UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
Rogers Corporation	)	**Docket No. TSCA-I-94-1079**
	)	
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND THE COMPLAINT

ORDER DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

ORDER SCHEDULING HEARING

Introduction

On September 12, 1997, Respondent Rogers Corporation ("Respondent") filed a Motion for Accelerated Decision, with attached supporting memorandum and affidavit. On September 22, 1997, the United States Environmental Protection Agency ("Complainant" or "EPA") filed an Opposition to the Respondent's Motion for Accelerated Decision, a Motion for Partial Accelerated Decision on the Issue of Liability, memoranda in support of both pleadings, and a Motion to Amend the Complaint and Prehearing Memorandum, with attached Amended Complaint and supplemental prehearing memorandum.[(1)] On October 2, 1997, the Respondent filed Responses to the EPA's Motion for Partial Accelerated Decision, the EPA's Opposition to the Respondent's Motion for Accelerated Decision, and the EPA's Motion to Amend the Complaint. The Respondent also filed a Request for Oral Argument. On October 9, 1997, the EPA filed a Reply Regarding Motions for Accelerated Decision. In an order entered by the undersigned on October 9, 1997, the hearing in this matter scheduled for October 22-24, 1997, in Boston, Massachusetts, was

canceled pending action by the undersigned on the parties' cross-motions for accelerated decision.

The EPA's Motion for Partial Accelerated Decision as to Liability is Granted as follows along with its Motion to Amend the Complaint and Prehearing Memorandum. The Respondent is liable for violating the PCB disposal requirements of 40 C.F.R. § 761.60 and Section 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, as alleged in Count I of the Complaint. A hearing to determine the appropriate penalty is scheduled for January 14-16, 1998, in Boston, Massachusetts.

The Respondent's request for oral argument is denied. See 40 C.F.R. § 22.16(c). I note that the Respondent has not set forth the reason or basis for this request other than its generalized assertion that it is entitled to judgment as a matter of law in this matter. Respondent's Request for Oral Argument.

Background

The Complaint in this matter is filed under the authority of Section 16(a) of TSCA, 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.01 et seq.

Section 6 of TSCA, 15 U.S.C. § 2605 directs the Administrator of the EPA to promulgate regulations establishing requirements for the manufacture, distribution, and use of polychlorinated biphenyls ("PCBs"). These implementing regulations are found at 40 C.F.R. Part 761, and are entitled "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions" ("PCB regulations"). Section 6(e) of TSCA and the PCB regulations provide that it shall be unlawful for a person to dispose of PCBs at concentrations of 50 parts per million ("ppm") or greater in any manner other than that listed in the regulations. 40 C.F.R. §§ 761.60, 761.70, 761.75. The PCB regulations list and describe the allowable disposal methods for various manifestations of PCBs. The prescribed methods of disposal for liquids, other than mineral oil dielectric fluid, containing a PCB concentration of 50 ppm or greater but less than 500 ppm include disposal in an approved incinerator, a designated chemical waste landfill, a high efficiency boiler, or a specifically approved combustion process. 40 C.F.R. § 761.60(a)(3).

In the Complaint, the EPA alleges one (1) violation of 40 C.F.R. § 761.60, which prohibits the disposal of PCBs in a manner not approved by the PCB regulations. The Complaint filed on September 23, 1994, proposes a civil administrative penalty of $226,750 for this alleged violation, but in the EPA's Amended and Supplemental Prehearing Memorandum filed on April 18, 1997, the proposed penalty amount was reduced to $182,700. The proposed Amended Complaint now before me seeks a civil administrative penalty of $300,300 for the alleged violation.

Specifically, the Complaint alleges that the Respondent is a Massachusetts company that owns and operates a plant located at 245 Woodstock Road in East Woodstock, Connecticut ("Facility"), at which the Respondent produces polyurethanes, elastics, and foams. Complaint at ¶ 1. The Complaint alleges that at the Facility the Respondent operated a heat transfer system identified by the Respondent as Heat Transfer System No. 975 ("HTS 975") that spilled oil into a bermed area below. The Complaint also alleges that a sample of this spilled oil was collected from the bermed area below HTS 975 on November 5, 1993, and that subsequent laboratory analysis revealed the presence of PCBs. Complaint at ¶¶ 4, 5. The Complaint further alleges that a follow-up inspection was performed on December 1, 1993, at which time samples of oil spilled from HTS 975 were collected, and that subsequent laboratory analysis of theses samples revealed PCB concentrations of 50 ppm or greater. Complaint at ¶¶ 6-8. Finally, the Complaint alleges that on or about June 16, 1993, the Respondent became aware of earlier laboratory analysis results which showed that samples of oil from HTS 975 contained PCBs at a concentration of 50 ppm or greater, but failed to clean up the materials containing PCBs at unacceptable concentrations until at least December 1, 1993. Complaint at ¶¶ 9-10.

Count I of the Complaint alleges that the Respondent improperly disposed of PCBs from at least June 1, 1993, to at least December 1, 1993, by operating HTS 975 at the Facility in a manner that caused uncontrolled discharges and spills of PCBs at or above concentrations of 50 ppm or greater, or by allowing such PCBs to be present in, or improperly disposed of in, concrete material beneath HTS 975 during this time period. Count I further alleges that with respect to the PCBs spilled from HTS 975, the Respondent failed to initiate prompt cleanup in accordance with the PCB Spill Cleanup Policy, 40 C.F.R. Part 761, Subpart G. Based on the foregoing, Count I alleges that the Respondent has violated 40 C.F.R. § 761.60 and Section 15 of TSCA. Complaint at ¶¶ 11-19.

Motion to Amend the Complaint and Prehearing Memorandum

As a preliminary matter, I address the EPA's Motion to Amend the Complaint and Prehearing Memorandum. As noted above, the Motion to Amend the Complaint and Prehearing Memorandum was filed concomitantly with the EPA's Motion For Partial Accelerated Decision as to Liability. The purpose of the Motion to Amend the Complaint, as reflected by its attached Amended Complaint and as stated by the EPA, is to allege that the period of violation for the improper disposal of PCBs is from June 16, 1993, to at least March 29, 1994, rather than from June 16, 1993, until December 1, 1993, as alleged in the Complaint, and correspondingly to increase the amount of the proposed penalty from $226,750 to $300,300 based on the longer period of alleged violation. Complainant's Proposed Amended Complaint, Complainant's Motion to Amend the Complaint and Prehearing Memorandum at p. 1.

The EPA maintains that this alleged longer period of violation is based on information provided in the affidavit of Mr. Gerry Langelier which was submitted by the Respondent in support of its Motion for Accelerated Decision filed on September 12, 1997. Langelier Affidavit. The EPA notes that Mr. Langelier is a corporate official in the Respondent's corporation who was listed as a proposed witness by the Respondent in its prehearing exchange. The EPA contends that the proposed amendments, which concern only the dates and duration of the alleged violation and the corresponding amount of the proposed penalty, are not introduced for a dilatory purpose and will not cause any delay or undue prejudice to the Respondent. The EPA further contends that these requested amendments do not affect the Respondent's alleged liability and, thus, do not affect the parties' cross-motions for accelerated decision.

The Respondent opposes the Motion to Amend the Complaint and the Prehearing Memorandum. The Respondent argues that the EPA's Motion to Amend the Complaint and Prehearing Memorandum is inexcusably untimely as the EPA's alleged rationale is based on information known to the EPA for at least two years. The Respondent further argues that the proposed amendments would severely prejudice its defense.

Motions to amend the complaint are governed by the Rules of Practice which allow amendment upon motion granted by the Presiding Officer.[(2)] 40 C.F.R. § 22.14(d). The Rules of Practice do not, however, illuminate the circumstances when amendment is or is not appropriate. Nevertheless, some parameters have been developed through various administrative decisions. In

particular, the Environmental Appeals Board ("EAB") has offered some guidance on the subject, informed by the Federal Rules of Civil Procedure ("FRCP"). The EAB has held that a complainant should be given leave to freely amend a complaint in EPA proceedings, in accord with the liberal policy of FRCP 15(a), inasmuch as it promotes accurate decisions on the merits of each case. See In the Matter of Asbestos Specialists, Inc., TSCA Appeal 92-3, 4 EAD 819, 830 (EAB Oct. 6, 1993); see also In the Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1, 4 EAD 170, 205 (EAB Aug. 5, 1992).[(3)]

With regard to the amendment of pleadings, the United States Supreme Court has interpreted FRCP 15 to mean that there should be a "strong liberality...in allowing amendments" to pleadings. Forman v. Davis, 371 U.S. 178 (1962). Leave to amend pleadings under Rule 15(a) should be given freely in the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by previous amendment, undue prejudice, or futility of amendment. See Id.

The EPA's Motion to Amend the Complaint and Prehearing Memorandum comes at a late date, but the EPA explains that new information was just offered by the Respondent on its Motion for Accelerated Decision which has compelled the EPA to reevaluate its interpretation of the provable dates of violation. The Respondent correctly points out that undue delay or undue prejudice to the opposing party may serve as justification to deny a motion to amend a complaint, but I see no such delay or prejudice in this case. The longer period of violation alleged by the EPA in its Amended Complaint will not require massive documentation or a significant modification of strategy by the Respondent. Additionally, the hearing to determine the appropriate penalty in this matter is now scheduled for January 14-16, 1998, in Boston, Massachusetts, affording the Respondent ample time to address the new allegation. The undersigned also notes that inasmuch as the proposed amendments to the Complaint concern only the duration of the alleged violation and the amount of the corresponding penalty and do not directly affect the issue of liability, the ensuing order on the parties' cross-motions for accelerated decision as to liability may be rendered and entered without prejudice to either party.

Accordingly, the EPA's Motion to Amend the Complaint and Prehearing Memorandum is Granted. Upon the filing of the Amended Complaint, the Amended Complaint will become the Complaint in

this matter. Pursuant to 40 C.F.R. § 22.14(d), the Respondent shall have twenty (20) additional days from the date of service of the Amended Complaint to file its Answer. Thereafter, the Respondent shall amend its prehearing exchange, should it choose to do so, by December 19, 1997.

Findings of Fact

In reliance on the Respondent's Answer, and on the facts and attachments jointly stipulated by the Respondent and the EPA, I make the following findings.

1. The Respondent, The Rogers Corporation, is a corporation organized under the laws of Massachusetts with its principal place of business at One Technology Drive, Rogers, Connecticut, and is a "person" within the meaning of 40 C.F.R. § 761.3.

2. The Respondent owns and operates a manufacturing facility at 245 Woodstock Road, East Woodstock, Connecticut ("Facility"). The Facility, which was acquired by the Respondent in December 1967, manufactures polyurethane elastomers and foams.

3. Since before 1972 and through March 29, 1994, the Facility utilized a heat transfer system known as HTS 975.

4. HTS 975 was located in a basement room and used oil as a heat transfer medium.

5. In 1972, the Respondent replaced the PCB oil it had historically used in HTS 975 with non-PCB oil as a heat transfer medium. At the time of the adaptation to non-PCB oil, the Respondent flushed the HTS 975 system.

6. HTS 975 was equipped with so-called "wet seals," and its pumps "wept" oil while in operation. This oil was captured in a shallow concrete-lined, bermed containment area surrounding and underlying the HTS 975 heaters and pumps. Periodically, the Respondent pumped the oil from the berm into drums, sampled the contents for PCBs, and sent the drums off-site for disposal.

7. From at least 1988 to at least March 1992, samples of oil taken from the berm revealed PCB concentrations under 50 ppm.

8. In 1992, the Respondent's production rate increased dramatically to the point at which the HTS 975 was operating 24 hours per day, 365 days per year, an increase that continued through 1993 and into 1994.

9. In April 1993, the Respondent performed sampling of 16 drums of waste oil from the berm under HTS 975. Analysis of the samples was performed by Averill Environmental Laboratory, Inc. and reports of this analysis dated June 16, 1993, revealed the presence of PCBs in concentrations above 50 ppm in nine of the drums. The Respondent received these results sometime after they were sent to it on June 16, 1993.

10. On September 10, 1993, the Respondent properly shipped the 16 drums off-site for disposal in accordance with the PCB regulations.

11. On December 1, 1993, the Connecticut Department of Environmental Protection ("CT DEP") performed an inspection of the Facility and took five samples of oil from the HTS 975 room.

12. Upon analysis of the five samples taken by the CT DEP, one sample of oil from within the HTS 975 bermed area was found to contain 170 ppm of PCBs and one sample of oily Speedi-Dry from the drum storage area was found to contain 70 ppm of PCBs.

13. Splits of the samples taken by the CT DEP were sent by the Respondent to Averill Environmental Laboratory, Inc. on December 7, 1993, and the analysis of these samples revealed that two samples contained PCBs at concentrations of 140 ppm and 110 ppm, respectively.[4] The Respondent reported these results to the CT DEP on January 10, 1994.

14. On December 15, 1993, the Respondent received a Notice of Violation from the CT DEP, to which the Respondent responded on January 12, 1994.

15. On March 29, 1994, the CT DEP issued an order to the Respondent to undertake certain studies and to take certain remedial actions with respect to the PCBs around the Facility.

Arguments

Respondent's Arguments

The Respondent contends that it cannot be held liable for a violation of Section 15 of TSCA because it has not committed any of the violations of the PCB regulations as alleged in Count I of the Complaint. The Respondent offers several arguments for a finding of no liability in this case.

The Respondent begins with an assertion that it did not "dispose" of PCBs at the Facility within the meaning of the PCB Spill Cleanup Policy at 40 C.F.R. Part 761, Subpart G, as alleged in Count I because the policy is not applicable on its face to the facts of this case. In this regard, the Respondent maintains that any release of PCBs at the Facility must have occurred prior to the 1972 transformation of the HTS 975 from PCB to non-PCB oil and certainly before May 4, 1987, the effective date of the PCB Spill Cleanup Policy. Respondent's Memorandum of Law in Support of its Motion for Accelerated Decision ("Respondent's Memorandum") at 9-11. In support of this argument, the Respondent states that "HTS 975 has not contained any PCBs in excess of 50 ppm since [June 1972]" and it therefore follows that PCBs could not possibly have been "spilled" from HTS after June 5, 1972. Respondent's Memorandum at 10.

Next, the Respondent contends that the PCB disposal requirements of 40 C.F.R. § 761.60 do not apply to the facts in this case because any historic releases of PCBs at the Facility are covered by the "disposal site" exemption embodied in the prefatory note of Subpart D of the PCB regulations ("Prefatory Note"). The Prefatory Note states that "PCB items which have been placed in a disposal site are considered to be 'in service' " and therefore exempt from the PCB disposal requirements. 40 C.F.R. Part 761, Subpart D (prefatory note). In this regard, the Respondent asserts that the "disposal site" exemption creates a legal fiction that PCBs "placed in a disposal site" before February 17, 1978, are "in service" until they are removed for disposal. In other words, the Respondent asserts that the term "disposal site," as used in the Prefatory Note, refers to places where PCBs were spilled or released into the environment prior to February 17, 1978. Applying this assertion to the instant case, the Respondent contends that as the PCBs in question were "placed in a disposal site" no later than June 5, 1972, if at all, these PCBs are "in service" and therefore exempt from the PCB disposal requirements of Subpart D in general and of 40 C.F.R. § 761.60 in particular. Respondent's Memorandum at 12.

The Respondent argues that the EPA's reliance in this matter on the Chief Judicial Officer's ("CJO") decision in In the Matter of Standard Scrap Metal Company, TSCA Appeal No. 87-4, 3 EAD 267 (CJO Aug. 2, 1990) is misplaced. In particular, the Respondent argues that the CJO's discussion in that case of whether or not the spill sites in question were "disposal sites" was dicta only and therefore the EPA's reliance on the CJO's statement that "disposal site" refers to a narrow subcategory of places "set

aside for the purpose of containing waste...not just places where PCBs happen to spill" is unwarranted.

The Respondent then invokes the 1994 Proposed Rule for the PCB regulations ("Proposed Rule") to argue that this proposed rule has effectively overruled Standard Scrap. Disposal of Polychlorinated Biphenyls, 59 Fed. Reg. 62788, 62858 (1994) (to be codified at 40 C.F.R. Part 761). Respondent's Memorandum at 13. According to the Respondent, in response to confusion generated by the Standard Scrap opinion, the EPA proposed new regulations to clarify that PCBs disposed of prior to 1978 will not require further disposal action unless a Regional Administrator finds that such an historic disposal presents a risk of exposure. The Respondent also argues that the Proposed Rule acknowledges that Standard Scrap had erroneously narrowed the intended meaning and scope of the "disposal site" exemption and, in response, the Proposed Rule reaffirmed that the Prefatory Note was intended to exempt pre-1978 spills from the Disposal Regulations. The Respondent notes that the new regulations are incorporated in a Proposed Rule issued on December 6, 1994, only a couple of months after the filing of the Complaint in the instant matter.

The Respondent claims that the validity of the 1994 Proposed Rule has been recognized by the District of Columbia Circuit of the United States Court of Appeals in General Electric Company v. United States Environmental Protection Agency, 53 F. 3d 1324 (D.C. Cir. 1995), and by the EAB in In Re CWM Chemical Services, Inc., Docket No. TSCA-PCB-91-0213 (EAB May 15, 1995). Respondent's Memorandum at 15-16.

In addition, the Respondent contends that the PCB regulations are prospective in application and therefore do not apply to the alleged releases of PCBs from HTS 975. In particular, the Respondent maintains that the PCB Disposal Rule and the PCB Ban Rule, the twin cornerstones of the PCB regulations, do not apply to spills that occurred before April 18, 1978, and July 2, 1979, the respective effective dates of these rules. In this regard, the Respondent argues that, in the absence of clear Congressional intent, it would be unconstitutional to hold that these Rules apply to spills that occurred before the respective effective dates of these PCB regulations. See Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Respondent's Memorandum at 16-19.

Alternatively, the Respondent argues that even if the PCB disposal requirements of 40 C.F.R. § 761.60 were applied

retroactively to the alleged releases of PCBs from HTS 975, any resulting PCB disposal violations are nevertheless time-barred under the five-year statute of limitations contained in 28 U.S.C. § 2462. The Respondent notes that Section 2462 applies to administrative proceedings for the assessment of civil penalties under Section 16(a) of TSCA and it claims that such law precludes the EPA from pursuing disposal violations that occurred more than five years before the filing of the Complaint, which was before September 23, 1989, in the instant matter. Following the same reasoning as that employed in its historic spill argument, the Respondent asserts that the latest date on which a spill could have occurred was in 1972, well before the cut-off date. Respondent's Memorandum at 21-23.

Finally, the Respondent argues that any finding of liability against it would violate due process in that such a finding would need to rest on an EPA interpretation of the PCB regulations that held historic spills to be subject to the disposal regulations. Respondent's Memorandum at 23-25. Such an interpretation, argues the Respondent, would be too novel and too unreasonable to afford regulated entities sufficient notice of the scope of the regulations.

EPA's Arguments

The EPA alleges that the undisputed facts show that samples of oil from the bermed area beneath HTS 975 taken and analyzed on at least two separate occasions in 1993 revealed PCB concentrations greater than 50 ppm, which constitutes an improper disposal under the PCB regulations. The EPA maintains that when the Respondent allowed the PCB contaminated oil to remain on the floor under HTS 975 an improper disposal occurred because the floor is not a permitted disposal location. The fact that the PCBs were present because of a spill, leak, or discharge does not alter a finding of improper disposal according to the EPA's argument. Complainant's Memorandum in Support of its Motion for Partial Accelerated Decision ("Complainant's Memorandum") at 7-8; Complainant's Reply Regarding Motions for Accelerated Decisions ("Complainant's Reply") at 10.

The EPA rejects all the above arguments raised by the Respondent as being based on the false premise that no spill could have occurred after the 1972 adaptation of the HTS 975 to non-PCB oil. The EPA argues that for the purposes of the instant cross-motions for accelerated decision, it is not necessary to resolve the issue of the origin of the PCBs as the undisputed fact that

PCBs were present at regulated levels in the pool of waste oil under HTS 975 for several months in 1993 establishes the Respondent's liability. In support of this argument, the EPA cites the CJO's holding in In the Matter of City of Detroit Public Lighting Department, et al., TSCA Appeal No. 89-5, 3 EAD 514 (CJO Feb. 6, 1991), that "[f]rom the unexplained presence of PCBs in the soil or on the floor, it can be inferred that one or more "uncontrolled discharges" of PCBs took place." Further, the EPA argues that a finding of liability for causing and contributing to an improper disposal of PCBs, in violation of 40 C.F.R. § 761.60(d), is fully warranted and appropriate because the undisputed facts reflect that the Respondent did nothing to clean up the PCB contaminated oil on the floor after it was on notice in June 1993 that PCBs were at an excessive level but rather it allowed further leakage of oil and continued exposure of its workers to PCBs at excessive levels. Complainant's Memorandum at 8-10.

In addition, the EPA argues that, even if the PCBs should be determined to be part of an historic spill occurring prior to the enactment of TSCA and the PCB regulations, long-standing, controlling EPA precedent holds that a Respondent is liable for uncontrolled spills even if the spills occurred prior to TSCA's effective date. See Standard Scrap; City of Detroit. In this regard, the Respondent asserts that, under the CJO's holding in Standard Scrap, the area of the floor under HTS 975 where the discharges and pooling of PCB contaminated oil occurred in 1993 are not "disposal sites" falling within the "disposal site" exemption because there is not a shred of evidence that the floor was a place set aside for containing waste. Standard Scrap, at 275-279. Further, the EPA argues that its interpretation of the PCB regulations is neither novel nor unreasonable and that the Respondent had sufficient notice of the coverage of the PCB disposal requirements. Complainant's Memorandum at 16-17.

The EPA rejects the Respondent's contention that the proposed amendments to the PCB regulations effectively overrule Standard Scrap. First, the EPA points out that such proposed amendments are not final and therefore do not have the force of law. Even if it were assumed arguendo that the concrete floor is a "disposal site" and that Standard Scrap is wrong, the EPA contends that the Respondent was still required to clean up the PCBs improperly disposed of in the exposed pool of oil under HTS 975. Further, the EPA argues that at the time relevant to this case, the Respondent's conduct is governed by Standard Scrap and

that the proposed amendments, which were published in December 1994, would not affect this application of Standard Scrap.

Finally, the EPA rejects the Respondent's additional defenses based on the application of the statute of limitations and the alleged improper retroactive liability. The EPA emphasizes that it is not alleging liability for failing to clean up the PCBs acknowledged by the Respondent to be present in the soil under its building but rather it alleges liability based on the uncontrolled discharge of PCBs in a pool of oil on the floor under HTS 975 in 1993.

Discussion

Motions for Accelerated Decision

As noted above, the procedures governing these proceedings are set forth in the Rules of Practice. The regulation governing accelerated decisions provides in pertinent part:

> The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

40 C.F.R. § 22.20(a).

In the parties' cross-motions for accelerated decision on the issue of liability of the Respondent for the alleged violation of 40 C.F.R. § 761.60, the EPA and the Respondent agree that there are no genuine issues of material fact while each party contends that it is entitled to judgment as a matter of law. Respondent's Motion for Accelerated Decision; Complainant's Memorandum at 1, 5. The Respondent argues that, relying on the facts stipulated to by both parties or admitted by the Respondent, the EPA has failed to establish a prima facie violation of 40 C.F.R. § 761.60 and, thus, the Respondent cannot be held liable for any violation of Section 15 of TSCA. The EPA, on the other hand, maintains that the material facts for establishing liability have been admitted or stipulated to by the Respondent and liability, therefore, should be determined by summary adjudication. Based on the record before me, including

the stipulated facts with their accompanying documentation, I agree with the EPA.

The CJO's Holdings in Standard Scrap and City of Detroit Are Controlling in the Instant Case

A. PCB Disposal Requirements

Contrary to the many well-articulated arguments set forth by the Respondent in this case, the cross-motions for accelerated decision are governed by the CJO's holdings in Standard Scrap and City of Detroit. The EPA alleges in the instant case, as the EPA did in Standard Scrap and City of Detroit, that the Respondent violated 40 C.F.R. Part 761, which regulates, among other activities, the disposal of PCBs. The Respondent in the instant case, as the Respondent did in Standard Scrap, raises the defense that the PCBs must have been spilled before February 17, 1978, and, therefore, pursuant to the application of the "disposal site" exemption, the PCBs in question are not subject to the disposal regulations.

The disposal requirements of 40 C.F.R. § 761.60(a) become applicable only when PCBs "are removed from service and disposed of." 40 C.F.R. § 761.60 (prefatory note); see City of Detroit at 516; Standard Scrap at 269. Thus, in order to determine the applicability of the disposal requirements, there must be an adjudication of whether the PCBs in question are "in service" or have been taken out of service for disposal.

To review, the relevant undisputed facts in the instant case concerning the presence of PCBs at regulated levels and PCB testing are as follows: the Respondent shifted from PCB to non-PCB oil in HTS 975 in 1972; oil wept or dripped from HTS 975 into a concrete berm throughout its use; from 1988 through 1992, samples of the berm oil revealed PCB concentrations under 50 ppm; the HTS 975 rate of activity increased dramatically in 1992 and continued until 1994; testing of berm oil samples in April of 1993 showed PCBs in concentrations above 50 ppm; testing of a berm oil sample in December of 1993 showed PCBs in a concentration above 50 ppm. Both parties have agreed to these facts but disagree strongly as to the legal inferences to be drawn from these undisputed facts. Also, both parties have indicated that the catalyst for the increase in PCB

concentration may have been the increased production levels of HTS in 1992 and until 1994.[5]

As noted above, analyses of samples of oil taken from beneath HTS 975 in April and December 1993 at the Facility operated and owned by the Respondent since December 1967 revealed PCB concentrations of 50 ppm or greater. From the unexplained presence of PCBs on the concrete floor, it can be inferred that one or more "uncontrolled discharges" of PCBs took place. City of Detroit at 517; see Standard Scrap at 270; see also Electric Service Company, TSCA Appeal No. 82-2, 1 EAD 947 (CJO Jan. 7, 1985). Pursuant to Section 761.60(d), which references the term "spills," "spills and other uncontrolled discharges" of PCBs at regulated levels, as well as leaks, amount to a disposal.[6] Thus, an uncontrolled discharge of PCBs is considered to be a removal of the PCBs from service and termination of their useful life. PCBs that have been discharged onto the floor or onto the soil, therefore, must be regarded as out of service and in a state of improper disposal, and, accordingly, must be disposed of in accordance with Section 761.60(a). In the instant case, the Respondent's failure to dispose of the PCB-contaminated oil in the prescribed manner, therefore, would appear to constitute an ongoing violation of the disposal requirements of Section 761.60(a), as alleged in Count I of the Complaint.

B. The "Disposal Site" Exemption

An exception to the disposal requirements of Section 761.60(a) is found in the Prefatory Note to Section 761.60(a), which provides that the disposal requirements of 40 C.F.R. Part 761 do not apply to PCBs "placed in a disposal site" prior to February 17, 1978.[7] As noted by the CJO in Standard Scrap and the Respondent in its Motion for Accelerated Decision, the "disposal site" exemption creates a legal fiction that PCBs placed in a disposal site before February 17, 1978, are "in service" until they are removed from their "disposal site." Standard Scrap at 271; Respondent's Memorandum at 12.

In Standard Scrap, the CJO held that the "disposal site" exemption is not available unless the soil contaminated by PCBs as a result of a spill was removed from its spill site and placed into an area set aside for the disposal of waste (e.g., a dump or landfill) before February 17, 1978. The CJO found that a "disposal site" is something more than a place where PCBs have been accidentally discharged. Id. Thus, while an uncontrolled discharge constitutes a "disposal," the place where an

uncontrolled discharge occurs is not necessarily a "disposal site" within the meaning of the disposal site exemption.

In Standard Scrap, the CJO also held that the "disposal site" exemption must be raised as an affirmative defense, with both the burden of production and the burden of persuasion on the party seeking to invoke the exception. As the respondent bears both the initial burden of going forward and the ultimate burden of persuasion on the applicability of the "disposal site" exemption, the Respondent here is required to establish by a preponderance of the evidence that the PCBs in the oil samples from beneath HTS 975 were "placed in a disposal site" prior to February 17, 1978. See Id. at 272-273; 40 C.F.R. § 22.24. The EPA, therefore, does not have the initial burden of production on the timing of the improper disposal as part of its prima facie case. Standard Scrap at 273.

Despite the torrent of arguments set forth by the Respondent in this case, the issue of the applicability of the "disposal site" exemption can be disposed of by direct application of the CJO's holdings enunciated in Standard Scrap and reiterated in City of Detroit. Applying the CJO's holdings in those cases to the instant case, I find that the Respondent's argument invoking the "disposal site" exemption fails on two grounds.

First, I find that, regardless of the date of the spill or uncontrolled discharge of PCBs in this case or the standard and allocation of the burden of proof, the concrete floor and bermed area from which some of the oil samples in question were collected are not "disposal sites" within the meaning of the disposal site exemption contained in the Prefatory Note to the PCB regulations. See Standard Scrap at 275-279. In other words, the concrete floor and bermed area did not become a disposal site merely because PCBs were discharged or spilled onto it. There is no suggestion by the Respondent that the PCB-contaminated oil or the concrete floor from which the oil was collected at issue here were placed into an area set aside for the disposal of waste, such as a landfill. Accordingly, I find that on this ground alone, the disposal site exemption is not available to the Respondent.

I have considered the Respondent's contention that the CJO's pronouncement concerning the disposal site aspect of the disposal site exemption in Standard Scrap is merely non-binding dicta. I reject this contention. A reading of the Standard Scrap decision discloses that the CJO concluded "[a]s an alternate basis for this decision," that inadvertent spill sites are not

disposal sites and such conclusion is unequivocally a holding and not dicta. Standard Scrap at 275.

Second, I find that the Respondent has failed to carry its burden of proving the applicability of the disposal site exemption by demonstrating that the PCB spill occurred prior to February 17, 1978. Although the burdens of persuasion and production rest on the EPA with respect to the elements of its prima facie case, once the EPA has established those elements, both burdens shift to the Respondent in respect to the affirmative defense of the "disposal site" exemption. Standard Scrap at 271-275. Accordingly, the Respondent is required to establish by a preponderance of the evidence that the PCBs in the oil samples in 1993 were "placed in a disposal site" prior to February 17, 1978.

In Standard Scrap, the CJO found that the respondent in that case had presented no direct evidence showing when the uncontrolled discharges at issue took place. Instead, the respondent in Standard Scrap attempted to show that, because it had not handled PCB-contaminated oil after February 17, 1978, the spills must have occurred before that date. The CJO then went on to find that the respondent had failed to prove by a preponderance of the evidence that the spills took place before February 17, 1978. The CJO ruled that in the absence of any direct evidence that the discharges occurred before that date, the respondent needed to rule out the possibility that the discharges occurred after that date. Id. at 274-275.

A similar situation arose in City of Detroit when the cause of the uncontrolled discharge was not demonstrated by direct evidence even though there was sufficient evidence to show that the discharge occurred before the respondent in that case took possession of the property in 1984. Initially, I note that there is no question as to the responsible party in the instant matter as was raised in City of Detroit because the Respondent has not raised the issue and the admitted facts by the Respondent reflect that it has operated the Facility since it acquired ownership in 1967. Accordingly, the facts and resulting outcome, if not the legal reasoning, of City of Detroit are readily distinguishable from those in the instant case.

Although the CJO in City of Detroit recognized that the lack of causation is not an affirmative defense and that the EPA has the initial burden of production and the burden of persuasion as to causation because that element is the essence of the violation, he further recognized that it is much easier for the respondent

to prove that it did not cause the uncontrolled discharge than it is for the EPA to prove that the respondent did cause the discharge. City of Detroit at 529. If the EPA were required to prove causation in every instance, its ability to enforce the PCB disposal requirements would be severely impaired. Id. In an attempt to avoid this result, the CJO in City of Detroit found that the lack of causation creates the following rebuttable presumption: if PCBs are found in the soil or on a surface of a piece of property so as to raise the inference that an uncontrolled discharge has taken place, then it must be presumed that the present owner caused the uncontrolled discharge that deposited the PCBs there. Id. Thus, in order to make its prima facie case on the causation element, the EPA need only show that PCBs were found on the property in a state of improper disposal.

However, the CJO in City of Detroit, in contrast to his analogous ruling in Standard Scrap, ruled that the showing of an improper disposal creates the rebuttable presumption that the present owner caused it and that this presumption may be rebutted by the present owner showing that it is more likely or equally likely that another person caused the uncontrolled discharge. The CJO pointed out that the present owner could do this by presenting evidence that would rule out any significant possibility that the spill occurred after the present owner acquired the property. Such ruling, by analogy, indicates a retreat from the more stringent ruling in Standard Scrap that a respondent must rule out the possibility that a discharge occurred after the February 17, 1978, date for the application of the "disposal site" exemption. I agree with this indicated modification because to rule otherwise improperly allocates the burden of persuasion on the respondent.

Informed by these rulings by the CJO in Standard Scrap and City of Detroit, I now turn to the case before me. The Respondent has proffered no direct evidence showing when the uncontrolled discharges at issue took place or how these discharges were caused. In fact, the Respondent has proffered no evidence or direct theory to explain the presence of the PCB-contaminated oil beneath HTS 975 on two separate occasions in 1993. Rather, the Respondent relies solely on its argument that PCBs could not possibly have been spilled from HTS 975 after June 5, 1972, because it has not used any PCB-containing oil since June 1972 and that HTS 975 has not contained any PCBs in excess of 50 ppm since that date. Respondent's Memorandum at 10. The conclusion of an historic spill, however, is not as obvious as the Respondent claims it to be.

I note that during the period from 1988 to at least March 1992 samples of oil from the concrete berm area underneath HTS 975 revealed PCB concentrations below 50 ppm. I attach some significance to the fact that PCBs were present, although at unregulated levels, well after the 1972 change over to non-PCB oil by the Respondent and a concomitant flushing of HTS 975. This presence of PCBs, in itself, contradicts the Respondent's assertion that the PCBs could not possibly have been spilled after June 5, 1972. The Respondent also contends that the EPA's inference that a disposal took place in 1993 because two sets of samples of residual oil from the bermed area taken eight months apart were at levels above 50 ppm is unwarranted. It further contends that this inference is rebutted by the undisputed fact that the Respondent has not used PCBs in its Facility since 1972. Respondent's Response at 2-3. I disagree with these contentions. In fact, I find that the only plausible explanation for the presence of PCBs at regulated levels in 1993 after years of lower levels, especially those reported by the Respondent as late as 1992, is that there was an uncontrolled discharge in 1993.

From my review of the materials, two possible explanations exist for the cause of the uncontrolled discharge of PCBs at increased concentrations in the berm oil. The first, initially implied by the Respondent in its Response to the EPA's Motion for Accelerated Decision, is that PCBs, which had saturated the concrete floor and supporting soil from pre-1972 leaks, had leached up into the pool of oil, thereby increasing the PCB concentration. Respondent's Response at 4-5.

The Respondent claims that "HTS 975 has not contained any PCBs in excess of 50 ppm since [June 1972]." Respondent's Memorandum at 10. This allegation supports the first theory that the PCBs must have leached out of the concrete into the berm oil. However, switching the equipment to non-PCB oil, even when flushing the machine, does not lead inevitably to such a conclusion. The equipment had run on PCB oil for a number of years prior to the shift to non-PCB oil and likely would have accumulated marked amounts of PCB residue within its intricate machinery, residue that may not be dislodged by flushing. Moreover, the Respondent's implied leaching claim would be difficult to accept even in the absence of an alternative theory. For such a claim to hold water, as it were, the PCBs would have to have leached down into the concrete at some point prior to 1972 then leached back up into the oil in the berm in 1993 in great enough quantities to contaminate over 9 barrels of oil. I find that it strains the imagination to envision the

amount of PCBs that would have to leach into the berm oil from the concrete in order to contaminate 9 drums of oil, all presumably filled after the last "clean" test of the oil in 1992.

The second theory is based on both parties' indication that the catalyst for the increase in PCB concentration was likely the increased production levels from 1992 until 1994. This theory is that the increased use of the HTS 975 lead to the dislodging of residual PCBs remaining in the equipment from the pre-1972 use of PCB oil and that these dislodged PCBs contaminated the non-PCB oil that then dripped into the berm. I also note that HTS 975 was equipped with "wet seals" which could have harbored PCBs until dislodged by the increased production. Although the probability of both theories is not without substantial doubt, the second inference appears far more likely in light of the increased use of the machine and the quantity of oil that was found to be contaminated by PCBs.

As noted above, the Respondent's claim of a disposal site exemption has arisen as an affirmative defense in light of the EPA's demonstration of PCBs at concentrations greater than 50 ppm. I conclude, based on the above discussion, that the Respondent, lacking direct evidence that the discharge occurred before February 17, 1978, has not only failed to rule out the possibility that the uncontrolled discharge occurred after February 17, 1978, but it has also failed to show that it is more likely or equally likely that the discharge occurred before that date. I further conclude that the Respondent has failed to prove by a preponderance of the evidence that the spills at issue meet the disposal site exemption. Accordingly, the "disposal site" exemption is not available to the Respondent and the EPA has established that the Respondent violated the PCB disposal regulations as alleged in Count I of the Complaint.

1994 Proposed PCB Rule

The Respondent contends that the 1994 Proposed PCB Rule overrules Standard Scrap. I do not agree. First, I note that the 1994 Proposed Rule does not overrule anything inasmuch as it is not a final rule and therefore does not have the force of law. The fact that the EAB and the Federal Circuit Court for the District of Columbia have recognized the Proposed Rule's existence (as opposed to its precedential vitality) does not impart legal authority to it. Standard Scrap's refusal to include spill sites in the disposal site exemption is valid law and must direct this inquiry. In addition, I point out that even

if one were to accept the Respondent's rather unlikely implied argument that the PCBs in the samples were the result of leaching from historic spills into the concrete, these spills would still be subject to PCB disposal requirements. As such, the high PCB concentrations found in the berm oil, however they got there, clearly establish a violation of the PCB Regulations under governing precedent.[8]

The Respondent further contends that the 1994 Proposed PCB Rule was written not only to overrule Standard Scrap but also to define all pre-February 17, 1978, PCB spills as disposal sites. The preamble to the 1994 Proposed PCB Rule does support the Respondent's contention to some extent. In this regard, I note that in the Proposed Rule the EPA is proposing to delete the Prefatory Note to Section 761.60, which states that PCBs disposed of prior to the effective date of the regulations were considered to be "in use" and therefore did not need to be cleaned up under the regulations, and to substitute language on the disposition of PCB waste disposed of before April 18, 1978, as introductory text to Section 761.60. Under this proposed substituted language, PCBs disposed of, placed in a land disposal facility, or spilled or otherwise released to the environment, including areas contaminated by spills and releases, prior to the effective date of the PCB disposal regulations on April 18, 1978, would be presumed to be disposed of in a manner that does not present a risk of exposure, and would not necessarily require further disposal action. However, the proposed Rule would allow the Regional Administrator, on a case-by-case basis, to make a finding that any pre-April 18, 1978, disposal site does present a risk of exposure, whether a landfill or a spill. In other words, the proposed deleted "disposal site" exemption would be replaced by a rebuttable presumption that a pre-April 18, 1978, disposal does not present a risk of exposure.

Thus, under the Proposed Rule, although a pre-April 18, 1978, spill would not necessarily require further disposal action, a pre-April, 18, 1978, PCB disposal in an area set aside for the disposal of waste could now be subject to the disposal regulations. Such enlarged coverage of the disposal rules contradicts the Respondent's assertion that the purpose of the Proposed Rule was to overrule Standard Scrap. I do not believe that the Proposed Rule acknowledges that Standard Scrap had erroneously narrowed the intended meaning and scope of the "disposal site" exemption as argued by the Respondent. Rather, the Proposed Rule, as well as enlarging the coverage of the disposal rules, may well reflect a shift in approach taken by

the EPA to address pre-April 18, 1978, spills so as to create a rebuttable presumption that there is not a resulting risk and to place the burden of demonstrating resulting risk on the EPA. There is no indication in the Proposed Rule that the term "disposal site" as used in the Prefatory Note ("disposal site" exemption) was ever intended to include sites where PCBs happened to be spilled. However, I need not adjudicate this issue because, as found above, the Proposed Rule has not become final. I also point out that even if the Proposed Rule were to become final at some future date, it would not be available for possible application in this case unless the final regulation provides a retroactive effective date before the violation date in this case.

The 1993 Uncontrolled Discharge Precludes any Argument as to the Applicability of the Statute of Limitations, the PCB disposal regulations, or the PCB Spill Cleanup Policy

The Respondent correctly points out that the five-year statute of limitations for federal enforcement actions found in 28 U.S.C. § 2462 applies to civil administrative enforcement actions of the EPA. See 3M Co. (Minnesota Mining and Manufacturing) v. Browner, 17 F. 3d 1453 (D.C. Cir. 1994). In the instant case, the EPA filed its initial Complaint on September 23, 1994. In order to fall within the statute of limitations time period, the violative activity must have occurred later than September 22, 1989. As discussed earlier, the Respondent's own admissions and the parties' stipulations demonstrate that the prohibited PCB levels appeared sometime in 1993, and this unexplained presence of PCBs is considered an improper disposal which requires proper disposal under Section 761.60. Therefore, no statute of limitations concerns exist.

On this same basis, I reject the Respondent's argument that the PCB Spill Cleanup Policy and the PCB disposal regulations do not apply in this case because the uncontrolled discharge at issue preceded the effective date of that policy on May 4, 1987, and the effective date of the disposal regulations on April 18, 1978. Moreover, even if the spill had been before April 18, 1978, the disposal regulations and cleanup policy would still be applicable. Standard Scrap at 278; City of Detroit at 517 note 7.

EPA's Interpretation of the PCB Regulation Raises no Due Process Concerns

The Respondent argues that the EPA's application of the PCB regulations to the PCB-contaminated berm oil violates the constitutional prohibition against penalizing parties without offering them notice of their legal responsibilities. Specifically, the Respondent argues that the EPA's attempted assessment of civil penalties for violating the PCB regulations rises from a novel and strained interpretation of the regulations of which the Respondent had no notice. Respondent's Memorandum at 23-25. The Respondent bases its argument on the alleged ambiguity in the PCB Regulations over the inclusion of historic spills in the PCB disposal and cleanup requirements and the subsequent indication in the 1994 Proposed Rule that historic spills are generally excluded. It claims that such ambiguity and internal EPA inconsistency paint a confusing and unenlightening picture of the responsibilities of regulated entities under the PCB regulations. Respondent's Memorandum at 25.

These contentions are meritless. As discussed earlier, the Respondent has not met its burden of persuasion in demonstrating that the contaminated oil was a result of an historic spill rather than one occurring after February 17, 1978. Even if this were an historic spill, Standard Scrap clearly put the Respondent on notice that its spill would not be exempt from the PCB disposal requirements and the PCB cleanup policy. The fact that the Respondent disagrees with the CJO's holdings in Standard Scrap and City of Detroit does not make the EPA's arguments novel or strained. Likewise, the fact that a Proposed PCB Rule, which deals with pre-April 18, 1978, disposals, was published in 1994 but has not become final, does not elevate the EPA's arguments that the existing disposal regulations govern this matter to the level of being unique.

Conclusion

In the instant matter, there are no genuine issues of material fact and the EPA is entitled to judgment as a matter of law on the issue of the Respondent's liability.

The Respondent violated the disposal requirements of the PCB regulations at 40 C.F.R. § 761.60 when it allowed oil contaminated with PCBs at concentrations greater than 50 ppm to pool in the concrete berm beneath the HTS 975. The Respondent has failed to meet its burden of demonstrating that the "disposal site" exemption to the application of the PCB diposal regulations apply in the instant case. The Respondent therefore

is liable for violating 40 C.F.R. § 761.60 and Section 15 of TSCA as alleged by the EPA in Count I of the Complaint.

The issue of the amount of penalty to assess for the violation found herein remains controverted. This proceeding will continue for purposes of assessment of an appropriate penalty for the violation.

ORDERS

The EPA's Motion to Amend the Complaint and Prehearing Memorandum is Granted.

The EPA's Motion for Partial Accelerated Decision as to Liability is **Granted** as to the issue of the Respondent's liability for the one violation alleged in the Complaint.

The Respondent's Motion for Accelerated Decision is **Denied**.

The Hearing for the determination of the appropriate penalty in this matter will be held beginning at 9:30 a.m. on Wednesday, **January 14, 1998**, in Boston, Massachusetts, continuing if necessary on January 15 and 16, 1998. The Regional Hearing Clerk will make appropriate arrangements for a courtroom and retain a stenographic reporter. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

IF ANY PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

original signed by undersigned

_____

Barbara A. Gunning

Administrative Law Judge

Dated: 11-13-97

Washington, DC

1. The EPA's proposed second amended prehearing memorandum includes a proposed amended Complainant's Exhibit 15.

2. The term "Presiding Officer" refers to the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. 40 C.F.R. § 22.03(a).

3. The Federal Rules of Civil Procedure are not binding on administrative agencies but many times these rules provide useful and instructive guidance in applying the Rules of Practice. See Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D.N.Y. 1982); In re Wego Chemical & Mineral Corporation, TSCA Appeal No. 92-4, 4 EAD 513 at 13 n. 10 (EAB Feb. 24, 1993).

4. The Stipulations by the parties dated July 3, 1997, state that the Respondent took samples of the oil from within the bermed area surrounding HTS 975 on December 7, 1993. In the Respondent's later Response to the Complainant's Motion for Partial Accelerated Decision, however, the Respondent states that the December 7, 1993, samples were splits of the December 1, 1993, samples taken by the CT DEP and that such was attested to by Mr. Gerry Langelier in his October 1, 1997, affidavit, attached to its Response. Stipulations at ¶ 9.a; Response of Respondent to Complainant's Motion for Partial Accelerated Decision ("Respondent's Response") at fn. 1, p.2. The EPA agrees with the Respondent's statement that the Respondent's December 7, 1993, samples were splits of the December 1, 1993, samples taken by the CT DEP. Complainant's Reply Regarding Motions for Accelerated Decision at 2.

5. This assertion was made by the Respondent's Manager of Environmental Engineering, William J. Whiteley, in a May 26, 1994, letter to Lori Saliby, Environmental Analyst as CT DEP. Stipulations at ¶ 19.a., Attachment 6. It has been referenced by the EPA in the Complainant's Reply at 4, note 3.

6. The term "disposal" is defined as follows:

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

40 C.F.R. § 761.3.

7. The disposal site exemption discussed in the prefatory note to Subpart D of the PCB regulations states in relevant part:

NOTE: This subpart does not require removal of PCBs and PCB Items from service and disposal earlier than would normally be the case. However, when PCBs and PCB Items are removed from service and disposed of, disposal must be undertaken in accordance with these regulations. PCBs (including soils and debris) and PCB Items which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of this subpart.

40 C.F.R. Part 761, Subpart D (prefatory note).

8. The Respondent also attempts to insinuate that the leaching of PCBs from historic spills is not an act of disposal, but is rather passive migration of PCBs that should not subject the Respondent to liability. In order to support this claim, the Respondent cites federal decisions that characterize passive migration, in the context of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as falling outside the disposal definition. However, not only are these cases distinguishable by the fact that they address soil leaching rather than concrete, they also focus heavily on the purposes of CERCLA to reach their conclusions, purposes that are not necessarily present in TSCA. In fact, the focus of these cases on passive migration directly undermines the Respondent's claim in that it has already admitted that its increased production from 1992 to 1994 played an active role in the alleged leaching of the PCBs. See United States v. CDMG Realty Co., 96 F.3d 706, 712-14 (3rd Cir. 1996), ABB Industrial Systems v. Prime Technology, Inc., 120 F.3d 351, 357-58 (2d Cir. 1997).