UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Cotter Corporation,	)	
Schwartzwalder Uranium Mine,	)	Docket No. PCB-81-004
	)	
Respondent	)	

Toxic Substances Control Act --

A leak from the draincock of a transformer is not a "spill" or "disposal" where PCBs do not find their way to the ground in such an amount and concentration as to eventually contaminate the environment or pose a hazard to man or terrestrial or aquatic organisms.

Toxic Substances Control Act --

Direct evidence that the surface of a container is in direct contact with PCBs in order to qualify the container as a "PCB Container" is not essential when, under the facts, it would be unrealistic to find otherwise.

Toxic Substances Control Act --

The marking of the area where transformers are located does not constitute the required marking of the transformer itself.

Toxic Substances Control Act --

Removal of capacitors from use does not constitute removal from service in the absence of direct evidence that they are PCB capacitors and are intended for and have been stored for disposal.

Appearances:

For Respondent:

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Charlotte L. Nietzel, Esquire
Holme Roberts & Owen
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For Complainant:

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INITIAL DECISION

I. This is a civil penalty proceeding initiated under Section 16(a) of the Toxic Substances Control Act (TSCA), 42 U.S.C. Section 2615(a). This proceeding was commenced pursuant to the issuance of a Complaint by Director, Enforcement, Region VIII, Denver, Colorado, against Cotter Corporation (Cotter). The Complaint in this matter alleges that Cotter violated certain provisions of TSCA and Environmental Protection Agency (EPA) regulations promulgated pursuant to Section 6(e) of TSCA (42 U.S.C. Section 2605(e)). Specifically, it is alleged that Cotter violated the marking, storage, disposal, and record keeping provisions of TSCA and EPA's polychlorinated biphenyl (PCB) regulations at Cotter's Schwartzwalder Uranium Mine.[1/] Based upon the alleged violations, in its Complaint EPA proposed a civil penalty of $106,950.

The original Complaint in this matter, filed on April 23, 1981, and an Amended Complaint filed on April 30, 1981, were filed against Cotter Corporation and Commonwealth Edison Company. On May 20, 1981, Answers, Requests for Hearing, and Motions to Dismiss were filed by both Respondents. After response by Complainant, Respondents' Motions to Dismiss were denied on June 26, 1981.

On September 10, 1981, the parties filed a Stipulation whereby it was agreed that Complainant would move to dismiss this action as to Commonwealth Edison Company in exchange for a commitment by Cotter Corporation that it would not raise as an issue in this matter inability to pay the proposed

1/ Section 2614 of the Act (15 U.S.C. 2614) provides in pertinent part:

> "It shall be unlawful for any person to - (1) fail or refuse to comply with (A) any rule promulgated or order issued under Section 4, (B) any requirement prescribed by section 5 or 6, or (C) any rule promulgated or order issued under section 5 or 6; --."

PCB rules were issued under section 6(e) (15 U.S.C. 2605(e)).

penalty. In accordance with instructions and pursuant to Section 22.19 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" (Consolidated Rules), 40 C.F.R. Section 22.19, on September 11, 1981, the parties made a prehearing exchange of information. As agreed in the September 10, 1981 Stipulation, on September 17, 1981, Complainant filed a Motion to Dismiss Respondent, Commonwealth Edison Company. That Motion was granted on October 8, 1981. On September 17, 1982, a Motion for Leave to Amend Answers was filed by Cotter. After response by Complainant, that motion was denied on October 7, 1982. A subsequent Motion to Certify the Order of the Presiding Officer Denying Motion for Leave to Amend Answer for Appeal to the Administrator and a Motion for Administrator to Review Order also were denied.

On March 29, 30 and 31, 1983, hearing was held in Denver, Colorado.

During a prehearing conference, the parties stipulated to the dismissal of Counts II and IV, the alleged marking violations at substation 4160 ($11,500.00), and the alleged marking violations concerning line material company transformers ($11,500.00). Also stipulated was the admissibility of the Federal Mine Safety and Health Administration (FMSHA) citations (Cotter Exhibits 1-4), the presence of a PCB mark on the fence outside substation 2300, and to the absence of a PCB mark on the PCB transformer located inside substation 2300.

Upon completion of the hearing, at the request of Complainant, the record was held open for further proceedings. On June 22, 1983, upon Complainant's Motion, the record was ordered closed. A post hearing Motion to Strike and Not Admit Evidence Relating to the EPA Rebuttal Case concerning contamination of the ground behind the compressor shed was filed by

Respondent. Since the rebuttal submitted by Complainant at the hearing, and which was the subject of this motion to strike, was incomplete and not subject to cross-examination, said Motion was granted on July 28, 1983.

Based upon the entire record, including the briefs and proposed findings and conclusions of the parties, I find that the following facts are established.

FINDINGS OF FACT

1. Respondent, Cotter Corporation, maintains a place of business, the Schwartzwalder Uranium Mine, near Golden, Colorado.

2. On July 25, 1980, an anonymous complaint was received by personnel at the Lakewood Colorado office of the U. S. Mine Safety and Health Administration (MSHA) regarding the improper storage of PCBs at Respondent's Schwartzwalder Uranium Mine.

3. On July 25, 28, and 29, 1980, inspections were conducted of the Schwartzwalder facility by Mr. Michael L. Lynham of MSHA.

4. On September 17, 1980, an EPA inspection was conducted of Respondent's facility to determine compliance with the PCB manufacturing, processing, distribution in commerce, and use prohibitions.

5. EPA Participants in the inspection were Mr. Daniel W. Bench, Mr. Paul Hanneman, and Ms. Marilyn Longan.

6. Written notice was provided to Respondent prior to the inspection.

7. A single transformer and a bank of capacitors were located at substation 2300.

8. A manufacturer's nameplate on the single transformer located in substation 2300 indicated that the transformer contained 430 gallons of Inerteen dielectric fluid.

9. Inerteen is the brand name of a PCB dielectric fluid.

10. EPA analysis of a sample from a spill below the draincock of the transformer located in substantion 2300 showed there to be 260,000 parts per million PCBs in the spilled material.

11. Respondent's laboratory analysis of a split of the EPA sample taken of the spillage below the draincock of the transformer in substation 2300 showed there to be 11,000 parts per million PCBs in the spilled material.

12. There was no PCB marking on the transformer located at substation 2300.

13. Marking the fence surrounding the area where an in use transformer is located does not constitute the required marking of the transformer itself.

14. A leak from the draincock of a transformer is not a "spill" or "disposal" where PCBs do not find their way to the ground in such an amount and concentration as to eventually contaminate the environment or pose a hazard to man or terrestrial or aquatic organisms.

15. On February 11, 1980, a fire occurred in the compressor shed at the Cotter facility.

16. The fire in the compressor shed resulted in the spillage of PCBs from a PCB capacitor located in the compressor shed.

17. The capacitor damaged during the February 11, 1980, fire contained 26% (260,000) parts per million PCBs.

18. Material from the fire cleanup was placed in a red drum which, at the time of MSHA and EPA inspections, was located in an open area near a trailer house.

19. Included in the fire cleanup material placed in the red drum were PCB-contaminated soils from behind the compressor shed, PCB-contaminated debris from inside the compressor shed, PCB-contaminated rags, and protective clothing worn by Cotter employees during the cleanup.

20. The red drum was a PCB container and was not labeled with a PCB mark or other notation indicating the presence of PCBs in the drum.

21. The red drum and its contents were stored for disposal and were not stored in a prescribed storage facility, nor was the area labeled with a PCB mark.

22. The red drum was undated.

23. The residue of PCBs at the point of the draincock in the transformer at substation 4160 was not a spill or improper disposal. See Finding No. 14, supra.

24. Fact that capacitors were out of use at substation 800 does not lead to conclusion that capacitors were out of service and, therefore, improperly stored.

25. Evidence that the two capacitors at substation 800 were PCB capacitors was insufficient.

26. During the course of the cleanup from the February 11, 1980, fire in the compressor shed, material was "washed out" the back of the compressor shed.

27. EPA analysis of a sample taken from a depression in the ground immediately behind the compressor shed disclosed the presence of 19,000 parts per million PCBs.

28. The "wash out" of the PCB spill at the compressor shed constituted a spill and improper disposal of PCBs.

29. The "bone yard" was a "junk yard" containing discarded barrels, cars, trucks, and unused and unserviceable capacitors.

30. The black drum located in the bone yard was a PCB container and was not marked.

31. The six PCB capacitors in the black drum were out-of-service and were designated for disposal.

32. The capacitors in the black drum were neither marked nor stored in an appropriate facility. The black drum was not labeled with a PCB mark.

33. The two large G. E. Pyranol capacitors on the ground, five additional large G. E. capacitors on the ground, and two capacitors in a discarded panel box, all in the bone yard, were all PCB capacitors which had been removed from service, were not properly marked, and were improperly stored for disposal.

34. The bone yard area itself was not marked with a PCB label as required.

35. Respondent had not developed and maintained records required by Section 761.45(a) of the PCB regulations.

Substation 2300 (Counts I and X).

At substation 2300, Respondent is alleged to have violated both the marking and disposal requirements of the PCB regulations (Sections 761.20(a)(2) or (c)(1) and 761.10(a)(1)).

Count I- Marking of Transformer at Substation 2300.

There is no dispute that a transformer located at substation 2300 bore a manufacturer's nametag identifying it as a PCB transformer and that high levels of PCBs were present in that transformer's dielectric fluid (Answer, p. 9) (Bench Tr., p. 109) (Comp. Ex. 5) (Resp. Ex. 16). Furthermore, Respondent admits that the transformer itself was not marked with an appropriate PCB mark (Answer, p. 9) (Tr., p. 6). As a result, it is alleged that Respondent violated Section 15(1)(C) of TSCA and Section 761.20(a)(2) or (c)(1) of the PCB regulations.

Respondent Cotter does not contest that the transformer contained more than 500 ppm and thus was required to be marked. It does, however, contest the allegation that the transformer was not marked. Respondent asserts that it did not violate Section 761.20(a)(2) or (c)(1) because the locked gate leading into the protected location of the transformer in the substation was marked with a PCB label.

Respondent argues at length that Answer 78 of "EPA's Final Ban Rule: Over 100 Questions & Answers to Help You Meet These Requirements" (June 1980), Cotter Exhibit 6 , "Q and A Document") indicates that a PCB label can be placed on a gate leading into a protected area. It reads:

> All labels (or marks) are to be put on the exterior of PCB items and transport vehicles in a place that can be easily seen or read by anyone inspecting or servicing them. Q and A Document at 22.

Respondent argues further that "PCB Item" is defined to include any "PCB Article Container" or "PCB Container," 40 C.F.R. § 761.2(x). The two terms mean, generally, any "device" used to contain "PCB Articles." 40 C.F.R. § § 761.2(u), (v). "PCB Article," in turn, is defined to include transformers. 40 C.F.R. § 761.2(t). Therefore, these definitions indicate that a "PCB Item" can be construed to be a substation which enclosed a PCB transformer. Thus, Respondent asserts that placement of a PCB label on the outside of the substation complies with Answer 78.

Question 79 and answer of the Q and A Document harmonize with this reading. They state:

> Do I have to label a PCB Capacitor that is on a pole or in a similar inaccessible location?
>
> If a PCB capacitor is installed in a "protected area" (e.g., on a power pole, structure or behind a fence), the pole, structure or fence is to be labelled in a place easily seen by interested persons, such as servicemen. Q and A Document at 23.

The record in this case shows that the 2300 substation was a protected area labelled with a PCB sign. The parties stipulated prior to the hearing that a PCB label was on the gate leading into the substation. Tr. at 6, 7. A heavy gauge cyclone-type fence about seven feet tall completely encircled the substation. Tr. at 172, 437. Three strands of barbed wire surrounded the top of this fence. Tr. at 437. The gate was kept locked and was locked on the date of the EPA inspection. Tr. at 145, 172. Mr. Allen, an employee of Respondent, had the only keys to this gate. Tr. at 437.

Respondent argues that nothing in the Q and A Document suggests that Answer 79 could not apply to transformers as well as to capacitors, thus

indicating that a transformer located behind a "protected area can be labeled on a gate, a place easily seen by interested persons. I disagree. This answer relates to capacitors and not transformers, and even then, only when they are behind a fence and inaccessible. This transformer was not inaccessible.

Respondent further argues that its good faith effort to comply with the PCB labeling regulations at Substation 2300 should be given great weight. Respondent argues that the record reveals that Cotter had made a good faith effort to comply with the marking rule prior to the EPA inspection. Mr. Allen testified that he relied on Answer 79 in the Q and A Document when he placed the PCB label on the gate, rather than on the transformer. Cotter Exhibit 6 is a copy of Allen's marked-up version of the Q and A Document, which shows the mark he made by Answer 79 when studying it in August of 1980. He testified that he made the arrow by this answer "because it was significant to this area [substation 2300]." Tr. at 437. Mr. Allen interpreted the answer to apply to transformers, as well as to capacitors, because he "didn't see any relative difference" between transformers and capacitors located in inaccessible and protected locations. Tr. at 437-38. According to Mr. Allen, he "placed it on the gate rather than the transformer because it was in a contained area, and anyone entering could be sure to see the sign." Tr. at 437.

The record also reveals that Respondent took corrective action with respect to marking at Substation 2300 shortly after the inspection. Mr. Allen testified that one of the inspectors told him that the PCB label on the gate should have been on the transformer. Tr. at 424. Mr. Allen placed a PCB label on the transformer "within a few days after the inspection." Tr. at 439.

From a factual standpoint, it is clear that the fence surrounding Substation 2300 was substantially removed from the one PCB transformer inside that substation.

Marking the area where a transformer is located does not constitute marking the transformer itself. The PCB regulations draw a definite distinction between an "area" and a specific item or article (see Section 761.20(10) May 31, 1979, where, in addition to the marking requirements, for the transformer itself, the regulations require that each "storage area" used to store PCBs and PCB items for disposal" be marked. Unless the PCB article itself is marked, there is no way that the public in general, or an employee in particular, can assess where the danger from PCB exposure may be.

In this particular case, the dangers of marking a fence surrounding a substation as opposed to the enclosed PCB transformer itself must be considered. Unless an employee or other person entering Substation 2300 specifically knew that the PCB article in that substantion was the center transformer, they could have come in contact with PCB oil which had spilled from that transformer without ever knowing that it was PCB oil.

Respondent attempts to bolster its argument that marking the area is as good as marking the article by citing the Q and A Document. However, in citing the Q and A Document, Respondent misinterprets the language of Question and Answer 78, fails to cite the specific question and answer dealing with the marking of PCB transformers, and overlooks an important caveat set forth on the very first page of "Questions and Answers." The

answer to Question 78 states quite clearly that the mark goes on "the exterior of PCB Items." A whole substation cannot be deemed to be a "PCB Item."

Although Respondent is correct when it says that the definition of PCB Item (761.2(x)) includes PCB Article Container or PCB Container, Respondent is incorrect when it argues the definitions of PCB Article Container and PCB Container mean, "generally, any 'device' used to contain PCB articles." (Respondent's Initial Brief, page 9). The definition of both PCB Article Containers and PCB Articles include the following sorts of containers: "any package, can, bottle, bag, barrel, drum, tank, or other device. . . ." A "substation" does not fall within this category of "containers" or "articles."

The answer to Question 76, on the very same page, is directly on point:

> 76. DO ALL TRANSFORMERS CONTAINING PCBs HAVE TO BE LABELED?
>
> PCB transformers, containing (sic) 500 ppm or greater PCB, are required to be labeled. . . .

The significance of that Q and A Document must be kept in context. As the caveat on page 1 states:

> This Booklet has been prepared by the Industry Assistance Office and the Chemical Control Division with EPA Office of Toxic Substances. It is an <u>informal document</u>, and persons are directed to the PCB Final Rule for specific legal requirements. (emphasis added)

Respondent's argument that its actions comported with its understanding of the "Questions and Answers" are rejected.

Respondent's argument that "it made a good faith effort to comply with the marking rule" and as a result should not be penalized, must also be rejected. The Toxic Substances Control Act was signed into law on October 11, 1976, and became effective January 1, 1977. EPA first promulgated PCB regulations applicable to Respondent's facility on February 17, 1978. (43 F.R. 7150) Under these regulations, as well as EPA's May 31, 1979, PCB regulations, all PCB transformers were to be marked no later than January 1, 1979. Sometime in August 1980, only after Mr. Bench of EPA took the initiative of sending the Q and A Document and the PCB regulations to Respondent's Mr. Vanlaninghan did Respondent's representative place a mark in the vicinity of the PCB transformer. (Allen Tr., p. 415-419 and 437-438).

Count X - Disposal at Substation 2300

During EPA's September 17, 1980, inspection, PCB residue was observed below the draincock of the PCB transformer located in Substation 2300 (Bench Tr., p. 108) (Hanneman Tr., p. 172). The residue was on an unbermed concrete pad and completely exposed to wind, rain, and other weather (Hanneman Tr., p. 173-174). A sample of the residue was taken by the EPA inspectors and "split" with Respondent. Both EPA's and Respondent's analyses of the split sample established that the residue contained high levels of PCBs. The EPA analysis showed there to be 260,000 ppm PCB and the Cotter analysis showed there to be 11,000 ppm PCB (Comp. Ex. 5) (Resp. Ex. 16). Regardless of which analysis is relied upon, it is obvious that there was a significant PCB residue on the concrete pad. Complainant alleges that this constitutes a "spill" and, therefore, improper disposal of PCBs constituting a violation of Section 761.10(a)(1).

EPA relies on Section 761.10(d)(1) of the PCB regulations in asserting this violation, which reads:

> Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs.

Two EPA administrative decisions, however, suggest that this provision cannot create liability for the type of leak encountered at Substation 2300. In re Liberty Light & Power, TSCA No. VI-8C (Decision by Administrative Law Judge Thomas B. Yost, April 7, 1981), aff'd, TSCA Appeal No. 81-4 (Decision by Judicial Officer Ronald L. McCallum, October 27, 1981); In the Matter of National Railroad Passenger Corp. (AMTRAK), TSCA No. VI-24C (Decision by Administrative Law Judge Gerald Harwood), rev'd, TSCA appeal, No. 82-1 (Decision by Judicial Officer McCallum, April 27, 1982).

Liberty Light dealt with a situation similar to the one at issue here. In Liberty Light, "a small quantity of PCBs leaked from a stored PCB capacitor onto a supporting concrete pad." The concrete pad, which had no curbing, was outdoors with no roof or walls. The percentage of PCBs found in a sample taken from dirt and debris under the capacitor "was rather high." The EPA inspector observed no flow from the leak. Judge Yost pointed out in his Initial Decision that EPA presented no evidence to show that the oily substance ever left the immediate area of the capacitor or ran off the concrete pad. Neither has there been such a showing here.

Judge Yost held that a leak on concrete was not a spill within the meaning of the PCB regulations. He reasoned that the PCB regulations envision a "spill" as "an event where PCBs find their way to the ground in such an amount

and concentration as to eventually contaminate the environment or pose a hazard to man or terrestrial or aquatic organisms."

Judicial Officer McCallum, in affirming Judge Yost's decision, in the Final Decision, provided an extended rationale as to why a leak should not trigger disposal liability under the PCB regulations. According to Judicial Officer McCallum, "the language of the regulations is unclear and misleading, and as a consequence, it would be manifestly unfair to impose a monetary penalty on anyone who failed to interpret the regulations in a manner advocated by complainant." And that, while EPA specifically defined the term "leak," see 40 CFR § 761.2(m), it did not include this word under the definition of "disposal." See 40 CFR § 761.2(h). The final decision rejected EPA's argument, which was based on Section 761.10(d)(1), the same provision cited in the EPA Complaint against Respondent here. According to Judicial Officer McCallum, Section 761.10(d)(1) was contained in Subpart B, entitled Disposal of PCBs and PCB Items, rather than in a Subpart A definitions section. "Obviously no one should have to follow such a circuitous route simply to find out whether penalties attach." Judicial Officer McCallum further pointed to the storage regulations in Subpart E, Annex III, which address "leaks" comprehensively. According to his Final Decision, the storage regulations proscribe improper storage of leaking PCBs, but neither they nor the disposal regulations proscribe the leak itself.

Judicial Officer McCallum set aside, in part, the initial AMTRAK decision based on his appeal decision in Liberty Light. AMTRAK dealt with the "weeping" of a small amount of fluid around a transformer terminal. In an opinion

written prior to the Liberty Light Final Decision, Judge Harwood held that failure to clean or contain a leak was a disposal violation, although the leak itself was not. He based this decision on the risk that PCBs could be washed off the transformer by rain into the surrounding environment. On appeal, Judicial Officer McCallum reversed this initial decision based on Liberty Light. See also, Yaffee Iron and Metal Company, Inc., TSCA No. V1-1C. (Decision by Administrative Law Judge Herbert L. Perlman, March 27, 1981) (A sticky PCB mixture on the side of a drum was not a disposal violation.

The leak at issue here was similar to the one described in Liberty Light. The leak on the concrete slab of Substation 2300 was from the draincock of the transformer. Tr. at 175. According to Messrs. Bench and Hanneman, the spot was about 10 or 12 inches in diameter. Tr. at 108, 172-73. Mr. Allen testified that the spot was three inches by two and one-half inches. Tr. at 464. The spot was entirely on the eight foot square concrete pad. Tr. at 173, 174, 212. As with Liberty Light, EPA presented no evidence to show any flow or that the oily substance had run off the concrete slab. See Tr. at 144. Mr. Allen testified that the spot was dry. Tr. at 464. Both Messrs. Hanneman and Allen testified that the spot was a fair distance from the edge of the pad. Mr. Allen said that it was about four feet from the edge, Tr. at 414, and Mr. Hanneman said that it was two to two and one-half feet from the edge, Tr. at 212. EPA presented evidence that the substation contained no containment curbing, Tr. at 112. Liberty Light also dealt with a leak on concrete with no curbing.

Complainant argues in rebuttal that neither Liberty Light nor AMTRAK are on point. It asserts that in the Liberty Light case, the disposal issue arose regarding approximately forty-two PCB capacitors that were being stored for disposal, at least one of which was observed to be "leaking." In the AMTRAK case, there was nothing on the record to indicate that the "leakage on one transformer was anything more than the 'weeping' or 'sweating' of a small amount of fluid around the transformer's terminals resulting from temperature variations causing the terminal's seals to expand and contract."

Complainant states that the spill at Substation 2300 does not involve leakage from capacitors (or even transformers) stored for disposal and does not involve a weeping transformer. I agree. At Substation 2300, the EPA inspectors observed a quantity of PCB oil below the draincock of an in-use and totally intact PCB transformer. There is no assertion by Complainant that the material weeped, seeped, or leaked from a seam in the transformer as was the case in both Liberty Light and AMTRAK. Complainant asserts that what we are dealing with is clearly spillage and thus improper disposal.

Respondent notes that Complainant refers to the leak under the draincock of the Substation 2300 transformer as a "spill" and in so doing, ignores its own administrative precedents which address the definition of "spill" under the PCB rules. I agree. In re Liberty Light & Power, supra, governs the issue of whether the leak at Substation 2300 was an illegal disposal of PCBs. Judge Yost held that a leak of nonflowing highly concentrated PCBs on a concrete pad located outside with no roof, walls,

or containment curbing was not a spill or disposal of PCBs. The facts of the Liberty Light case cannot be distinguished from the situation encountered at Substation 2300. Judicial Officer McCallum also has rejected an argument that the failure to clean up a leak is a disposal violation. In the Matter of National Railroad Passenger Corp. (AMTRAK), supra. Complainant, in the AMTRAK case, had based its unsuccessful argument on the possibility that PCBs can be washed into the environment, the identical argument raised here.

While the distinction between stored and in-use transformers is factually present in these cases, it is my opinion that the distinction is a minor one. The storage regulations proscribe improper storage of leaking PCB transformers which have been removed from service, but neither they nor the disposal regulations proscribe the leak itself. This is not to say that a leak from an in-use transformer cannot or will not be construed as a spill or improper disposal under any given set of facts. The amount of the leak, the amount of contamination, and its impact on the environment will weigh heavily in such a consideration. However, those factors are not present here. For these reasons and those set out in the Initial and Final Liberty Light decisions, Count X is dismissed.

Red Drum - (Counts III and VII) Failure To Mark and Improper Storage

Marking

Complainant alleges that Respondent failed to mark a red fifty-five gallon drum located north of Respondent's water treatment pond and failed to mark the area in which the drum was stored in violation of Section 15(1)(c) of TSCA and 40 CFR 761.20(a)(1) and (10).

There is considerable proof on the record that the drums did contain PCBs. Mr. Lynham, the MSHA inspector, testified that he was told by Mr. Bayles, an employee of Respondent, "that the material (inside the drum) was disposal of PCB contaminated oil from a compressor fire that occurred on approximately February 11, 1980." (Lynham Tr., p. 56). Later, Mr. Lynham testified that in subsequent conversations with Mr. Bayles and Mr. Urban, also employees of Respondent, that he was told that the drum contained ". . . materials used in the cleanup resulting from a fire in the compressor house that occurred February 11 (1980), and PCB contaminated materials were stored there." (Lynham Tr., p. 63). Mr. Bench, an EPA inspector, testified that he was told that the red drum contained, ". . .cleanup from the capacitor that burst in the compressor shed--clean up materials." (Bench Tr., p. 117). Mr. Hanneman testified that he was told the contents of the drum contained soil and cleanup material from the rupture of a. . .capacitor in the compressor room. (Hanneman Tr., p. 176). Mr. Hanneman also testified that "we determined that a capacitor had ruptured in the compressor shed, and that a sample was taken of that liquid, and in turn taken to a laboratory. The results of that sample

was 26 percent PCB oil of which they began cleanup and the contents of the drum were the results of that cleanup." (Hanneman Tr., p. 176). Mr. Allen testified that, among other things, the red drum had a quantity of material containing 26% PCBs (Allen Tr., p. 489). In its Answer, Respondent states that "Mr. Allen stated that the drum contained materials used to clean up a minute amount of PCBs that leaked from a capacitor when a compressor exploded in a shed in February of 1980. Such materials included rags, gloves, clothes, and a small amount of dirt cleaned up on the concrete floor inside the shed." (Answer, p. 11). There is no dispute that the drum did not have the prescribed PCB mark. Not only is that fact established by EPA witnesses Respondent admits to it in its Answer (Answer, p. 11). Further, the area in which the red drum was situated was not posted with a PCB mark (Hanneman Tr., p. 178).

Respondent asserts that to prove a marking violation, EPA must prove that the red drum was a "PCB container." A PCB container is a drum that (1) contains PCBs and (2) whose surface(s) has been in direct contact with PCBs. 40 CFR § 761.2(v). And that Complainant's brief argues only that the drum "did contain PCBs." Brief at 14. While Respondent admits that the content of the red drum was material used in the cleanup in the compressor shed, such as rags, soil, cleanup gear, etc. It argues that Complainant ignores half of the definition of a "PCB container" -- that the surface of the container has been in direct contact with PCBs, Respondent asserts that the record lacks evidence that the surface of the red drum had any direct contact with PCBs. Further, only part of the contents of the red drum were PCB contaminated materials. The drum also contained materials with no evidence of PCB contamination, such as a valve and small dry type

transformers. Respondent's Brief at 41. The minute amount of PCBs that leaked out of the capacitor indicates that only a small portion of any solid materials inside the drum would have contained PCBs.

Mr. Allen testified that the red drum contained floor weepings from inside the shed. Tr. at 446, 489. Several witnesses testified that "soil" was contained in the red drum.

Respondent's defense that the red drum was not a PCB container must be rejected. While Complainant did not specifically allege or present testimony that the surface of the container had been in direct contact with PCBs, it would be unrealistic to assume that the rags, dirt or any other contaminated materials in the red drum did not contain PCBs and that they were not in direct contact with the surface of the red drum.

The red drum was marked "DANGER, TOXIC MATERIALS" with white spray paint. The mark required by the PCB regulations 40 CFR 761.20(a)(1) is illustrated in Figure 1 of Annex V:

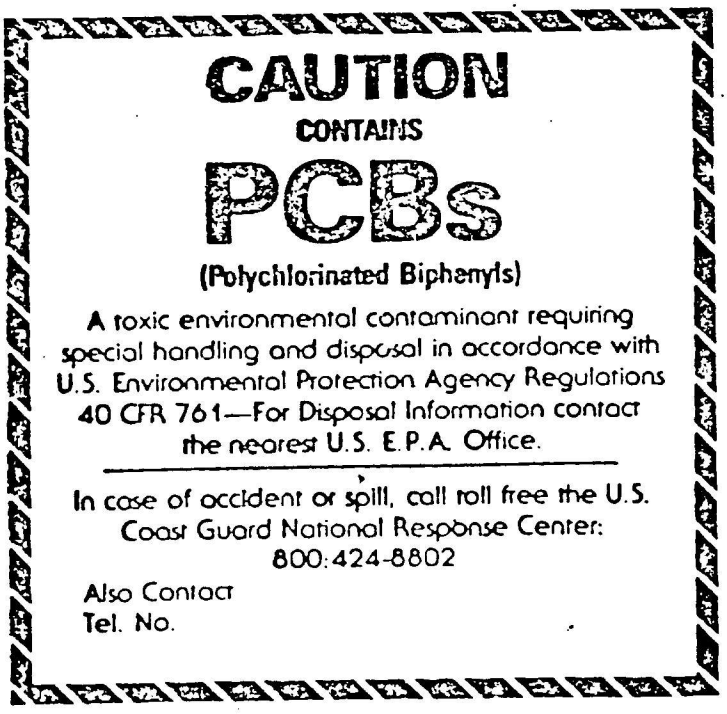

Figure 1

The spray painted words "DANGER, TOXIC MATERIAL" are not the equivalent of a PCB label. Not only do the painted words fail to notify the public-at-large, or Respondent's employees in particular, of what material is in the drum, it does not provide the critical information found on a PCB label. No emergency phone numbers are given. No emergency procedures are set forth. In short, no information is given which would lead one to believe that the toxic material in the drum is anything more than typical mining waste. Additionally, the entire red drum was eventually placed in an 85 gallon drum, which indicates Respondent considered it to be a PCB container.

It is therefore concluded that the PCB container, red drum, was not marked as required.

Storage

Regarding the storage of the red drum, Complainant alleges that the evidence establishes that, not only was the drum not stored in an appropriate storage facility, it was stored unsheltered in an open area. (Lynham Tr., p. 65-66) (Bench Tr., p. 120-121) (Hanneman Tr., p. 178).

And further, considering the contents of the red drum, it is almost impossible to believe that Respondent did not intend to dispose of the drum and its contents. Therefore, I find that the drum and its contents were being stored for disposal. As such, the area in which that drum was located was a storage area used for storage of PCBs and PCB items for disposal and required a PCB mark. It did not have one.

Respondent alleges that Complainant has failed to prove a violation of Section 761.20(10), requiring areas that "store PCBs and PCB items for disposal" to be labeled. And that the record contains insufficient evidence that

Respondent had made a conscious and deliberate decision to dispose of the red drum at the time of the EPA inspection. And that Complainant must also prove that Respondent intended to use the area around the red drum as a PCB storage area.

As to the allegation that the storage of the red drum did not comply with 40 CFR § 761.20(a)(1) and (10), Respondent argues that Complainant has failed to prove the prerequisite to any violation -- that the red drum was being stored for disposal. And further, that Respondent did take measures to protect the contents of the red drum such as placing the sturdy and nonleaking drum on a wooden pallet and tightly covering it with a lid.

It is my opinion that Respondent had made a conscious and deliberate decision to dispose of the red drum and its contents. While no testimony was illicited to this effect, my considered opinion is that Respondent had no other choice than to dispose of the drum and its contents.

Even if Respondent had not intended to use the area around the red drum as a storage area, the record is clear that the drum was stored there from February 1980, until the arrival of the 85 gallon drums, a period far in excess of thirty days, a requirement delineated in 40 CFR 761.42(c) which reads as follows:

> (c)(1) The following PCB Items may be stored temporarily in an area that does not comply with the requirements of paragraph (b) for up to thirty days from the date of their removal from service, provided that a notation is attached to the PCB Item or a PCB Container (containing the item) indicating the date the item was removed from service.

As to whether or not the red drum was being stored for disposal as stated above, I find it difficult or almost impossible that the red drum and its contents were destined for any other action. I therefore conclude

that the area was a disposal area, the area was not marked and that the red drum and its contents were intended for disposal. These conclusions constitute a violation of Section 15(1)(c) of TSCA and Sections 761.20(a)(1) and (10) of the PCB regulations.

Count XI -- Disposal at Substation 4160

During EPA's September 17, 1980, inspection, the inspectors observed residue directly below the draincock of the center transformer in Substation 4160 (Bench Tr., p. 112-113) (Hanneman Tr., p. 173). The residue, as was the case at Substation 2300, was in an unsheltered area and susceptible to discharge into the environment (Hanneman Tr., p. 173-174). EPA analysis of a split sample taken of this residue showed there to be 160 parts per million PCBs in the spilled material. Respondents analysis of its split revealed 90 parts per million PCB (Comp. Ex. 5) (Resp. Ex. 16). Complainant alleges that this residue of PCBs at Substation 4160 constitutes a spill and improper disposal and is a violation of Section 761.10(a)(1) of the PCB regulations.

Respondent asserts that the evidence presented at the hearing indicates that the leak at Substation 4160 did not constitute a "spill" as that term was construed by Liberty Light. Substation 4160 was surrounded by a chain link fence that remained locked. Tr. at 112, 145, 146. See Cotter Exhibit 39. Messrs. Bench and Hanneman testified that the center transformer of the three transformers located at this substation caused the leak. Tr. at 112-13, 175. The leak covered three to four inches on the concrete pad beneath the draincock. Tr. at 173, 174. According to Mr. Hanneman, the concrete pad was approximately eight feet by fifteen, Tr. at 174, and the spot was about two feet from the edge of the concrete pad. Tr. at 212-213. It seems likely that the spot was farther from the edge of the concrete

pad since the three inch spot was in the middle of an eight foot by fifteen foot pad. It is concluded from the size of the spot of residue, the size of the concrete pad and the location of the transformer on the pad establishes that no PCBs found their way to the ground in such an amount and concentration as to eventually contaminate the environment.

The evidence indicates that the leak at Substation 4160 did not constitute a spill and disposal as those terms were construed by Liberty Light and, therefore, Count XI is dismissed.

Substation 800 (Counts VI and IX) Failure To Mark And Improper Storage Of Two PCB Capacitors

At Substation 800, Respondent is alleged to have violated the marking and storage requirements of the PCB regulations (Sections 761.20(a) and 761.10(b)(5)). Complainant alleges that the marking violations at Substation 800 were for "one out-of-service transformer and two out-of-service capacitors" and that the storage violation was for an out-of-use transformer. However, evidence produced at hearing and cited by Complainant in its Motion to Conform Pleadings to Proof filed in this matter on August 12, 1983, limited the violations alleged at substation 800 to the failure to mark and the improper storage of two PCB capacitors.

Complainant asserts that the EPA inspectors identified the two capacitors in Substation 800 as "Custom Control 50 KVAR 460 volt Weaver Capacitors" (Hanneman Tr., p. 191-192) (Comp. Ex. 7). That the two capacitors were not in service and oil was seeping from one of the two capacitors at the seam (Bench Tr., p. 115) (Hanneman Tr., p. 192). A wipe sample taken of the oil seeping from the one capacitor confirmed that it contained PCBs (Comp. Ex. 5) (Saunders Tr., p. 246). And further, that due to the general condition

of these two capacitors, there can be no doubt that the capacitors could not be reused and, thus, would require disposal (Bench Tr., p. 115) (Sittner Tr., p. 263). Neither capacitor was marked with a PCB mark (Bench Tr., p. 116) and, assuming they would require disposal, the capacitors were stored improperly. As a result, Respondent is alleged to have violated the PCB regulations for the improper marking and storage of the two capacitors located in Substation 800.

The only support to Complainant's argument that the capacitors were subject to the PCB regulations, was established by analysis of a wipe sample taken of oil emanating from a seam of one of the capacitors (Comp. Ex. 5). Respondent attempted to establish that the capacitors contained well over three pounds of PCBs by the expert testimony of Mr. Sittner, a consultant in electrical engineering:

> Q. The capacitors identified as the two Custom Control KVAR 50, 460 Volt Weaver capacitor in Substation 800?
>
> A. Only that they exceed three pounds very, very greatly each.
>
> JUDGE FINCH: You said greatly?
>
> A. Many times. I can estimate probably in the order of 30 to 40 pounds.
>
> JUDGE FINCH: That is each capacitor?
>
> A. Each one, sir, yes. (Sittner Tr., p. 279-280)

Respondent alleges that the subject capacitors were out-of-use, as opposed to out-of-service. Mr. Bench testified that the subject capacitors were not "energized" and that in his opinion, the capacitors could not be reused (Bench Tr., p. 115-116). That the expert testimony of Mr. Sittner

was to the effect that when a capacitor "weeps or seeps or leaks. . .it is generally disposed of. . . ." Complainant assumes then that the subject capacitors had been removed from service, would require disposal, and should have been marked. This required storage in an Annex III storage facility. Substation 800 does not qualify as such.

Respondent rebuts Complainant's allegations by asserting that the only evidence presented by Complainant regarding the type of dielectric fluid in the capacitors was a sample result. This sample, taken by Mr. Hanneman, indicated only that PCBs were present in one capacitor. EPA Exhibit 5, #3. PCBs are regulated only at concentrations of 50 ppm or more, 40 CFR § 761.2(s). Without a concentration level, the sample result does not indicate that the capacitor was subject to the PCB regulations. The sample tested was Araclor 1254 which is a dielectric fluid containing more than 50 ppm. There is no evidence in the record that the other capacitor contained PCBs. The inspection report, EPA Exhibit 7, specifically states that "neither nameplates [on these capacitors] indicated the type of dielectric fluid." Messrs. Bench and Hanneman also testified that the nameplates on the capacitors did not indicate that they were PCB capacitors. Tr. at 151, 192.

Respondent further asserts that to establish a marking violation with respect to the capacitors at Substation 800, EPA must prove that the capacitors (1) contained 50 ppm or more of PCBs and (2) had been removed from use. 40 CFR § 761.20(a)(5). The record contains no evidence to prove the first element, and contains insufficient evidence to prove the second element.

Of the elements above to be proven, (1) becomes irrelevant and immaterial if it is determined that the two capacitors had <u>not</u> been removed from use.

With respect to the element of removal, it is my opinion that EPA has failed to establish a violation. According to In the Matter of Transformers Unlimited Corp., PCB No. 79-003 (Decision by Administrative Law Judge J. F. Greene, March 20, 1981), EPA must prove that the equipment was permanently out of service and that it was not intended for reuse. Respondent has established that no decision had been made to take the capacitors permanently out of service and the very location of the capacitors in the underground substation indicates that no such decision had been made.

EPA attempts to prove removal from use by arguing that the capacitors were not in service and that one capacitor had weeped, and by pointing to "the general condition of these capacitors." The term "not in service" means that the capacitors were disconnected, not that they were removed from use. EPA Exhibit 7, the inspection report of Mr.Hanneman, states as to these two capacitors, "Also two out-of-service capacitors were being stored at this substation. . . ." There is no indication that Mr. Hanneman, at this point, questioned anyone as to whether or not these capacitors were "removed from use" or simply "out of service." There is a definite distinction between the two; one requiring a label, the other not requiring a label. I have been convinced by the evidence presented that the latter is the case. Further, this evidence fails the Transformers Unlimited standard for removal from use. Moreover, Complainant should not penalize a company due to of an unknown circumstance that a capacitor starts to weep. In-service or disconnected equipment can start to weep at any time. If a company knows that a capacitor has started to weep, it can be presumed to have made a decision to permanently remove the capacitor from service. EPA should at least prove, however, that a responsible person knows of the leak.

The evidence establishes that, at the time of the EPA inspection, Respondent had made no decision to remove the capacitors from use permanently. Mr. Allen testified that the capacitors were stored at this underground substation "for possible reuse in the mine." Tr. at 454. He was the person responsible for any decision to take the capacitors permanently out of service. Tr. at 454. At the time of the inspection, Mr. Allen "had not made any decision to remove them from permanent service." Tr. at 455. Further, he would have made any decision to dispose of these capacitors and no such decision had been made at the time of the EPA inspection. Tr. at 455. The record contains no evidence that Mr. Allen made any statements to the EPA inspectors during the inspection suggesting that he had made any decision to remove the capacitors from use permanently. See Tr. at 151, 153, 224, 455.

In the Matter of Briggs & Stratton Corp., TSCA Appeal No. 81-1 (February 4, 1981), held that the "mere removal of PCBs from service, in and of itself, does not necessarily or automatically signify an intention to dispose of them. . . ." That decision held that a company must make a conscious and deliberate decision to dispose of PCB articles to trigger Annex III requirements. In the Matter of Transformers Unlimited Corp., supra, held that the type of evidence needed to meet the Agency burden of proof are statements made by a respondent indicating a decision to dispose of equipment.

Complainant's evidence that attempts to prove that the capacitors were being stored for disposal is precisely the type of evidence described in Briggs & Stratton as inadequate. Complainant's argument that the capacitors were being stored for disposal is based solely on the fact that they were disconnected.

No evidence was presented by Complainant that Mr. Allen, the person responsible for PCB compliance, knew that one of the capacitors at substation 800 had started to weep prior to the EPA inspection. Without such evidence, Complainant cannot establish a violation. Complainant's argument that the "general condition" of the capacitors indicates removal from use is rejected. While Mr. Bench's and Mr. Sittner's testimony tend to support this allegation, Mr. Bench failed to substantiate his opinion, see Tr. at 115-16, and Mr. Sittner stated that companies generally dispose of capacitors that start to weep. Tr. at 263.

The evidence presented by Complainant fails to establish that the capacitors were removed from use. The opinions of the EPA inspectors are not substantiated and are of no probative value.

Counts VI and IX are hereby dismissed.

Area Behind Compressor Shed

The issue here is very controversial.

Complainant alleges that Respondent spilled and improperly disposed of PCBs in the area immediately behind Respondent's compressor shed, thus violating Section 761.10(a)(1) of the PCB regulations.

Complainant relies solely upon the fact that Mr. Hanneman and Mr. Bench, both EPA inspectors, testified that during the inspection they were told that PCBs which had been spilled inside the compressor shed during a fire on February 11, 1980, had been hosed out the back of the shed (Hanneman Tr., p. 193) (Bench Tr., p. 128-129). Further, it was Mr. Hanneman's testimony that, behind the compressor shed ". . .there was a depression in the ground, probably two and one-half feet across, eighteen inches deep, oily, black goo on most of the soil that was there and standing water." (Hanneman Tr., p. 193). Mr. Hanneman took a sample from that depression which revealed

the presence of 19,000 parts per million PCBs (Comp. Ex. 5 and 7). The validity of Mr. Hanneman's sample is undisputed.

It is also undisputed that there had been a fire in the compressor shed which was caused by the explosion of a compressor. This fire caused a capacitor to heat up and leak. The capacitor did not explode. As stated above, Complainant alleges that the contamination behind the compressor shed was a direct result of Respondent's efforts to hose the leaked PCBs out to the back of the shed.

Respondent, however, asserts that the testimony of Messrs. Allen and Vanlaningham, also an employee of Respondent, indicate that this cleanup from the leaking capacitor could not have caused the presence of PCBs behind the shed. They stated that on February 11, 1980, a compressor located in the compressor shed did explode, which caused one capacitor to heat up and leak. Tr. at 439. They further testified that the capacitor leaked a small amount of liquid on the concrete floor beneath the capacitor. The leak covered approximately two by three inches, and was three-sixteenths to a quarter of an inch thick. Tr. at 440, 475, 537. Respondent's employee took a sample of the content of the leak from the concrete to determine its contents, and sent the sample to Industrial Laboratories. At this point, it should be parenthetically noted that neither Mr. Allen nor Mr. Vanlaningham were present at the compressor shed when the sampling and cleaning was accomplished, but rather these procedures were allegedly related to them by an employee of Respondent. Tr., p. 440. According to Mr. Vanlaningham, the sample used for testing took up to 90 percent of the content of the leak. Tr. at 537-38. After receipt of the results of the analysis indicating a PCB content, Cotter Exhibit 18, Respondent cleaned up the rest of the liquid with trichlorethylene or acetone, which was absorbed and placed in the red drum together with the absorbent material. Tr. at 441.

Respondent repeated this process at least twice. Tr. at 441. After this chemical cleaning process was completed, Respondent steam cleaned the inside of the shed. Tr. at 445, 538. Messrs. Allen and Vanlaningham testified that steam cleaning, which occurred after chemical clean up of the leak, could not have caused the presence of PCBs behind the compressor shed. Tr. at 476, 537.

Respondent further asserts that until the issuance of the EPA Complaint on April 22, 1981, Messrs. Allen and Vanlaningham were not aware of the presence of PCBs behind the compressor shed, Tr. at 435, 477, 527, 542. And, therefore, had not attempted to clean up behind the compressor shed prior to the EPA inspection. Tr. at 527, 528.

In furtherance of Respondent's defense, it is asserted that while Complainant has failed to establish that Respondent caused the contamination behind the compressor shed, Respondent also presented evidence as to what might have caused the contamination. Mr. Vanlaningham testified that a Rural Electric Assocation ("REA") substation, not owned or controlled by Respondent, was located in the area of the compressor shed until about 1972. Tr. at 538. See Cotter Exhibit 41, a picture of the Cotter site at the time the REA substation was located there.

Complainant does not dispute the fact that a Substation once occupied the same general location as where the PCB spill was observed by the EPA inspectors, but correctly observes that Respondent presented no evidence whatsoever that PCBs were spilled by Rural Electric Association from that substation in that specific area.[2/]

2/ While there was some indication that Complainant might present rebuttal to this contention by Respondent, and the record was held open for that purpose, the record was later closed upon motion by Complainant.

While the stated positions of each party are plausible, the best evidence is on the side of Complainant.

First, Carl Urban, an employee of Respondent, told Mr. Lynham, an inspector of the Mine Safety and Health Administration, who inspected Respondent's premises in July 1980, prior to Complainant's involvement, as follows:

> A. . . .the fire that had occurred on February 11, and that he [Carl Urban] had washed out the oil and cleaned up and put the material used to clean up the mess in the red barrel out by the white trailer that had toxic materials.

Second, the inspection report of Mr. Hanneman which sets forth the initial account of Complainant's first inspection of the shed site states:

"SPILL SITE (Located behind compressor shed, south of the main office building)

> Mr. Sluga showed us the site of the burst PCB capacitor in the compressor building. He said the liquid from the spill was hosed off the concrete floor into the rear of the compressor building and out onto the ground behind the building. I took a soil sample (PH 800917-4) from grease- and oil-soaked residue in a shallow depression in the ground, outside and at the rear of the compressor building."

Mr. Sluga, in spite of his position with Respondent, was the person who directed and accompanied Mr. Hanneman to the compressor shed on this initial visit by Complainant, and was the second employee who advised that the leak was "hosed off."

It was this statement concerning the "hose off" that prompted Mr. Hanneman to inspect behind the compressor shed.

Mr. Allen, who testified most emphatically that the hosing out of the leaked PCBs did not occur, was not present during the clean up procedures. Therefore, his testimony is given little weight.

The court is convinced that the testimonies of Mr. Lynham and Mr. Hanneman are the more accurate accounts of what occurred immediately after the fire and leak. This is not to say that additional measures,

such as those related by Mr. Allen, did not take place at a later time, but only after the original "hose off."

It is concluded, therefore, that the action taken to "hose off" the "leak" constituted a spill and improper disposal of PCBs in violation of Section 761.10(a)(1) of the PCB regulations.

Bone Yard - Counts V, VIII and XIII

Generally:

Complainant alleges that Respondent violated the marking, storage, and disposal requirements of TSCA and the PCB regulations in the Bone Yard (Section 15(1)(C) of TSCA and Sections 761.20(a) or (c), 761.10(b)(5) and (c)(3), and 761.10(a)(1)).

Complainant asserts that on the whole, it is important to understand that the Bone Yard should be viewed as nothing more than a highly disorganized area containing junk, old vehicles, and other discarded items. Mr. Hanneman referred to the Bone Yard as a "junk yard" (Hanneman Tr., p. 184).

It is appropriate at this point to quote from EPA Ex. 7, the EPA Inspection Report regarding the official description of the Bone Yard by the inspectors.

"BONE YARD (Located at the north end of the complex)

Mr. Allen and Mr. Sluga took us to the "bone yard" at the north end of the Schwartzwalder complex. The bone yard is an area about 100 yards long and 50 yards wide which appears to be a scrap yard where used equipment, empty barrels and junk cars and trucks are stored. At the north end of this bone yard, Mr. Allen showed us the site where the unused and unservicable capacitors were stored for disposal. We found approximately 15 PCB capacitors at this site, as follows:

Five Large GE Pyranol Capacitors: None appeared to be leaking; none had PCB marks. (Example: SN V91116 GE Pyranol 0.334 gallon -- see photos #11 and #12; photo #11 is nameplate of SN V91116, at right knee of inspector in photo #12). Because the remaining four capacitors were

scattered on the ground in the area around the panel box in photo #12, and they were in a possibly contaminated area, we did not get their serial numbers. They all appeared to be the same size as the example.

Two Large GE Pyranol Capacitors: GE SN 7920091 A080A, on the ground; no PCB marks. Because of the position of the other capacitor, we were unable to get its serial number (see in front of panel box, next to barrel, in photo #12).

Six Large PCB Capacitors: Mr. Allen estimated that approximately six PCB capacitors were stored in a 55-gallon drum in the bone yard (see photo #12), one of which was the burst capacitor from the compressor building. Because of obvious leaking of PCB liquid and possible contamination, we did not count the exact number of capacitors in the barrel, nor were we able to determine the size of the capacitors in the barrel. The drum had no PCB mark, no lid, and none of the capacitors we could see had PCB marks.

Two GE Capacitors: SN B37332 and SN B31968, each containing 1.9 gallons of pyranol. One capacitor had a PCB mark; both had manufacturer's nameplates (see photo #14). The capacitors were sitting inside a metal electrical panel box (gray box in front of inspector, photo #13). One of the capacitors was leaking onto the bottom of the panel box. The wood on the outside base of the box was also oil-soaked. We were unable to determine whether or not the ground was oil-soaked."

See EPA Exs. 12-C, 12-D, 12-G and page 6 of EPA Ex. 8.

Black Drum Containing Six PCB Capacitors

It was the testimony of three different EPA witnesses, Mr. Lynham, Mr. Bench, and Mr. Hanneman, that they were told by officials of Respondent that the uncovered black 55-gallon drum contained six PCB capacitors, including the one which had burst in the compressor shed on February 11, 1980, a sample from which was found to contain 260,000 parts per million PCBs. Mr. Lynham testified that he was told, during conversations with Mr. Allen and Mr. Bayles that the black drum in the Bone Yard contained six Pyranol (a trade name for dielectric fluid containing PCBs) capacitors. Mr. Lynham also testified that he read the manufacturer's nametag on the capacitors and determined that they contained pyranol. Lynham Tr., p. 67.

Complainant alleges that there can be little dispute that the capacitors in the black drum were out of service, leaking, and thus designated for disposal. Mr. Lynham testified that the uppermost PCB capacitor in the drum was punctured and leaking oil (Lynham Tr., pp. 66-67, 69, and 84). Mr. Bench also observed the capacitors in the drum leaking oil (Bench Tr., p. 123). Even Mr. Allen testified that he placed capacitors in the drum because they were leaking (Allen Tr., p. 518). While examining EPA Exhibit 12-G, Mr. Sittner further elaborated on the upper-capacitor in the drum and discussed the general condition of that capacitor:

> I would estimate right in the center of that lower compartment approximately three inches, and probably six inches above the ring of the 55 gallon drum appears to be two indentations. The upper one looks almost like a hole. The one three inches above may be just an indentation, and then on the left hand corner of the device, looks like a penetration of the lower section of the capacitor. Even if those are not holes through those, it would degrade and make the reuse of that device very doubtful, because it would be too close to the internal electrical foils and so on that are inside that capacitor. It would cut down the electrical clearance. (Sittner Tr., p. 265).

And further, Complainant asserts that the capacitors in the black drum were neither marked nor stored properly. There were no PCB marks on the drum (Hanneman Tr., p. 182) (Lynham Tr., p. 70); the drums were not stored in an appropriate storage facility, and the lid was off the drum at the time of both the MSHA inspection and the EPA inspection (Lynham Tr., p. 69) (Hanneman Tr., p. 189) (Comp. Ex. 8, p. 6) (Comp. Ex. 12-G).

As in the instance of the red drum, Respondent alleges that the black drum is not a PCB container.

To prove that a drum is a "PCB Container," Complainant must prove that any PCBs contained in the barrel have touched the surfaces of the barrel.

Respondent correctly asserts that the record contains no evidence that any PCBs in any capacitor in the black barrel had touched the surface of the black barrel.

None of the inspectors testified that they observed any fluid identified as PCBs from any capacitor touching the sides of the barrel. Mr. Lynham, testified that he saw only one Pyranol nameplate on those capacitors in the black barrel. That his testimony does not establish that the capacitor with the Pyranol nameplate was the same one that, he claimed, had leaked oil. See Tr. at 67-68. Further, Mr. Lynham never testified that any oil he claimed to have observed had touched the sides of the black barrel.

Respondent further asserts that Messrs. Lynham, Bench and Hanneman testified that they could not see inside the barrel to determine whether any liquid had touched the sides of the barrel. Tr. at 69, 87, 158, 221. They observed no leaking on the outside of the black barrel and did not turn it over to look at the bottom of it. Tr. at 76, 86-87, 158 and 221-22.

Complainant replies that the existence of particular specifications in Annex III of the PCB regulations for PCB containers used to store nonliquid PCBs clearly refute that contention (see Section 761.42(c)(6)).

The distinction between PCB Containers and PCB Article Containers does not revolve around the presence or absence of PCB <u>liquids</u>, but rather around the manner in which the PCBs in that container are enclosed. The definition of PCB Article Containers is restricted to containers

holding PCB Articles and PCB Equipment which have maintained their structural integrity; i.e., have not allowed the inside surface of the container to become contaminated.

In the case of the black drum located in the Bone Yard, there is no doubt that it fits the definition of "PCB Article Container" and as such was subject to the marking requirements.

Mr. Allen did testify that a leaking PCB capacitor was placed in the black drum.

> Q. One was placed in there because it was leaking and you wanted to contain it?
>
> A. That is correct. (Allen Tr., p. 518)

There were exposed PCBs within the black barrel resulting from a leaking PCB capacitor. As discussed above, by definition, a drum holding PCBs is a PCB Container. A drum containing a leaking PCB article is by definition a PCB Container. It is concluded, therefore, that the black drum is a PCB container which required a PCB mark.

Respondent does not dispute the fact that the black barrel was not marked. It is concluded that there was a violation of 761.20(a) on the basis of the black drum in the Bone Yard.

Individual Capacitors In Black Drum

Complainant alleges a violation of Section 761.20 (a)(3) and (c)(2), relating to high voltage capacitors. High voltage capacitors are ones that operate at 2,000 volts or above 40 C.F.R. § 761.2(d)(2). Mr. Allen testified that all of the capacitors in the black barrel were 480 volts.

Tr. at 450-51. EPA submitted no evidence to contradict his testimony except that Mr. Sittner, a private consulting engineer, testified that in his opinion the capacitor sticking out of the top of the black barrel contained more than three pounds of dielectric fluid.

This statement by Mr. Sittner does not confirm or rebut that the capacitor is a large, high voltage capacitor as defined in Section 761.2 (a)(2). Complainant has not carried its burden of proof on this violation of failure to mark the large high voltage capacitor and same is hereby dismissed upon the finding that the capacitor is a large low voltage capacitor.

However, this large low voltage capacitor should have been marked if it had been removed from use and was being stored for disposal.

While there is considerable discussion by both Complainant and Respondent concerning the marking of other capacitors in the Bone Yard, i.e., two large G. E. Pyranol capacitors on the ground, five more large G. E. capacitors lying on the ground, and two capacitors in a discarded panel box, the evidence weighs in favor of Complainant that these were all PCB capacitors, which had been removed from use, not properly marked, and were improperly stored for disposal. Complainant's reasoning is as follows:

Two Large G. E. Pyranol Capacitors

It was the testimony of Mr. Hanneman that there were two capacitors on the ground in a second area of the Bone Yard (Hanneman Tr., p. 187). Mr. Hanneman was able to identify the manufacturer's nametag on one of the two capacitors (Serial number 7930091 A080A) and noted that

it was a General Electric Pyranol capacitor (Hanneman Tr., p. 187) (Comp. Ex. 7). Based on his expertise in the electrical field, when shown Complainant's Exhibit 8, page 6 (photo #12), Mr. Sittner testified that both of the subject transformers contained more than three pounds of PCBs (Sittner Tr., p. 280). Again, neither capacitor bore a PCB label (Bench Tr., p. 122-123) (Hanneman Tr., p. 182). It is clear that Respondent violated the marking and storage requirements of the PCB regulations by not placing a PCB mark on these capacitors when they were removed from use and by not placing them in an appropriate storage area.

Five Large G. E. Pyranol Capacitors

During the EPA inspection, Mr. Hanneman noticed one group of five capacitors lying on the ground in the Bone Yard. Mr. Hanneman observed that the five capacitors were of the same size and that one of the five -- serial number V91116 -- bore a manufacturer's nametag which identified it a "A GE Pyranol capacitor containing .334 gallons of Pyranol." (Comp. Ex. 7) (Hanneman Tr., p. 185). Mr. Hanneman further observed that the capacitors in this group were "dirty and neglected." It was the testimony of Mr. Sittner that capacitor V91116 contained 3.82 pounds of PCBs. The capacitors in this group, then, were required by Section 761.20 to be marked with a PCB mark at the time of removal from use and stored in a proper storage facility. None of these capacitors were marked (Bench Tr., p. 122-123) (Hanneman Tr., p. 132), nor were they stored in a storage facility meeting the requirements of Section 761.42.

GE Capacitors

During the September 17, 1980, inspection, the EPA inspectors observed two more capacitors sitting haphazardously in the bottom of a discarded electrical panel box. The two capacitors bore manufacturer's nametags indicating that each contained 1.9 gallons of Pyranol (Comp. Ex. 7) (Comp. Ex. 8, p. 7) (Hanneman Tr., p. 190). These two capacitors were stored for disposal. They were leaking, stored improperly, and one was unmarked.

Both Mr. Bench and Mr. Hanneman observed oil in the bottom of the panel box which had spilled from the capacitors stored in the panel box (Bench Tr., p. 123) (Hanneman Tr., p. 186). Moreover, Mr. Allen testified that he was aware that one of the capacitors in the electrical panel box was leaking Pyranol (Allen Tr., p. 514). Considering the fact that the panel box was not enclosed and, in fact, was open to the elements, there was a definite potential for escape of PCBs into the environment.

Mr. Hanneman testified that one of the two capacitors in the electrical panel box did have a PCB mark. However, it was Mr. Hanneman's further testimony that neither the second capacitor nor the area in which they were stored was marked (Hanneman Tr., p. 182-183).

The marking violations in the Bone Yard are further established by Respondent's failure to mark the panel box in which two out-of-service PCB capacitors were observed. The panel box falls within the definition of "PCB Container." Two EPA inspectors observed a Pyranol capacitor leaking onto the bottom of the box (Bench Tr., p. 123) (Hanneman Tr., p. 186). Respondent argues that the PCB label on one of the two capacitors

constitutes labeling of the PCB container itself. This argument is rejected for obvious reasons, i. e., the labeling of a capacitor in a PCB container does not constitute labeling of the PCB container.

The facts established in this case indicate that the subject capacitors were removed from use and, in most instances, could not have been reused even if so desired by Respondent. The capacitors located in the Bone Yard were not neatly stacked, sorted, and categorized. They were deposited randomly in four general areas (Hanneman Tr., p. 17). Some were thrown leaking into a black barrel. Some were thrown leaking into an electrical panel. Some were just laid on the ground. At least three were identified as damaged and, thus, as verified by the expert testimony of Mr. Sittner (Sittner Tr., p. 265), incapable of being reused.

Complainant has shown that some, if not all, of the capacitors in the Bone Yard were PCB capacitors, removed from use and not marked and were improperly stored for disposal and such a finding is hereby made.

Records -- Count XIV

Complainant alleges that Respondent violated the provisions of Section 761.45(a) in that the records required were not being kept.

At the commencement of the inspection, Mr. Bench "asked to inspect the official PCB records." Mr. Allen said there were "no PCB records." EPA Ex. 7. Mr. Bench testified that he inquired of Mr. Boyles, Mr. Allen's superior, about the records at the end of the inspection as well and received the same response. Tr. 105 and 129-30. Mr. Hanneman testified to this same effect. Tr. 171-172.

Respondent asserts that "While Mr. Allen told the EPA inspector during the inspection that he had no PCB records, Tr. 105, he thought the

inspectors wanted records on official forms. Tr. 483. And that since an annual report was required to have been filed for the year 1979 at the time of the EPA inspection, Mr. Allen was preparing records and, in fact, had handwritten PCB records on a yellow notepad that was sitting on one of the barrels in the tin shed at the time of the inspection.

Respondent introduced into evidence Cotter Ex. 19 which purports to indicate some of the information (records) contained on the yellow notepad previously mentioned. It also sets forth additional record information. Mr. Allen stated that a part of the first two pages of Cotter Ex. 19 was the information contained on the yellow notepad. However, Mr. Allen testified that "They were made in my own handwriting, but I am not sure if it was prior to the inspection or not." Tr. 482.

It must be concluded that Respondent had not developed and maintained records on the disposition of PCBs and PCB items as required by Section 761.45(a).

Appropriateness of the Proposed Penalty

Section 16(a)(2)(B) of the act (15 U.S.C. 2615(a)(2)(B) provides that in determining the amount of a civil penalty "the Administrator shall take into account the nature, circumstances, extent, and gravity of the. . . 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." Section 22.27(b) of the Rules of Practice (45 F.R. 24360), the rules of practice applicable herein, provides as follows:

> (b) Amount of civil penalty. The presiding officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the act relating to the proper amount

of a civil penalty, and must consider any civil penalty guidelines published under the act. The presiding officer may increase or decrease the assessed penalty from the amount proposed to be assessed in the complaint.

The penalties proposed herein and the resultant findings are as follows:

	Violation Found	Dismissed
Substation 2300		
Count I -- Marking	$11,500.00	
Count X -- Disposal		$ 5,750.00
Red drum		
Count III -- Marking	1,725.00	
Count VII -- Storage	1,725.00	
Substation 800		
Count VI -- Marking		1,725.00
Count IX -- Storage		1,725.00
Substation 4160		
Count II -- Marking		11,500.00*
Count XI -- Disposal		5,750.00
Bone Yard		
Count V -- Marking	1,725.00	
Count VIII -- Storage	1,725.00	
Count XII -- Disposal	19,550.00	
Area Behind Compressor Shed		
Count XIII -- Disposal	19,550.00	
Line Material Company Transformers		
Count IV -- Marking		11,500.00*
Recordkeeping		
Count XIV	11,500.00	
	$69,000.00	$37,950.00

Respondent has suggested that its general good faith efforts to comply and its credit for expenditures for PCB compliance should mitigate any penalty which might be assessed for violations found to exist. In addition, Respondent contends the actual calculation of the penalty by Complainant is in error since the Guidelines (45 F.R. 59770) were not followed.

* Dismissed by stipulation.

Good Faith

It does appear that an effort was made by Respondent during the month between the time Mr. Lynham of MSHA made his inspection and the date of the EPA inspection. The Q and A Document was received prior to the EPA inspection. Pursuant to information contained therein, Mr. Allen ordered PCB labels, DOT approved 55 gallon drums and 85 gallon barrels. He had placed certain capacitors in PCB labelled drums, which had arrived in August 1980, and placed the drums in the tin shed. By the time of the EPA inspection, Mr. Allen had started labelling other equipment, even though some of the labelling might not have been in accordance with the PCB regulations.

Complainant adjusted the proposed penalty upwards by 15% because of the violator's attitude concerning the PCB rules. In evaluating the attitude of an alleged violator, the Civil Penalty Policy requires that the promptness of corrective actions be taken into account in proposing a penalty. Mr. Blackwell, the EPA employee who calculated the proposed penalty, admitted that he disregarded this factor by not attempting to discover the corrective actions taken. The record is silent as to any objective evidence such as statements or actions in support of any alleged "bad attitude" on the part of Respondent. For the reasons set forth, the overall proposed penalty for each count found to be in violation totalling $69,000.00 is hereby reduced by 15% to a penalty of $58,650.00.

Since $37,950.00 has been eliminated from the proposed penalty based upon a finding of no violation or, in the case of Counts II and IV, by stipulation of the parties and an additional 15% or $10,350.00 has been

eliminated by readjusting the penalty pursuant to the "bad attitude" allegation, I find that the total penalty proposed, $106,950.00 should be reduced to $58,650.00

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this Initial Decision are denied.

O R D E R*

Pursuant to Section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)), a civil penalty of $58,650.00 is hereby assessed against the Respondent Cotter Corporation, Schwartzwalder Uranium Mine for the violations of the act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.

Edward B. Finch
Chief Administrative Law Judge

Dated: March 21, 1984

* Unless an appeal is taken pursuant to Section 22.30 of the rules of practice or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. (See Section 22.27(c)).

CERTIFICATION

I hereby certify that a copy of this Initial Decision was mailed to the Regional Hearing Clerk, U. S. EPA, Region IX, by certified mail, return receipt requested, and the original of this Initial Decision was hand-carried to the Hearing Clerk, EPA Headquarters, this date.

Leanne B. Boisvert
Leanne B. Boisvert
Secretary to CALJ Edward B. Finch

March 21, 1984