it's separated from everything else. And they would put it in a tray, big tray, and so you would actually end up with a big mound of copper cut coils. And that would be part of the burn.

Tr. 212 (Vol. I).

In Count III of the Second Amended Complaint, EPA has charged that during 15 different burn cycles on 11 dates in March, September, and October of 1999, EPS failed to operate the primary chamber of its scrap metal recovery oven in accordance with the provisions of 40 C.F.R. 761.72(a)(3) (1999).³³ Specifically, EPA alleges that non-compliance with Section 761.72(a)(3) occurred on March 23, September 27, 28, and 30, October 1, 2, 26, 27, 28, 29, and 30, 1999.³⁴ Complainant charges that during these periods respondent failed to comply with the time and temperature requirements of Section 761.72(a)(3) for the burning of "regulated materials" (*i.e.*, contaminated electrical equipment of 50 to 499 ppm PCB, regulated for disposal under Section 761.60(b)(4)) by failing to maintain the minimum temperature of 537 degrees C (999 degrees F) for a minimum of 2-1/2 hours. *See* Compl. Br. at 36. These time and temperature requirements are as follows:

§ 761.72 Scrap metal recovery ovens and smelters.

Any person may dispose of residual PCBs associated with PCB-Contaminated articles regulated for disposal under § 761.60(b), metal surfaces in PCB remediation waste regulated under § 761.61, or metal surfaces in PCB bulk product waste regulated under §§ 761.62(a)(6) and 761.79(c)(6), from which all free-flowing liquids have been removed:

³³ In its post-hearing brief, however, the complainant asserts that the evidence shows that respondent actually failed "to maintain the minimum regulatory temperature for two and one-half hours as required by 40 C.F.R. § 761.72(a)(3) in the primary chamber of the scrap metal recovery oven" during 51 burn cycles over the randomly sampled three-week period. Compl. Br. at 39-40, citing Tr. 34-42 (Vol. IV) (CBI testimony of Inspector Rice). The evidence in this case, however, only supports the charges relating to the 15 burn cycles cited in the Second Amended Complaint.

³⁴ In its Second Amended Complaint, EPA also alleged non-compliance with Section 761.72(a)(3) on March 25, 1999. As noted, complainant has since withdrawn the charges relating to that date. Compl. Br. at 36 n.12.

(a) In a scrap metal recovery oven:

* * * * *

(3) *The primary chamber shall operate at a temperature between 537° C and 650° C for a minimum of 2-1/2 hours and reach a minimum temperature of 650° C (1,202° F) once during each heating cycle or batch treatment of unheated, liquid-free equipment.*

40 C.F.R. 761.72(a)(3) (1999) (emphasis added).

The time and temperature violation charged in Count III stems from the November 2, 1999, inspection of the EPS facility by Inspectors McPhilliamy and Rice. During that inspection, the EPA inspectors requested from respondent operational data concerning the scrap metal recovery oven. Among the data requested was the operating temperature of the furnace for the periods of March 22-26, September 26 - October 2, and October 24-31, 1999. These dates were randomly selected by EPA. Tr. 268-269 (Vol. I), 98 (Vol. II).

Inspector McPhilliamy testified that EPS provided this information to the EPA Wheeling office shortly after the November 2, 1999, inspection. The information included circular charts showing the oven temperatures, and tabular data (“Transformer Furnace Data”) listing the equipment and materials burned during each burn cycle. Tr. 269-271 (Vol. I), 102 (Vol. II). The data provided by EPS is contained in Complainant’s Exhibits 16A (March, 1999, data), 16B (September, 1999, data), and 16C (October, 1999, data). It is also included as Attachments 6 and 7 to EPA’s Inspection Report of November, 1999. CX 11.

Inspector Rice described the data contained in Exhibits 16A, 16B, and 16C as “computer-generated furnace operating measurement levels as well as inventory sheets of what was burned during each burn cycle of that one-week period.” Tr. 101 (Vol. II). For example, he testified that Exhibit 16A contains computer-generated data that is recorded every five minutes during the burn cycles for the primary oven. In that regard, the date, hour, and minutes of each burn cycle are included, as well as the afterburner temperature and the primary oven temperature. Tr. 108 (Vol. II). EPS furnace operator Ernest also testified that the temperature of the primary chamber is downloaded on the computer every 5 minutes. Tr. 227 (Vol. I).³⁵

³⁵ In addition, Ernest testified that there are two temperature gauges in the primary chamber and that their readings differ by 100 degrees C. He stated that in 1999, the temperature recorders were measuring the lower of the two temperatures. As it turns out, this lower temperature reading was taken from the lower probe which was only about three feet above the cart containing the material to be burned. The higher temperature probe is located on the roof of the primary chamber. Tr. 229-231 (Vol. I).

Rice further explained that Exhibits 16A, B, and C, also contained the Transfer Furnace Data, “otherwise known as the transformer inventory sheets,” of the equipment that was burned during that given burn cycle, as well as the six-digit barcode used by EPS to identify this material. Tr. 219-220 (Vol. I), 109 (Vol. II). These transformer inventory sheets were filled out by the furnace operator. Included on these inventory sheets were “[t]he date that the burn was initiated, the time that the burn was initiated, and an ID.” Tr. 110 (Vol. II).

Inspector Rice then proceeded to mark this data in 2-1/2 hour increments in order “to quantify how many burns were in violation.” Tr. 102 (Vol. II). He explained, “for the round charts the first thing I did was counted up the number of burns indicated by the peaks on each round chart and compared that to the number of burns that are indicated on the computer-generated data to ensure that they matched up.” Tr. 105 (Vol. II). The inspector performed this review for all the March, September, and October, 1999, data provided. Tr. 105-106 (Vol. II). *See n.27, supra.* Rice reviewed this data and identified the dates and the burn cycles in which respondent’s scrap metal recovery oven failed to meet Section 761.72(a)(3)’s 999 degree Fahrenheit minimum temperature requirement for a 2-1/2 period. This is a critical first step in EPA’s establishing the violation alleged in Count III. In that regard, the inspector’s testimony regarding EPS’s failure to meet the time and temperature requirement may be summarized as follows:

| <u>Date</u> | <u>Two and One-Half Hour Burn Cycle Periods:</u> |
|---------------------|---|
| March 23, 1999 | 8:03 am. - 10:37 pm. 11:50 am. - 2:22 pm. |
| September 27, 1999 | 11:22 am. - 1:54 pm. |
| September 28, 1999 | 8:57 pm. - 10:41 pm. |
| September 30, 1999 | 10:14 am. - 12:45 pm. |
| October 1, 1999 | 5:13 am. - 7:47 am. 1:50 pm. - 4:23 pm. 5:12 pm. - 7:46 pm. |
| October 2, 1999 | 1:25 am. - 3:59 am. 9:14 am. - 11:47 am. |
| October 26, 1999 | 2:48 pm. - 5:21 pm. |
| October 26-27, 1999 | 11:17 pm. - 1:50 am. |
| October 27, 1999 | 10:52 am. - 1:24 pm. 2:28 pm. - 5:00 pm. 8:11 pm. - 10:43 pm. |
| October 28, 1999 | 3:23 am. - 5:54 am. |
| October 29, 1999 | 1:38 pm. - 4:09 pm. |
| October 30, 1999 | 2:50 am. - 5:20 am. |

Tr. 34-42 (Vol. IV) (CBI); *see* Compl. Br. at 40-41.³⁶

Having overcome the initial hurdle in proving a violation here by showing that the time and temperature requirements of Section 761.72(a)(3) were not complied with on at least 15

³⁶ Inspector Rice's testimony appears in the Confidential Business Information portion of the transcript, but his testimony in this regard is not considered to be "CBI." *See* Compl. Br. at 40 n.13.

different occasions, complainant's next critical task is to show that "regulated material" (*i.e.*, material containing a PCB concentration between 50 and 499 ppm) was burned in respondent's furnace during these burn cycles. EPA has carried its burden of proof as to this issue on the strength of analytical data obtained from a company by the name of Weidmann-ACTI, Inc. ("ACTI").

Following a dispute with EPS concerning the discovery of material in this case, EPA issued a TSCA subpoena to ACTI, a laboratory used by respondent in 1999, to analyze the PCB concentration of some of the samples collected from transformers received at its Wheeling facility. Tr. 49 (Vol. X). In this subpoena, EPA sought individual sampling results for PCB-contaminated items burned by respondent in 1999. Tr. 124 (Vol. II); RX 377. The laboratory data provided to EPA by ACTI is identified as Complainant's Exhibit 44 and it is protected Confidential Business Information.

The information contained in Exhibit 44 is a critical element in complainant's proof concerning the charged Section 761.72(a)(3) violation in Count III. In providing an overview of this exhibit, and just how it relates to this case, EPA states:

There are two columns of data that are most critical to the instant case. One column is labeled "serial numbers." The "serial numbers" on the ACTI lab data are six digits, and many of them identically match Respondent's six-digit barcode numbers on Respondent's Transformer Furnace Data sheets provided to EPA with the oven operating data. C. Ex. 44 (CBI) and C. Ex. 16A, 16B, 16C; Tr. Sept. 8 at 15-17. The other column of critical data is the analytical results in parts per million PCB which correspond to the serial numbers (barcodes). C. Ex. 44 (CBI). The dates on the ACTI lab data for samples analyzed correspond to the dates of the dates of the oven burns at issue. C. Ex. 16A, 16B and 16 C (Transformer Furnace Data Sheets); C. Ex. 44 (CBI).

Compl. Br. at 46. EPA was able to show this analysis through the testimony of Inspector Rice. Tr. 7-42 (Vol. IV) (CBI).

In reviewing the ACTI laboratory analytical data of Complainant's Exhibit 44 with the Transformer Transfer Data Sheets contained in Complainant's Exhibits 16A, 16B, and 16C, it is held that 73 items containing "regulated material" were burned in respondent's scrap metal recovery oven at various times when the oven failed to meet the minimum time and temperature requirements of 40 C.F.R. 761.72(a)(3). These instances of non-compliance, *i.e.*, a violation of Section 761.72(a)(3), involve the protected ACTI data and, therefore, are set forth in the Confidential Business Information section appearing below.

* * * * *

CONFIDENTIAL BUSINESS INFORMATION

[The Confidential Business Information portion of this decision is not available to the public.]

* * * * *

As a final argument, EPS sates that there can be no finding of violation here “[b]ecause EPA did not provide EPS with any pre-enforcement warning of its interpretation of 40 C.F.R. § 761.72(a).” Resp. Br. at 46 (citation omitted). This argument has nom merit. First, it ignores the clear and unmistakable regulatory language of Section 761.72(a)(3) as it relates to the time and temperature requirements for burning regulated material. Second, EPS’s argument ignores its own rulemaking involvement with respect to this regulation. *See pp. 30-31, supra*. Finally, respondent’s argument ignores the contrary testimony of its own scrap metal recovery oven operator, Chuck Ernest, who was aware of the regulation’s requirements. Tr. 210, 218 (Vol. I).

c. EPA’s Request for Sanctions

EPA requests that a monetary sanction be assessed against respondent for failing to comply with a discovery order issued by this tribunal. Specifically, as to Count III of the Second Amended Complaint, EPA asks that an adverse inference be made finding that 10 to 15 percent of the materials burned in respondent’s scrap metal recovery oven on the 11 dates at issue, when the time and temperature requirements of Section 761.72(a)(3) were not satisfied, exceeded a PCB concentration of 50 ppm. Compl. Br. at 61. Correspondingly, in order to account for the increase in the number of burns not in compliance with Section 761.72(a)(3), EPA requests that the civil penalty to be assessed for the Count III violation be increased by 25 percent, *i.e.*, from the \$86,900 initially calculated by EPA to \$108,625. Compl. Br. at 79 & 95.

This sanctions issue stems from the discovery order issued by this tribunal on March 5, 2003. In that order, EPS was directed, in part, to “[p]rovide the generator’s name, the manufacturer, the serial number, the type of dielectric fluid shown on the name plate, the date each item was received, the size of each item, and *the corresponding PCB concentration claimed by the generator and/or determined through direct analysis of the dielectric fluid.*” Request 1(a) (Emphasis added).

Thereafter, in an order dated June 3, 2003, this tribunal granted, in part, a motion by EPA seeking sanctions against EPS for the respondent’s failure to comply with the March 5, 1999, discovery order. Specific sanctions were not announced in this June 3 Order. Instead, the sanctions were to be assessed at a later date when the record was developed and the significance of any non-compliance with the discovery order could be better understood.

There were a number of discovery items addressed in the June 3 Order, but the only one that is relevant to the sanctions issue presented here involves the PCB concentration data identified in EPA’s Request 1(a), *supra*. Regarding this PCB concentration data, the Order of

June 3, 2003, reads:

... [I]t is established that this information exists. Also, it has been determined that this information is discoverable. Thus, respondent is directed to either provide “the PCB concentration claimed by the generator and/or determined through direct analysis of the dielectric fluid” to EPA no later than June 6, 2003, or to advise complainant as to where it might find this data in the material already provided.

June 3, 2003, Order at 3.³⁷

In its post-hearing brief, while EPA does concede that EPS provided “verifiable laboratory data” from respondent for 68 of the 1287 items sought (Compl. Br. at 61; CX 46) the Agency nonetheless contends that respondent never did provide all of the PCB concentration data as required by this tribunal. EPS strongly disputes the government’s charge of non-compliance, dismissing its sanctions request as being “without merit.” Resp. R.Br. at 41.

In considering the parties’ arguments, the only thing that may be said with certainty is that this issue does not want for complexity. When the discovery order was issued on March 5, 2003, and when the sanctions order was issued on June 3, 2003, of which the PCB concentration data material was only a part, this case was in its developing stage. At that time, it was the expectation of this tribunal that the significance of respondent’s non-compliance with the ordered discovery would come to light as the case took shape factually. That has not happened with respect to the unavailable PCB concentration data. While the significance of this data to EPA’s establishing the scope of the violation at issue in Count III is quite clear, what is unclear (and is hotly contested by the parties) is the extent to which EPS is in the possession of the requested PCB concentration data for individual transformers. Thus, notwithstanding the Orders of March 5 and June 3, 2003, it is the opinion of this tribunal that, insofar as the PCB concentration data is concerned, the record is insufficient for a determination to be made that EPS intentionally withheld discoverable material, contrary to this tribunal’s order, and should be sanctioned. Accordingly, EPA’s request for sanctions is *denied*.

In that regard, the most troubling issue preventing a clear understanding of the PCB concentration data issue, *i.e.*, in determining who is right and who is wrong as to the existence of this information, is the confusion surrounding “batch testing.” The argument articulated by respondent in its Reply Brief casts sufficient doubt, in this tribunal’s mind, as to whether the data that EPA wants actually exists.

For example, EPS cites to 40 C.F.R. 761.60(g), as well as to this regulation’s preamble

³⁷ Respondent’s failure to comply with the March 5, 2003, discovery order was also discussed at the hearing prior to the taking of testimony. *See* Tr. 20-35 (Vol. I).

(44 Fed. Reg. 31520, 31531) for the proposition that batch testing is an appropriate method for determining the concentration of PCBs in dielectric fluid. Resp. R.Br. at 43-44. EPS also cites to the testimony of a number of EPA witnesses (McPhilliamy, Rice, Barto, and Smith), as well as “e-mails” between EPA employees, asserting that this evidence supports its position regarding batch testing. *Id.* at 44-48. Despite the fact that EPA addresses batch testing in its Reply Brief (*see* p. 39), taking a position on the facts and the law contrary to that advanced by EPS, it is not sufficient to ease this tribunal’s concerns as to whether sanctions are warranted and, if so, the appropriate sanctions to be assessed. This “batch testing” issue is probably better left for another day.

d. EPS’s Request for Sanctions

Also, by separate motion, EPS followed complainant’s motion for sanctions with its own request for sanctions. For the reasons that follow, EPS’s motion for sanctions is *denied*.

EPS filed its motion just prior to the second week of the hearing in this matter. In this motion, respondent notes that on February 28, 2003, this tribunal issued an order granting, in part, its request for the production of documents. Mot. at 1. Respondent further notes that subsequently, in a Freedom Of Information Act (“FOIA”) proceeding in Federal District Court for the Northern District of West Virginia, it became aware of an EPA document described as an “Internal EPA Region III memo re: inspection enforcement issue concerning EPS.” Respondent states that EPA had refused to turn over this document, citing the “deliberative process” privilege. Mot. at 2. Thus, in light of this refusal, respondent sought (1) the issuance of a default order against EPA; (2) the drawing of an adverse inference; and/or (3) the issuance of an order compelling compliance with this tribunal’s discovery order. Mot. at 5.

Initially, EPA was steadfast in its refusal to provide EPS with the newly identified document. It claimed that the deliberative process privilege applied here and also that respondent was not prejudiced by the government’s withholding of the document. Compl. Resp. at 1. EPA also submits that inasmuch as the Agency provided respondent with approximately 2,000 pages of documents in response to four FOIA requests submitted by respondent, the existence of this document was simply overlooked. *Id.* at 2.

Thereafter, however, EPA withdrew its claim of privilege and released this document to EPS. This document is identified as Complainant’s Exhibit 60 and it was provided to respondent during the examination of Charlene Creamer, the document’s author. Tr. 32-38 (Vol. XII). Accordingly, given EPA’s ultimate compliance with this tribunal’s discovery order, and given the absence of any showing of prejudice to respondent, it is determined that sanctions against EPA are not warranted under the facts of this case and respondent’s cross-motion for sanctions, therefore, is *denied*.

B. Respondent’s Affirmative Defense of Selective Prosecution

In defending against the TSCA violations leveled against it by EPA in this case, EPS relies in no small measure on the claim that it is the victim of unlawful, selective prosecution by

the government. Indeed, the majority of respondent's post-hearing brief addresses this argument, as did a large part of its case-in-chief. Despite this effort, however, EPS has failed to prove this affirmative defense.

1. An Overview of Respondent's Accusations of Governmental Misconduct

Essentially, EPS submits that EPA Region II (which includes the State of New Jersey) and EPA Region III (which includes the State of West Virginia) intentionally sought to shield G&S Technologies, Inc. ("G&S"), a competitor of respondent located in Kearny, New Jersey, from environmental enforcement. EPS further submits that it became the target of EPA Regions II and III (hence this enforcement case) in retaliation for its complaints to the government about G&S's misconduct. EPS offers the following overview of its defense:

... EPA unfairly selected EPS for enforcement by improperly allowing a similarly situated facility, G&S, to operate in complete disregard for and in violation of TSCA. Despite EPS's concerted efforts to exercise its constitutionally protected rights over ten years to bring such violations to the attention of EPA and to ensure the equal enforcement and application of laws by EPA, EPA Region 2 ... ignored such violations, leaving EPS with no alternative but to challenge to the highest levels the integrity of EPA's own enforcement efforts. Given EPA's stake in EPS's accusations and with full knowledge of contrary facts, EPA actively devised and advocated novel, unorthodox and incorrect interpretations of the regulations and facts to justify G&S's unlawful operations and EPA's incorrect positions. As a result, G&S has been left untouched and virtually unregulated, without any reasonable, rational or legal basis to justify EPA's disparate treatment of G&S. EPS's efforts to ensure the equal application of the PCB regulations to both entities (EPS and G&S) and to ensure a fair and level competitive market were met by EPA with vindictiveness, hostility, resentment and punitive measures. Simply stated, EPS's efforts at being a good corporate citizen backfired; rather than EPA using the information provided by EPS to initiate a thorough investigation and enforcement proceeding against G&S, the EPA began actively protecting G&S and systematically singling EPS out for prosecution, culminating in the unfounded and unsupported June 2001 Administrative Complaint.

Resp. Br. at 49-50 (fn. omitted).

2. Respondent's High Burden of Proof

Respondent's burden to show that it is the victim of selective prosecution is a very high

one indeed. While not without limits, the federal government has broad discretion regarding its decision-making authority on whom to prosecute. *Wayte v. United States*, 470 U.S. 598 (1985). In *Wayte*, the Court stated, “[t]he law does not need to be enforced everywhere to be legitimately enforced somewhere; and prosecutors have broad discretion in deciding whom to prosecute.” 470 U.S. at 607. Thus, proving that the government engaged in selective prosecution, as opposed to exercising its broad prosecutorial discretion, is no easy task. *See Order Denying Motion To Strike Defense Of Selective Prosecution* (February 28, 2003).

The standard, therefore, that EPS must meet in order to prove its affirmative defense of selective prosecution is a strict one. This standard is as follows:

In order to make a prima facie selective enforcement defense in an environmental case, “defendants bear a heavy burden of establishing that (1) defendants have been singled out while other similarly situated violators were left untouched, and (2) that the government selected defendants for prosecution ‘invidiously or in bad faith, i.e., based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of [their] constitutional rights.’”

United States v. Smithfield Foods, Inc., 969 F. Supp. 975, 984-985 (E.D. Va. 1997), citing *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990), *opinion adopted by* 955 F.2d 45 (6th Cir. 1990), *cert. denied*, 506 U.S. 820 (1992).

The Court’s *Smithfield Foods* decision, *supra*, was cited approvingly by the Environmental Appeals Board (“EAB”) in *B&R Oil Company*, 8 E.A.D. 39, 51 (EAB 1998). There, the EAB noted respondent’s “daunting burden in establishing that the Agency engaged in selective enforcement, for courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions.” *Id.* In the *B&R Oil Company* case, the EAB also commented:

Recognizing that government officials often operate under limited budgets and must inevitably exercise their discretion in selecting which cases to pursue, courts have traditionally allowed regulators considerable leeway in initiating enforcement actions. This reasoning was recently enunciated by the Sixth Circuit Court of Appeals in rejecting a defendant’s assertion of selective enforcement by state regulators: “Legislatures often combine tough laws with limited funding for enforcement. A regulator is required to make difficult, and often completely arbitrary, decisions about who will bear the brunt of finite efforts to enforce the law. As a result, even a moderately artful complaint could paint almost any regulatory action as both selective and mean-spirited.” *Futernick v. Sumpter Township*, 78 F.3d 1051, 1058 (6th Cir. 1996).

8 E.A.D. at 52-53. Accord, *Newell Recycling Co.*, 8 E.A.D. 598, 634-35 (EAB 1999), *aff'd*, 231 F.3d 204 (5th Cir. 2000), *cert. denied*, 534 U.S. 813 (2001).

3. EPS Has Failed to Prove Its Affirmative Defense

The evidence in this case does not establish that EPS was singled out by EPA Region III for prosecution for violation of environmental regulations, while others similarly situated (*i.e.*, G&S in Region II) were left untouched. Nor does the evidence show that EPA prosecuted this action in order to punish respondent for complaining to the government about G&S's environmental practices and thereby silence respondent.

Instead, as discussed below, what the evidence does show is that EPA had a valid enforcement reason to inspect EPS, and that EPA officials performed a routine review of the facts learned from the inspections and then made a supportable decision to bring this action against respondent. The evidence also shows that EPS failed in its attempt to prove that Region II provided G&S Technologies, Inc., with favored treatment. Finally, the evidence also shows that respondent failed in its attempt to prove that Region III proceeded against it at the suggestion or behest of Region II (again, to somehow benefit G&S).

a. EPA Had a Valid Enforcement Reason to Inspect the EPS Facility

The record evidence establishes that EPA had a valid enforcement reason for inspecting the EPS facility in Wheeling, West Virginia, on July 15, 1999, and on November 2, 1999. These inspections were carried out due to the Agency's concerns over respondent's request to change its financial assurance mechanism. As discussed earlier, 40 C.F.R. 761.65(g) (1999) provides that "[a] commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility he owns or operates." This regulation ensures complete environmental cleanup of a PCB storage facility should the owner or operator be unable to do so.³⁸

³⁸ Just exactly what this financial assurance is to cover is explained in 40 C.F.R. 761.65(f), titled, "Closure cost estimate." Section 761.65(f)(1) requires that a commercial storer of PCB wastes "shall have a detailed estimate, in current dollars, of the cost of closing the facility in accordance with its approved closure plan." *Id.* Among other things, the closure cost estimate of Section 761.65(f)(1)(i) requires that the cost estimate include "the cost of final closure at the point in the PCB storage facility's active life when the extent and manner of PCB storage operations would make closure the most expensive." The closure cost estimate is to "be based on the costs to the owner or operator of hiring a third party to close the facility." In addition, the closure estimate is to include "the current market costs of the facility's maximum estimated inventory of PCB wastes," *i.e.*, unless on-site disposal capacity will exist at the facility over the life of the PCB storage facility, and the closure cost estimate may not incorporate any salvage value that may be realized from the sale of wastes and other assets associated with the facility at the time of closure. Section 761.65(f)(ii), (iii), & (iv). In other words, "[f]inancial assurance would be demonstrated in an amount sufficient to close the facility when closure costs

It was in September of 1998, that EPS informed EPA that it desired to change its financial assurance for closure of its Wheeling facility from a “trust fund” to an “insurance policy.” Due to the obvious importance of a financial assurance mechanism in the event of a closure of a PCB storage facility, this request understandably caused immediate concern among the EPA Region III personnel who handle such matters. Indeed, this concern prompted the memorandum

Bobbie Wright, an Environmental Scientist with the Toxics Programs and Enforcement Branch, to Aquanetta Dickens, the EPA Branch Chief. The Wright memorandum expressed “serious concerns regarding EPS and their extreme rush to release trust fund dollars.” CX 7 (Attach. 1). It also requested an inspection to verify “EPS’s maximum containment capacity as per their permit requirements” and “EPS’s compliance with the time requirements for transporting waste off-site.” *Id.*

In fact, EPS’s request to change its financial assurance mechanism apparently caused enough of a stir within Region III’s office in Philadelphia, Pennsylvania, that the Region contacted EPA Headquarters for guidance. Tr. 17-18 (Vol. XII); *see* pages 9-10, *infra*. Charlene Creamer, the Region III PCB Coordinator offered the following testimony on this financial assurance mechanism change sought by EPS:

After the review of the papers that they had submitted to our office and we forwarded them to Headquarters, they took a look at it. And that was one of the issues, if that would actually be adequate or the right mechanism to have for closure of their storage facility.

Tr. 18 (Vol. XII).³⁹ Ultimately, the decision was made by Region III to inspect the EPS facility. Creamer explained, “[b]asically, we wanted to determine, I guess, their storage to make sure it met the requirements so that they would be able to have the right mechanism, financial

would be at a maximum, and that eventually would usually correspond to the maximum allowed inventory of stored PCB waste.” 54 Fed. Reg. 52738.

³⁹ In an internal office memorandum written prior to any EPA inspection of EPS, Creamer expressed the following concern regarding respondent:

- Selecting another financial mechanism for closure costs: EPS has submitted to EPA, at least twice, a request to modify their current financial assurance mechanism. However, on both occasions, after a review of the changed document, EPA could not agree with the proposed modification. *The requirement for accessible monies for EPS appears to suggest that their facility is managing more waste than permitted as stated in their approval.*

CX 60 (emphasis added).

mechanism, for closure.” Tr. 21 (Vol. XII).

The evidence thus establishes that EPA conducted a TSCA inspection of the EPS facility based upon valid enforcement considerations relating to respondent’s compliance with its TSCA PCB Commercial Storage Approval. The decision to inspect EPS was Region III’s alone. As discussed in more detail, *infra*, there is absolutely no evidence to suggest that Region II directed, or in any way influenced Region III to inspect the EPS Wheeling facility. Nor is there any evidence to support the theory advanced by respondent that the inspection of the EPS facility was initiated in order somehow to benefit G&S, respondent’s Region II competitor, or to coax respondent into keeping quiet about any non-compliance with TSCA by G&S. Again, it was EPS’s financial assurance mechanism communication with EPA, and nothing more, that placed the Agency in the inspection mode that ultimately resulted in this enforcement case.

The fact that EPA inspected respondent’s facility as part of the government’s normal course of business upon reviewing a commercial PCB storer’s request to change a critical financial assurance mechanism provision is compelling. There is no doubt that EPS strongly believes that EPA was guided by an improper motive -- *i.e.*, to somehow protect G&S in Region II and to punish it for demanding equal treatment under the Toxic Substance Control Act. This is a theory, however, unsupported by the evidence. There has been no showing by respondent that EPA inspected EPS for any reason other than in relation to the financial assurance mechanism matter and to ensure that the company was in compliance with its TSCA Storage Approval. The fact that respondent has offered an alternative reason for the government’s inspection is simply not enough. The evidence does not support EPS’s version of events.

b. EPA Region III’s Decision to Bring the Present Enforcement Action was the Product of Routine Agency Deliberation

Having made the decision to inspect the EPS facility, the next step for EPA was to evaluate the inspection results and to determine whether enforcement action was warranted. Here, EPA has shown that its decision to bring an enforcement action against EPS was made following a routine deliberative process involving Region III officials. Respondent has made no showing that the government officials involved in deciding to bring this enforcement action unlawfully selected EPS for prosecution as a measure of retaliation, or for any other unlawful reason.

James Webb, the Region III Associate Director for Enforcement in the Waste and Chemicals Management Division, signed the complaint on behalf of the Agency. Tr. 80-81 (Vol. I). Webb testified that he had reviewed the complaint and concurred in it. Tr. 93 (Vol. I).

Region III PCB Coordinator Charlene Creamer also was involved in the decision to issue a complaint against EPS. She explained the internal complaint review process as follows:

Well, first, we take a look at the inspection reports or the results of the inspection.

Once we do that, if we detect any violations, we look at the violations and determine then if a Notice of Noncompliance should be issued if there are violations or an Administrative Complaint.

Once it seems like the level of the violation, whether it's severe or not, usually that's when it goes to an Administrative Complaint. We also -- after we take a look to see what the violations are, we discuss that within -- usually within our group or with the inspector to determine the results or to find out exactly what the results of the inspection was.

And then we also have a meeting with our regional -- Office of Regional Counsel.

Tr. 39 (Vol. XII) (emphasis added).

Creamer further testified that this is the procedure that took place when the EPS matter came up for Region III's prosecutorial review. Creamer also discussed this matter with her immediate supervisor, Aquanetta Dickens, Chief of the Toxics Programs and Enforcement Branch, and with the Section Chief in the Office of the Regional Counsel. Tr. 40 (Vol. XII). Dickens described the decision to bring the present enforcement action against EPS as a "collaborative effort," involving the Waste and Chemicals Management Division staff, program office the Office of Regional Counsel, and the Office of Enforcement Compliance Assistance. Tr. 108-109 (Vol. XII). Dickens further defined her role in this pre-complaint review process "as a supervisor to see whether or not we had enough evidence to bring toward -- to our tier docket meeting to discuss with our attorneys and also others." Tr. 123 (Vol. XII).

In sum, just like the Agency's decision to investigate respondent, the record shows that in reviewing the results of that investigation EPA Region III followed its normal course of business in deciding whether to file a complaint in this case. Indeed, the fact that the decision here upholds all three charges set forth in the Second Amended Complaint shows that Region III had cause to proceed against EPS, thereby lending additional support to the conclusion that the government did not engage in selective prosecution.

c. There Has Been No Showing That EPA Region II Sought to Protect G&S or Sought to Influence Region III's Decision to Proceed Against EPS

(i). EPS's Contacts With EPA

There is no doubt that EPS complained often and loudly to EPA officials about the operation of its competitor G&S in Kearney, New Jersey (Region II) and how (in respondent's view) G&S was profiting from noncompliance with the PCB Rules. The highlights of these complaints are set forth below.

In August of 1998, Keith Reed informed the New Jersey Department of Environmental Protection that he believed that weekly shipments from a utility, Allegheny Power Systems, to G&S were illegal because, in Reed's view, the PCB concentration of the units shipped required that they be documented on a manifest rather than on a bill of lading. Tr. 315 (Vol. VII); RX 422. Thereafter, on September 11, 1998, EPS wrote to David Greenlaw, Region II's PCB Coordinator, questioning G&S's TSCA compliance. RX 423. In October of 1998, Keith Reed contacted EPA Headquarters concerning disposal practice under the new "Mega Rule." Tr. 208-209 (Vol. XIII); RX 414.⁴⁰

Shortly after receiving the EPA Headquarters response, on December 24, 1998, Reed sent a letter to Thomas Nolan of the New York Office of the EPA Office of Inspector General ("OIG"). RX 426. Reed's letter asserted that G&S is subject to the PCB disposal regulations and that Region II had not acted on information supporting a finding of violation. On January 25, 1999, Paul Zammit, Nolan's superior at OIG, referred the matter to George Pavlou, Director of Region II's Division of Enforcement and Compliance Assistance.

In addition to these Office of Inspector General inquiries, Keith Reed continued to contact EPA Region II officials. On January 7, 1999, Reed sent to Daniel Kraft, the Region II Toxics Section Chief of the Pesticides and Toxic Substances Branch, a questionnaire consisting of forty-one questions. RX 427. Also, in a February 15, 1999, letter to George Pavlou, Reed alleged that "G&S ... has enjoyed the financial benefits of noncompliance to 40 CFR 761 Rules and Regulations, while at the same time totally avoiding any enforcement from USEPA Region II." RX 428 at R001897. Moreover, in the year 2000, Keith Reed expanded the scope of his efforts to include EPA's Criminal Investigative Division ("CID"). Reed was in communication with David Dillion, the resident-agent-in-charge of the CID's office in Trenton, New Jersey. Tr. 10, 28-29 (June 29-30, 2004).

Keith Reed's final letter to Region II is dated June 12, 2001. RX 450 at R006867. This letter refers to a December 14, 2000, inspection of G&S by Region V officials (conducted independently of Region II). EPA Region V, with its principal offices in Chicago, Illinois, had been assigned by the Agency to conduct its own investigation into the operation of G&S in Kearney, New Jersey, in response to the complaints and allegations brought by EPS against the company, as well as against Region II personnel. Reed believed that the Region V inspection supported a finding of violation against G&S. The results of the Region V investigation are discussed, *infra*.

(ii). EPA's Responses to EPS's Concerns

⁴⁰ The Mega Rule amended the 40 C.F.R. Part 761 regulations for the disposal of PCB waste. See *PCB Disposal Amendments* 63 Fed. Reg. 35,384 (June 29, 1998) (effective August 28, 1998). Insofar as this case is concerned, the Mega Rule regulates the disposal of drained PCB-contaminated transformers. Prior to the Mega Rule, the disposal of drained PCB-contaminated transformers was *not* regulated. Tr. 143 (Vol. XII).

While EPS untiringly complained to a variety of EPA sources about the company's concerns over G&S, the record shows that the Agency made a substantial effort to respond to the problems and concerns raised by respondent. For example, on December 21, 1998, John Melone of the Office of Prevention, Pesticides and Toxic Substances responded by letter to each of Reed's nine questions regarding the Mega Rule's effect on disposal practice. RX 414.⁴¹ Also, in a letter dated March 1, 1999, Region II responded to Reed's questionnaire of January 7, 1999. Moreover, David Dillion of the Criminal Investigations Division interviewed employees of G&S's customers and met with EPA officials knowledgeable about the PCB Program. RX 611 at HQ CID 4-11, 14-49. Dillion's investigation did not lead to any prosecution. He closed the criminal investigation on February 16, 2001. *Id.* at HQ CID 50-51.

Another key response by EPA to EPS was a meeting between the two parties held in Region II on September 15, 2000. Attending this meeting on behalf of EPA were Region II officials, as well as James Webb from Region III's Waste and Chemical Management Division. Tr. 196 (Vol. I); RX 447; CX 36 at ¶ 20.⁴² At this September 15 meeting, Reed was allowed to express his beliefs that G&S was in violation of the regulations regarding PCB commercial storage approval, the 100-year flood plain requirements, as well as the regulations for the exporting of PCB waste material. Tr. 93-96 (Vol. VIII). In addition, the participants also discussed the decision by Region II official Pavlou to continue to assign Daniel Kraft and David Greenlaw to the task of monitoring G&S's conduct, despite Reed's accusations of their wrongdoing. Tr. 97 (Vol. VIII).⁴³

Lastly, Reed received an electronic mail reply from Lisa Jackson (Region II), Pavlou's successor, on February 21, 2002, discussing the EPA Region V report regarding G&S. RX 450 at R003014. In that letter, Jackson stated that the Region V report "identifies no new information previously unknown to inspectors, and raises no new area of concern." *Id.* Jackson further informed Reed that in light of this position, and because Region II had not "been able to find any verifiable instances of wrongdoing other than those documented in the Administrative complaint [against G&S]," she would "terminate [Region II's] review." *Id.* Finally, Jackson

⁴¹ Melone's letter expressed EPA Headquarters position based on the Mega Rule prior to the promulgation of the June, 1999, technical amendments. The letter was reissued in September, 2000, in which the technical amendments were taken into account. Tr. 208-209 (Vol. XIII).

⁴² By the time of this September 15, 2000, meeting, both EPA Region III inspections of EPS had taken place. Against this background, Region III official Webb testified that he had no knowledge of the EPS competitor in Region II (G&S) and that he did not discuss Region III's investigation of EPS with Region II. Also, Webb testified that his discussion of EPS with Region II was limited to the Region II Inspector General investigation regarding G&S, and possibly an EPA Region V investigation of G&S. Tr. 193-196 (Vol. I).

⁴³ As discussed, *infra*, there is no finding that either Kraft or Greenlaw, or for that matter any other EPA official or employee from Region II or Region III, engaged in wrongdoing.

attributed the “lack of agreement on the alleged violations” between the two EPA Regions (*i.e.*, Region II and Region V) to “differing interpretation of the rules rather than any lack of information on the part of EPA.” *Id.*

(iii). The Testimony of Finnegan and Kraft

Two of the Region II EPA employees singled out by EPS as providing favorable treatment to G&S are Anne Finnegan and Daniel Kraft. Both individuals testified at the hearing and denied respondent’s assertions of wrongdoing. Finnegan and Kraft are found to be credible witnesses and their testimony is accorded substantial weight.

Finnegan is an EPA inspector with Region II. Her immediate supervisor is Kraft. Tr. 136, 138 (Vol. XII). Inspector Finnegan inspected the G&S facility in Kearney, New Jersey, four times between 1997 and 2001. (Finnegan considered this many inspections in a four-year span to be unusual.) Tr. 151-152 (Vol. XII). These inspections were conducted because of complaints made to EPA by EPS. A two-count administrative complaint subsequently was issued against G&S in the latter part of 2000. One count involved an improper storage container used for PCB waste and the other count involved the failure to mark the date that several drums of PCB waste were removed from service. Tr. 151-153 (Vol. XII).⁴⁴

Finnegan also testified that it was her view that G&S was not a commercial storer of PCB waste (unlike EPS) through June of 2001, because it did not accept PCB transformers for disposal. Instead, the transformers were accepted as surplus for resale and thus were considered “in service.” Tr. 163 (Vol. XII). Accordingly, Finnegan concluded that G&S did not need to have EPA approval as a commercial storer of PCB waste and could not, therefore, be in violation of any PCB regulations concerning the commercial storage of PCB waste. Tr. 165-166 (Vol. XII).

As to the issue of the alleged favored treatment of G&S, Inspector Finnegan “utterly reject[ed]” respondent’s assertion that she was attempting to justify an inaccurate position to protect her job. Tr. 201 (Vol. XII). When asked, “Did you ever do or write anything to protect or shield G&S with regard to the application and enforcement of the PCB regulations?,” her response was “Absolutely not.” Tr. 201 (Vol. XII). When asked, “Did you ever do or write anything with regard to G&S that would violate your EPA duties and responsibilities?,” Finnegan’s response again was “Absolutely not.” *Id.* Finally, the following line of questioning between Finnegan and EPA counsel well-illustrates that insofar as G&S was concerned, she impartially carried out her duties as an enforcement officer:

Q. Have you, Ms. Finnegan, ever been offered or given money, a gift, or other financial reward by G&S for anything in

⁴⁴ On July 12, 2001, EPA and G&S entered into a Consent Agreement and Final Order settling this matter for \$19,000. RX 460 at 1.

connection with your EPA employment?

A. Absolutely not.

Q. Have you ever taken any money, gift, or other financial reward from G&S for anything in connection with your EPA employment?

A. Absolutely not.

Q. Have you ever been offered or given any money, a gift, or other financial reward by a third party on behalf of G&S for anything in connection with your EPA employment?

A. No.

Q. ... Did you ever knowingly or intentionally disregard, ignore, or otherwise overlook any activity or incident by G&S or occurring at the G&S facility for which, if it were committed by someone else, EPA Region II would have brought an enforcement action under the PCB regulations?

A. No.

* * * * *

Q. Did you ever inspect any facility owned, leased, or operated by EPS?

A. No.

Q. Did you ever ask anyone in EPA Region II to inspect any facility owned, leased, or operated by EPS?

A. No.

Q. Did you do any research for the preparation or issuance of the Complaint in this proceeding against EPS?

A. No.

Q. Did you have any role in the preparation of the Complaint in this proceeding?

A. No.

Q. Prior to the issuance of the Complaint, did you review it in any draft form?

A. No.

Q. Did you ask anyone in EPA Region III to conduct an inspection of EPS?

A. No.

Q. Did you ever urge or encourage anyone in EPA Region III to conduct an inspection of EPS?

A. No.

Q. Did anyone in EPA Region III ever seek your advice or opinion as to whether -- whether to inspect EPS?

A. No.

Q. Did you ever ask anyone in Region III to commence or prosecute this action against EPS?

A. No.

Q. Did anyone in EPA Region III ever seek your advice or opinion whether to commence and prosecute this action against EPS?

A. No.

Tr. 202-205 (Vol. XII).

As noted earlier, Inspector Finnegan was found to be a credible witness and her testimony, particularly the testimony referenced above, is accorded significant weight. To the extent the respondent seeks a different evaluation of Finnegan's testimony, it simply has not shown either directly, or circumstantially, that the witness was not telling the truth.

The same result obtains for Daniel Kraft. He is the Chief of the Toxics Section, Pesticides and Toxic Substances Branch in the Division of Enforcement and Compliance Assistance with EPA Region II. Also, Kraft is the immediate supervisor of Finnegan and had

been the immediate supervisor of David Greenlaw. Tr. 255-256 (Vol. XIII).⁴⁵ Kraft became aware of EPS in the Fall of 1998. He explained, “they began to send us letters and make telephone calls to us alleging violations at G&S and urging us to conduct compliance inspections and take enforcement action against alleged violations by G&S of the PCB regulations.” Tr. 297 (Vol. XIII).

Like the testimony of Finnegan, Kraft repeatedly denied engaging in wrongdoing regarding G&S. In that regard, he stated that he did not write anything to protect or to shield G&S from enforcement of the PCB regulations, or in any way violate his duties and responsibilities with EPA. Tr. 291 (Vol. XIII). When asked whether he had “ever been offered or given any money, gift, or other financial reward by G&S for anything in connection with [his] EPA employments,” Kraft answered, “Absolutely not.” Tr. 294 (Vol. XIII). He also strongly denied ever receiving money, gifts, or other financial rewards, or even knowing anyone else who had, from G&S or from a third party, presumably representing G&S. Tr. 295-296 (Vol. XIII).

Kraft also testified that he never inspected a facility “owned, leased, or operated” by EPS, nor did he ask anyone at Region II to do so. Nor did Kraft ever disregard, ignore, or overlook any activity by, or incident at, G&S for which, if committed by someone else, EPA would have brought an enforcement action under the PCB regulations. He also had no role in the drafting of the complaint against EPS and no one from his staff reviewed the complaint. Tr. 296-299 (Vol. XIII). Moreover, Kraft further testified that he did not ask anyone in Region III to inspect the EPS facility in Wheeling, nor did he encourage Region III to do so. Finally, no one in Region III sought his advice regarding EPS and neither he, nor his staff, participated in Region III’s decision to file a complaint against EPS. Tr. 299-300 (Vol. XIII).⁴⁶

As with Anne Finnegan, Daniel Kraft was found to be a credible witness and his testimony is accorded substantial weight. Also, like Finnegan, respondent has offered no persuasive argument showing that Kraft did not tell the truth.

(iv). Region V’s Inspection of G&S

EPA Region V conducted an independent inspection of the G&S facility, located in Region II, to determine its compliance with the PCB regulations. Tr. 277-278 (Vol. XIII). As noted earlier, Region II personnel were not a part of this investigation. Inspector Finnegan

⁴⁵ Mr. Greenlaw died some time prior to the hearing.

⁴⁶ Kraft did, however, acknowledge that he sent an e-mail to Aquanetta Dickens, Region III Chief of the Toxics Program and Enforcement Branch, and to EPA Inspector Scott Rice in Region III asking about the progress of the EPS complaint. Kraft essentially testified that these communications were in the normal course of Agency business and that he did not encourage either individual to prosecute the action against EPS. Tr. 301 (Vol. XIII). *See* Tr. 359-360 (Vol. XIII) & RX 449.

testified that she understood that this inspection “was a result of allegations that EPS was making that the Region II personnel were somehow biased towards G&S.” Tr. 167-168 (Vol. XII).

This Region V inspection of G&S took place on December 14, 2000, and a report was issued on February 2, 2001. Tr. 60 (Vol. VII); RX 489. The Region V report included enforcement measures that it would have considered taking against G&S. Tr. 168 (Vol. XII); RX 458 at R004614. Region II Inspector Finnegan prepared a memorandum taking issue with each of the potential enforcement measures identified by Region V. The Finnegan memorandum was prepared for Ken Stoller of Region II and it is instructive because it shows how two EPA Regions can have differing interpretations of certain PCB regulations.

Finnegan identifies the purpose of the memorandum as answering “the questions/recommendations that Region 5 has raised as a result of their inspection of G&S.” RX 458 at R004614. She continues, “I would point out that each of these issues has already been addressed (some at great lengths) in Region 2’s investigation and we were satisfied that there was no enforcement action that we can take, other than the one covered by our recent Complaint.” *Id.*,

In her “General Response” section, Finnegan states, “I am confused by Region 5’s repeated invocation of the commercial storage requirements.” *Id.* She adds, “[i]t appears almost as if they themselves do not understand the definition and application of the commercial storage rules.” *Id.* Finnegan concludes that both Region II and EPA Headquarters have determined that G&S “is not, and has not been, a commercial storer of PCB waste as that term is defined in the PCB regulations.” *Id.*⁴⁷

In her “Responses to specific comments/recommendations” section, Finnegan takes issue with all six findings of Region V. As for Finding No. 1, Finnegan states that Region V does not fully understand “the processes at G&S.” There, Region V suggests that G&S is a commercial storer of transformers. Region V concludes that further investigation of this issue could result in a storage violation. Finnegan’s response is that the bulk of G&S’s business is receiving drained transformers for scrap and that the transformers are tested and drained at the generator’s facility “prior” to shipping. (Finnegan’s emphasis.) She concludes by noting that both Region II and EPA Headquarters concur with G&S that these surplus transformers are not being commercially stored. Thus, she concludes that there is no requirement for G&S to have a commercial storage approval. RX 458 at R004614-15.

In Finding No. 2, Region V states, “G&S buys transformers for scrapping and treats the oil from these transformers as their own waste, rather than as commercially stored waste.” *Id.* at R004615. Region V would treat this as a storage violation. Finnegan, however, responds by stating that all scrap transformers brought in to G&S are tested and drained of free liquid at the

⁴⁷ Interestingly, Finnegan continues on, offering the following comment on G&S: “They may have played out a loophole in the regulation to the fullest practicable extent, but they are still within the regulations.” RX 458 at R004614.

generator's facility prior to shipping. Also, consistent with EPA Headquarters policy, "any residual PCB oil removed from PCB Contaminated Transformers which were previously drained is considered to be generated by the scrap facility." Therefore, according to Finnegan, this residual oil is not commercially stored. *Id.* "Since the oil in question is not considered to be commercially stored, there can be no storage violation." *Id.*

In Finding No. 3, Region V states that G&S filed its notification of PCB Activity as a commercial storer on September 9, 1999, but that it should have done so as early as 1990. Region V would treat this as a notification violation *Id.* Again, Finnegan's response is that this 1999 filing was precautionary by G&S and that there was no need, at any time, to complete such a filing inasmuch as the company did not commercially store the oil in question. *Id.*

As for Finding No. 4, Region V concludes that the G&S facility is located below the 100-year flood plain. Finnegan answers by noting that a Elevation Certificate provided by G&S shows that the buildings and storage areas are raised such that they are located above the 100-year flood elevation. She adds that EPA Headquarters concurs in the position that "this is not considered to be 'in' the flood plain." RX 458 at R004615-16.

Finding No. 5 concerns the scope of the commercial storage permit sought by G&S and is of little significance to this case. Finding No. 6 of the Region V report involved an area of the G&S facility that previously had required cleanup. Finnegan's response was that this is a State of New Jersey issue and that the state had already accepted the cleanup under the involved building sites. *Id.* at R004616.

The contrary views of Region V and Region II (and EPA Headquarters as well) as to the interpretation and application of the PCB regulations show a professional difference of opinion within the Agency tasked with their enforcement. This is nothing new and it is in no way unusual. It is not the intention of this opinion to say which side is right and which is wrong. It is the intention of this opinion though to note that for purposes of the respondent's selective prosecution defense, the Region V investigation and the Region II response, by way of the Finnegan memorandum, sufficiently establishes that Region II's review and analysis of the G&S operation was based entirely upon the Region's professional interpretation of the involved PCB regulations. Accordingly, the Region V inspection and report, and the Region II response, serve only as additional evidence that EPA did not seek to treat G&S differently from EPS.

In sum, EPS made an enormous effort in this case to show that it was the victim of selective prosecution. It had a very high burden to meet and it failed to do so by a wide margin. The facts of the case simply do not support the conclusion of selective prosecution which respondent finds to be so obvious. In order to reach the result sought by EPS here -- *i.e.*, that the government unlawfully singled out respondent for enforcement, this tribunal would have to draw adverse inferences from many sets of competing facts, seeing only the worst in the government's actions, despite the existence of more persuasive, alternative explanations showing that those actions were lawfully motivated. This tribunal declines such an invitation.

C. Civil Penalty

As set forth above, EPS is found to have violated Section 15 of the Toxic Substances Control Act, 15 U.S.C. § 2614, as alleged in Counts I, II, and III of the Second Amended Complaint. Accordingly, a civil penalty must be assessed. Section 16 of TSCA authorizes the assessment of a civil penalty up to \$25,000 per day for violations of the PCB regulations contained in 40 C.F.R. Part 761. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, has increased the maximum penalty that may be assessed under TSCA from \$25,000 per day to \$27,500 per day for violations occurring after January 30, 1997. 40 C.F.R. Part 19.

In addition, Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a)(2)(B), lists those factors that are to be taken into account in determining the penalty for a Section 15 violation. Section 16(a)(2)(B) provides:

In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

15 U.S.C. § 2615(a)(2)(B).⁴⁸

⁴⁸ Commenting on the application of similar penalty criteria under the Clean Water Act, 33 U.S.C. § 1319(g), the Environmental Appeals Board has observed:

Under the Consolidated Rules of Practice (“CROP”), 40 C.F.R. Part 22, the ALJ assessing a civil penalty “shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act.” 40 C.F.R. § 22.27(b). The EAB reviews penalty assessments *de novo*, see 40 C.F.R. § 22.30(f), but will generally defer to the ALJ’s judgment unless an appellant can demonstrate that the ALJ’s judgment is clearly erroneous or otherwise constitutes an abuse of discretion.

Vico Construction Corp. And Amelia Venture Properties, L.L.C., CWA Appeal No. 05-01, slip. Op. At 49-50 (EAB September 29, 2005).

EPA considered these penalty criteria in calculating its proposed penalty of \$151,800.⁴⁹ Complainant has also relied, in large measure, upon the *Polychlorinated Biphenyls (PCB) Penalty Policy* (EPA, April 9, 1990) (“Penalty Policy”) to explain the application of the statutory criteria as it calculated the proposed penalty. *See* CX 24.⁵⁰ These penalty criteria are discussed below.

1. Nature, Circumstances, and Extent

With respect to the waste PCB transformer (Count I) and the waste PCB capacitor (Count II) storage violations, the extent by which respondent exceeded the applicable Maximum Storage Capacity, *i.e.*, the “MSC,” is significant. For example, as to Count I, EPS was authorized to store a maximum of 5,000 pounds of PCB transformers. Yet, on July 21, 1999, it stored 10,898 pounds of waste PCB transformers and on November 2, 1999, it stored 15,320 pounds of waste PCB transformers. As to Count II, respondent was authorized to store a maximum of 1,000 pounds of PCB capacitors. EPS far exceeded its MSC by storing 26,367 pounds of waste PCB capacitors on July 9, 1999.

The nature and circumstances of the violations established relative to Counts I and II are brought into focus when measured against the intended role of the PCB regulations as they relate to the Maximum Storage Capacity requirement. In that regard, the reason for requiring an MSC is as follows:

This information is essential, because it bears upon the facility’s ability to demonstrate that it in fact has the capacity to store PCB waste in accordance with the § 761.65 storage requirements. Further, the maximum projected inventory of PCB wastes forms the basis for designing a maximum storage capacity for the facility, and for estimating the costs of closure. Financial assurance would be demonstrated in an amount sufficient to close the facility when closure costs would be at a maximum, and that eventuality would usually correspond to the maximum allowed inventory of stored PCB waste.

54 Fed. Reg. 52738.

EPA notes, the “purpose of the rule is to ensure proper disposal of PCB wastes. There

⁴⁹ As discussed earlier, EPA’s attempt at an upward adjustment to this penalty amount through requested sanctions against EPS has failed.

⁵⁰ The Board has held that an administrative law judge “can depart from a penalty policy as long as he or she adequately explains the reasons for doing so.” *John A. Capozzi d/b/a Capozzi Custom Cabinets*, RCRA Appeal No. 02-01 (EAB March 25, 2003), slip. op. at 40.

have been historical cases of improper storage or disposal of PCB wastes which have resulted in the creation of Superfund sites. Because the cleanup of these sites is often extremely expensive, this rule has the potential to benefit the economy as well as the environment.’ 53 Fed. Reg. 37436, 37458.” Compl. Br. at 69.

“Respondent’s actions precluded EPA from determining whether Respondent’s storage of additional quantities of PCB wastes would meet the regulatory standard of 40 C.F.R. 761.65(d)(2)(vi) which provides that EPA [Regional Administrators] may grant approval for an applicant to engage in the commercial storage of PCB waste only upon a determination that: ‘the operation of the storage facility will not pose an unreasonable risk of injury to health or the environment.’ Without an opportunity to review the proposed changes to Respondent’s PCB waste storage operations and closure plan before Respondent implemented these changes, EPA was unable to assess whether Respondent might have lacked the financial capability to clean up and to dispose of quantities of PCBs or PCB Items released as a result of a catastrophic event such as a spill or fire, or abandoned as a result of mismanagement or insolvency, as required by 40 C.F.R. § 761.65(d)(2)(iv) and (v). Nor did EPA have the opportunity to evaluate whether Respondent’s facility had the capacity to physically contain quantities of PCB waste in excess of the MSC limits in the event of an accidental release such as a spill, as required by 40 C.F.R. § 761.65(d)(2)(ii).” Compl. Br. at 72.

Insofar as Count III is concerned, Section 761.72(a)(3) establishes specific oven operating requirements as to time and temperature in order to ensure that “[a]ny PCBs present in the drained PCB-Contaminated articles will vaporize or be destroyed at these temperatures.” 63 Fed. Reg. at 35402. Moreover, as argued by EPA, “[r]espondent’s failure to operate the primary chamber of its SMRO at a temperature of at least 537 [degrees] C for at least two and one-half hours during the burn cycles ... presented a high risk of harm to health, the environment, and the PCB regulatory program.” Compl. Br. at 81.

Furthermore, EPA properly argues that a high penalty is warranted for this Count III violation because of the toxic nature of the PCBs involved, and the potential for human and environmental exposure. *Id.* Along these lines, EPA witness, Dr. John Smith, offered as an expert in the areas of PCB disposal, processing, and incineration (Tr. 246 (Vol. II), testified that “the problem with uncontrolled burning was that there were residues of incomplete combustion of PCBs, or, could be, on the surfaces of the material.” Tr. 254 (Vol. II). (Inspector McPhilliamy also testified that if the primary chamber of the oven is not operating at a specified temperature, it would not be as effective in removing the PCBs. Tr. 59 (Vol. II)).

Dr. Smith added, “people who would be handling those, people who would be working in workshops where that material would be allowed to escape or be brushed off of that equipment, would not be aware of that, could become contaminated, could become sick from those products of incomplete combustion.” *Id.* See 63 Fed. Reg. at 35402 (open burning of PCB-contaminated articles can create “significant amounts of products of incomplete combustion such as PCBs,

polychlorinated dibenzo-p-dioxins, and polychlorinated dibenzofurans.”)⁵¹

2. Gravity

It is well-established that violations of the PCB regulations are serious. This is evident from the introductory language of 40 C.F.R. 761.20 (“Prohibitions and exceptions”) which states, in part:

... [T]he Administrator hereby finds that the manufacture, processing, and distribution in commerce of PCBs at 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. This finding is based upon the well-documented human health and environmental hazard of PCB exposure, the high probability of human and environmental exposure to PCBs and PCB Items from manufacturing, processing, or distribution activities; the potential hazard of PCB exposure posed by the transpiration of PCBs or PCB Items within the United States; and the evidence that contamination of the environment by PCBs is spread far beyond the areas where they are used. In addition, the Administrator hereby finds ... that any exposure of human beings or the environment to PCBs ... may be significant, depending on such factors as the quantity of PCBs involved in the exposure, the likelihood of exposure to humans and the environment, and the effect of exposure.

⁵¹ Dr. Smith also subsequently reiterated:

And the reason that those surfaces must be cleaned is that, even though there may be fairly low amounts of PCBs on those surfaces to start, if the temperatures are insufficient to destroy and volatilize those PCBs, potential incomplete products of combustion from PCBs, such as I mentioned in that preamble text, polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans, are *much more toxic than PCBs*, and could be left on those surfaces.

And those handling those surfaces, managing those surfaces, further -- perhaps, melting those surfaces, could become exposed to those surfaces not knowing their- - the contamination.

Tr. 261-262 (Vol. II) (emphasis added).

40 C.F.R. 761.20.

Furthermore, “[e]pidemiological data and experiments on laboratory animals indicate that exposure to PCBs pose carcinogenic and other risks to humans.” *Environmental Defense Fund v. EPA*, 636 F.2d 1267, 1270 (D.C. Cir. 1980); *Rogers Corporation*, 9 E.A.D. at 536 (identifying PCBs as “probable human carcinogens”), *citing in part* 63 Fed. Reg. 35,384, 35,385 (June 29, 1998) and U.S. EPA, Office of Research & Development, *PCBs: Cancer Dose-Response Assessment and Application to Environmental Mixtures* 6 (Sept. 1966). In addition, PCBs have been identified as causing noncarcinogenic illness with respect to the skin, eyes, and nervous system. *Rogers Corporation*, 9 E.A.D. at 536, *citing in part* 64 Fed. Reg. 69,358, 69,362 (Dec. 10, 1999).

Moreover, as the Environmental Appeals Board commented in *Rogers*, “[o]nce released into the environment, PCBs are extremely persistent (they resist biological degradation) and tend to bioaccumulate in the fatty tissues of humans and animals.” 9 E.A.D. at 536. The Board also noted, “[d]ue to the extensive use and indiscriminate disposal of PCBs over the years, PCBs have become widely dispersed in the environment and are frequently detected at low levels in human beings.” *Id.* See *General Electric Company*, 4 E.A.D. 884, 891 (EAB 1993) (Congress “specifically singled out PCBs for special attention due to the concern it had over the persistency, ubiquity, and toxicity of PCBs.”), *vacated on other grounds*, *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995).

3. Ability to Pay and Ability to Continue to do Business

EPS does not raise an “ability to pay” defense. Accordingly, ability-to-pay is not an issue in this case. *New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994). Respondent also does not argue that the assessment of the penalty sought by EPA in this case will have an “effect on [its] ability to continue to do business.” Indeed, very little of respondent’s brief addresses the civil penalty aspect of this case.

EPA, however, does address the “ability to continue to do business” penalty criterion. In that regard, complainant cites respondent’s increase in the number of employees over the years, as well as general indicators of the company’s overall good economic health, to argue that EPS can pay the proposed penalty and still remain in business. See Compl. Br. at 96-97, citing CX 22 at 7, CX 56 at 4, & CX 58 at 4, 6. Given EPS’s failure to offer any argument to rebut these assertions, the economic picture of respondent as presented by EPA is accepted as true.

4. History

In addition, as for EPA, the government has made no showing of “any history of prior such violations.” Accordingly, the penalty will not be increased for previous instances of non-compliance.

5. Culpability

Insofar as the storage violations of Counts I and II are concerned, EPS was highly negligent. The facts are straightforward. EPS received from the EPA Region III Regional Administrator permission to store a maximum of 5,000 pounds of PCB transformers and a maximum of 1,000 pounds of PCB capacitors at its Wheeling, West Virginia, facility. Rather than comply with the permitted amounts, respondent stored waste PCB transformers and waste PCB capacitors in quantities substantially greater than those authorized by EPA. In fact, respondent's storage of the waste PCB capacitors was more than 26 times the allowable amount and that it took place over at least a 10-day period. In addition, the evidence shows that with respect to Count I, 13 of the 16 PCB transformers listed as in storage on November 2, 1999, had been in storage between 39 and 127 days. CX 11 (Attach. 3).

EPS's violation of 40 C.F.R. 761.72(a)(3) also was the result of a high degree of negligence. Here, respondent was shown to have violated the time and temperature requirement of Section 761.72(a)(3) during 16 burn cycles over 11 randomly selected dates, ranging from March through October of 1999. EPS has offered no adequate explanation to answer how barcoded, PCB-contaminated transformers could be improperly disposed of in its scrap metal recovery oven with such regularity.

6. Other Matters as Justice May Require

No evidence has been presented in this case that would necessitate a penalty adjustment pursuant to this criterion. To the extent that EPA continues to advance its sanctions theory here resulting from the discovery dispute with EPS, that matter already has been laid to rest.

V. Order

It is held that Environmental Protection Services, Inc., violated Section 15 of the Toxic Substances Control Act, 15 U.S.C. § 2614, as alleged in each of the three counts of the Second Amended Complaint. As charged in Count I, on two separate occasions, EPS stored waste PCB transformers in excess of the Maximum Storage Capacity provided in its TSCA PCB Commercial Storage Approval. A civil penalty of \$37,400 is assessed for this violation. 15 U.S.C. § 2615. As charged in Count II, EPS stored waste PCB capacitors in excess of the maximum storage capacity provided in its TSCA PCB Commercial Storage Approval. A civil penalty of \$27,500 is assessed for this violation. *Id.* As charged in Count III, EPS violated the time and temperature requirements of 40 C.F.R. 761.72(a)(3) relative to the burning of "regulated material" (*i.e.*, material with a PCB concentration from 50 to 499 ppm) in its scrap metal recovery oven. A civil penalty of \$86,900 is assessed for this violation. *Id.*

The civil penalties for the three TSCA violations total \$151,800. Respondent is directed to pay this penalty within 60 days of the date of this order.⁵²

⁵² Payment is to be made by certified check, or cashier's check. This check is to be made payable to "Treasurer of the United States of America," Mellon Bank, EPA Region 3 (Regional

Unless an appeal is taken to the Environmental Appeals Board pursuant to 40 C.F.R. 22.30, this decision shall become a Final Order as provided in 40 C.F.R. 22.27(c).

Carl C. Charneski
Administrative Law Judge

Hearing Clerk), P.O. Box 360515, Pittsburgh, Pennsylvania, 15251.