85 APR 26 P2:45

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of Lamar and Frances Thumm and Holtzman and Silverman Builders, Respondents	)))))))))	Docket No. TSCA-V-C-222

Toxic Substances Control Act - Effective Date of Regulation - Disposal - Rules of Practice - Burden of Proof - Evidence -- Where evidence established that drums containing PCBs were placed in a disposal site several years prior to the April 18, 1978, effective date of the PCB disposal rule, such disposal was not a violation of the rule. Note at 40 CFR 761.60 (44 FR 31545, May 31, 1979) construed. Even if "disposal" as defined by the rule be interpreted as encompassing leaks or discharges from the drums, there was no evidence of such leaks or discharges from drums containing PCBs after the effective date of the rule and Complainant failed to carry its burden of proving the violation charged.

Toxic Substances Control Act - Effective Date of Regulation - Disposal - Rules of Practice - Burden of Proof - Inferences -- Where evidence failed to establish that PCB soil contamination at disposal site was attributable to discharges from drums containing PCBs and the most reasonable inference from

all the evidence was that the contamination was attributable to disposals of PCBs which occurred prior to the effective date of the regulation, Complainant failed to establish that the disposal was a violation of the rule notwithstanding the contention that a disposal prior to the effective date of the regulation was an affirmative defense the burden of proof of which was on Respondent. Electric Service Company, TSCA Appeal No. 82-2 (Final Decision, January 7, 1985) distinguished.

Toxic Substances Control Act - Rules of Practice - Burden of Proof -- Section 22.24 of the Rules of Practice (40 CFR Part 22.24) providing that following establishment of a prima facie case by Complainant, the Respondent shall have the burden of presenting and of going forward with any defense to allegations set forth in the complaint, is a rule as to the presentation of evidence and does not shift burden of proving violation charged, which remains on Complainant.

Appearance for Respondents - Lamar and Frances Thumm

Stephen D. Weyhing, Esq.
Miller, Canfield, Paddock and Stone
Lansing, Michigan

Appearance for Respondent - Holtzman and Silverman Builders

John W. Voelpel, Esq.
Elizabeth A. Lowery, Esq.
Honigman, Miller, Schwartz and Cohn
Detroit, Michigan

Appearance for Complainant - John Van Vranken, Esq.
Office of Regional Counsel
U.S. EPA, Region V
Chicago, Illinois

Initial Decision

This is a proceeding under § 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615). The proceeding was commenced by the issuance on March 24, 1984, of a complaint by the Director Waste Management Division, U.S. Environmental Protection Agency, Region V, Chicago, Illinois, charging Respondents, Lamar and Frances Thumm and Holtzman and Silverman Builders, with disposal of polychlorinated biphenyls (PCBs) in violation of § 2614 of the Act and regulations promulgated thereunder, 40 CFR Part 761.1/ It was proposed to assess Respondents a penalty of $25,000.

Lamar and Frances Thumm, hereinafter Thumms, answered denying knowledge of and responsibility for the alleged disposal for the reason that pursuant to a land contract, dated May 18, 1973, they had surrendered possession, control and rights to the property in question to Holtzman and Silverman Builders. Holtzman and Silverman (H&S) answered, denying responsibility for the alleged disposal and alleging, inter alia, that fee title to the property was in the Thumms and that any dumping on the property occurred prior to the time H&S assumed possession thereof. A hearing on this matter was held in Lansing, Michigan on November 13, 14 and 15, 1984.

1/ Sec. 15 of the Act entitled "Prohibited Acts" provides in 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;
>
> * * *

The instant rules were promulgated under § 6.

Based on the entire record including the proposed findings and conclusions of the parties, I find that the following facts are established:

Findings of Fact

1. The property in question, containing approximately 62 acres is described as the west 1019.04 feet of the Northwest 1/4 of Section 25, Township 3 South (Ypsilanti), Range 7 East, Washtenaw County, Michigan (Land Contract, H&S Exh 9). The property is known as the Textile Road property or site, being bounded on the north by Textile Road, on the west by Bunton Road and on the east by a Ford Motor Company Plant. The property was purchased by Lamar and Frances Thumm in August of 1947 (Warranty Deed, H&S Exh 31).
2. From the time the Thumms purchased the property until they entered into a land contract with H&S in May of 1973, the property was in continuous use as a source for the extraction of sand, gravel and aggregate (Tr. 497-99). The excavation, together with the naturally high water table, resulted in approximately two-thirds of the property being covered by artificial ponds (Atwell-Hicks, Inc. Report, dated May 1, 1973, H&S Exh 7). The principal pond, sometimes referred to as a lake, occupied the eastern and southern portion of the property (photos, H&S Exhs 10-14).
3. As a source of material to fill excavated areas, Mr. Thumm allowed dumping on the property (Tr. 505). Most of the dumping was accomplished by one Harold Handley, who had a contract to haul fly ash and cinders from the General Motors Willow Run Plant (Tr. 505-535).

Mr. Thumm estimated that Handley hauled fly ash and cinders to the site for 15 years, until he lost the contract. He, Thumm, also allowed broken concrete and dirt to be dumped on the property (Tr. 514-15, 544). The previously mentioned Atwell-Hicks Report (H&S Exh 7) reflects that the front 500 to 600 feet of the property, that adjoining Textile Road, was covered to a depth of seven to ten feet with artificial cinder fill, including trash, wood, bricks and soil in an uncompacted state.

4. Mr. Thumm insisted that he did not allow rubbish and tin cans to be unloaded on the property, stating that he sent people with that kind of material to the public dump (Tr. 506). He acknowledged, however, that he was not on the site at all times, that Mr. Handley had access to the site and hauled thereto seven days a week, that fill material, other than fly ash and cinders, was being delivered to the property until the closing [of the land contract] and that he did not generally inspect material delivered by Handley or others (527, 534-35, 537-38, 544-45, 560-61). Wooden block, apparently flooring, from the adjacent Ford Motor Company plant was also delivered to the site, Mr. Thumm using some as fuel in the stove in his shop and selling the balance (Tr. 506, 541, 546-47).

5. Mr. Vaughn Williams was an employee of Lamar Thumm from March 1, 1955 until October 31, 1973 (Tr. 567, 569-70). Although he performed other tasks such as operating a front-end loader and repairing equipment, his principal function was as a crane or dragline operator, excavating sand and gravel. Mr. Williams described the Textile Road site when

he arrived in 1955 as "just bare property" partially dug out. He stated that you couldn't dig without hitting water, that the site was not heavily vegetated and that he did not recall a single tree being on it at the time. He testified that the property was still quite bare when he left at the end of September 1973, with a few poplar trees along the bank close to the Ford Motor Company property line. This testimony is substantially supported by aerial photos of the property taken in June of 1973 (H&S Exhs 10-14).

6. Vehicle entrance to the Thumm property is from Textile Road from which a road, referred to as the north-south road, extends southward to the gravel-wash plant. In early 1973, Mr. Williams constructed a rough road or trail, sometimes referred to as a two-track, east of the north-south road and north of the principal pond (Tr. 571). Mr. Thumm stated that the two-track was constructed in the spring of 1972 or 1973 (Tr. 512). This roadway extended east to the Ford boundary and then south along the pond. Mr. Williams explained that his reason for constructing the two-track was so that a truck could get in there and 50 to 100 feet of original earth along the Ford boundary could be removed prior to sale [of the property]. He testified that the area where the two-track was constructed was visible from the north-south road. He confirmed Mr. Thumm's testimony relative to dumping on the property, stating that Mr. Handley stopped hauling fly ash in late 1972, that only dirt or broken concrete was brought in thereafter and that he would check loads [of material to be dumped], if he saw a strange truck (Tr. 602-03). He

did not, however, remember any concrete piles or peculiar odors on the property (Tr. 597, 601).

7. Under date of April 7, 1973, the Thumms entered into an agreement for the sale of the Textile Road Property to Holtzman and Silverman (Offer to Purchase Real Estate, H&S Exh 7). The agreement provided, inter alia, that the buyer would have 30 days to enter the premises for the purpose of taking soil borings to determine suitability of land for the purchasers intended use. If the property was determined to be unsuitable, the purchasers could by written notice withdraw the offer and obtain a refund of the deposit. The agreement further provided that dumping shall continue as is until buyer notifies seller of intent to close, then dumping shall cease, that the seller would have until September 1, 1973, for removal of approximately 7,000 yards of processed material (fill, sharp and masonry sand) and seller was to have use of garage and storage building until September 1, 1973.

8. H&S engaged Atwell-Hicks, Inc., an engineering and surveying firm, to perform the soil exploration work envisaged by the offer to purchase (Work Order, dated April 9, 1973, H&S Exh 18). This resulted in the report previously mentioned (findings 2 and 3) and soil boring drawings (H&S Exhs 8, 19). The report apparently indicated that soil conditions were satisfactory for H&S's intended use and under date of May 18, 1973, the Thumms and H&S entered into a land contract for the sale of the Textile Road site (H&S Exh 9). The contract provided that after a down payment the purchase price would be paid in equal instalments ~~in~~ not more than ten years. The contract further provided that

the sellers surrendered possession immediately, except that they would have the use and occupancy of the garage and storage building and surrounding area without payment of rent until September 1, 1973, and the right until the same date to remove approximately 7,000 cubic yards of previously processed sand. At the time the contract was executed, the Thumms also executed a warranty deed to the property, which was held in escrow by the title company (Tr. 515). The Thumms vacated the property on September 30, 1973, having been granted a one month extension of the occupancy period by H&S (Tr. 531).

9. On March 22, 1983, Mr. Gene Hall of the Michigan Department of Natural Resources (MDNR) accompanied by a Robert Colburn of the Washtenaw County Health Department, inspected the Textile Road property (Tr. 9, 10; Pollution Investigation Report, EPA Exh 3). They were allowed on the property by a Mr. Kenneth Mangus, identified as a caretaker. The inspection was conducted in response to a telephonic report of drums being deposited near a gravel pit. Material in the drums appeared to be old machine oil. Mr. Mangus reportedly told Mr. Hall that the drums had been there as long as he had worked there, 12 years or more (Tr. 32, 92; EPA Exh 3). The drums were in an area north of the pond and east of the north-south road (Sketch, EPA Exh 2). Because of a heavy snow cover, no samples were taken on this inspection.

10. Mr. Hall, accompanied by a Mr. Bob LaMere also of the MDNR, and Mr. Colburn of the Washtenaw County Health Department, made a second inspection of the Textile Road property on April 12, 1983. The snow had disappeared and 40 drums were lying in a disorderly state in an

area of approximately 1500 sq. ft. (Tr. 11, 68). Several piles of wooden blocks of the type typically used for factory flooring were observed (Tr. 18). The drums were in a state of disrepair, some were rusting, some having open tops, some having open bungs and some having what appeared to be bullet holes. Some of the drums were protruding from sludge piles (Tr. 18, 29, 30 and 68). Although there is some confusion in the record as to the precise number of samples taken, it appears that five samples were taken from drums and in addition, two soil samples and two water samples were collected (Tr. 12, 13, 34, 78, 79; EPA Exhs 2 and 3). Scans conducted by a gas chromatograph revealed the presence of PCBs (Aroclor 1254) in two of the drum samples (Drum Nos. 3 and 5, Lab Nos. 27889 and 27891) of 61 ppm and 210 ppm, respectively, and in the two soil samples (Nos. 7 & 8, Lab Nos. 27893 and 27894) of 500 ppm and 160 ppm, respectively (Tr. 150; Environmental Laboratory Analysis, EPA Exh 1 and Lab Log No. 1998, EPA Exh 8). The soil samples were taken in an area of stained soil to the west of where the drums were located (Sketch, EPA Exh 2).

11. A third inspection of the Textile Road property was conducted on June 29, 1983 (Tr. 170; PCB Compliance Inspection Report, EPA Exh 10). This additional inspection was conducted by representatives of the MDNR (Mr. Gene Hall and Ms. Margaret Fields) as a result of a meeting held at the Washtenaw County Health Department on June 23, 1983, attended by representatives of the MDNR, Washtenaw County Health Department, Mr. Lewis Thumm, an attorney and son of the Thumms, and Messrs. Gilbert Silverman and Dan Baumhardt of Holtzman and Silverman

and H&S's attorney, John W. Voelpel, wherein it was agreed that additional samples would be taken (Tr. 220; EPA Exh 13). Additional soil and sediment samples, a water sample and a wood shaving sample were taken (Transmittal of Evidence and Laboratory Analysis, Thumm Exh 3). The locations where the samples were taken is shown on a sketch drawn by Ms. Fields (Tr. 177, 179-80, EPA Exh 11). Ms. Fields took the wood shaving sample (from a pile of wooden blocks 200 feet west of the drum site), because she had prior experience with high PCB concentrations in wooden block floorings (Tr. 199-200). Piles of broken concrete piles and wooden blocks were observed to the right and left of the two track (Tr. 174; Sketch). A roughly triangular shaped area to the west of the drum area on the sketch is the area of stained soil. One of the photos taken by Ms. Fields (EPA Exh 4, Photo 5) appears to show wooden blocks scattered around the stained-soil area. Ms. Fields testified that because of the lack of vegetation in the stained-soil area, it was not possible to determine where the two-track ended (Tr. 223-24). Her sketch, however, shows the two-track extending in a direction through the area of dump piles and where at least two of the drums were located. The drum area, oblong in shape and estimated by Ms. Fields to be 90 feet in length, had been enclosed by a snow fence since the first inspection.

12. The samples were delivered to the Environmental Research Group (ERG) laboratory on July 6, 1983, and tested for PCBs (Aroclor 1254) with the result that two of the samples, Lab Nos. 92258 and 92259, showed concentrations of 100 and 360 ppm, respectively (Analytical Report, EPA Exh 5

and Extraction Sheet, EPA Exh 6). These laboratory sample numbers correspond to Sample Nos. 81012C and 81012D and were taken from sediments at the pond edge (southwest corner of drum area) and from surface soil at a point approximately 35 feet west of the fence surrounding the drum area. The nearest drum was approximately 30 feet from the location where Sample No. 81012C was taken (Tr. 198). A sample of what was described as "black material" taken between two drums (No. 81012E) showed a PCB concentration of 4.5 ppm (EPA Exh 10). A soil boring sample (No. 81012J) taken in the drum area at a depth of eight feet, which was the depth of the water table, revealed a PCB concentration of 22 ppm. The sample from the wooden block showed a PCB concentration of 11 ppm.

13. Mr. Gilbert Silverman, partner in H&S, testified that the Thumms complied with the condition of the offer to purchase that dumping was to cease as soon as the buyer notified seller of intent to close (Tr. 282, 323). He further testified that since the date of closing, neither he nor any other agent or employee of H&S had authorized any dumping on the property (Tr. 301). While he acknowledged that he had inspected the Textile Road property once or twice prior to execution of the offer to purchase and at least once thereafter, he denied seeing any drums on the property until June of 1983 (Tr. 319-20, 340). He explained that he had driven along the north-south road and looked at the lake, but that foliage along either side of the route would have made it impossible to see the drums. According to Mr. Williams (finding 5), however, he observed Mr. Silverman's car, a white Mercedes-Benz, proceed along the two-track north of the lake, the area where the drums were found, at least three times in the

spring of 1973 (Tr. 576-77, 584, 587-88). He acknowledged that Mr. Silverman had identified himself only on the third occasion and that he could not be certain his prior observations of the Mercedes were visits by Mr. Silverman.

14. Mr. Kenneth Mangus, identified as a caretaker (finding 9), testified that there were barrels interspersed with sludge piles and rags and creosote blocks in the area immediately north of the lake when he first visited the Textile Road property in 1969 (Tr. 417, 421-22). He was on the property because he was told there was "good fishing" in the lake. Thereafter, he visited the property for the purpose of fishing six to ten times a year until 1973 when he had a back operation and was unable to work (Tr. 416, 419, 423-24). In 1974 and 1975, while recovering from his back operation, he was on the property as frequently as four or five days a week (Tr. 424, 433). He testified that prior to the time the drums were removed there had been no change in the sludge piles (Tr. 423). In 1980, he made a deal with Mr. Silverman to look after the property and clean up trash in exchange for hunting and fishing rights (Tr. 420, 432). This is the reason he had a key to the gate at the Textile Road entrance to the property, which he still possessed at the time of the hearing. He testified that the gate was installed in 1974 or 1975 (Tr. 439). He described the trash dumped on the property as consisting of household and commercial, including roofing debris and "different things of that nature" (Tr. 420). He said the dumped material was spread or piled past the buildings at the entrance and

back to the road (Tr. 421). The piles ranged in size from one garbage bag to as many as 15. He denied ever working on the property and denied making the statement attributed to him in the Pollution Investigation Report (finding 9) that the drums had been there as long as he had worked there (Tr. 441). He didn't tell Mr. Silverman or anyone else from H&S about the drums, because he assumed H&S was aware of their presence (Tr. 444).

15. Mr. James Kovalak hauled sand and gravel from the Textile Road property from the mid-1960s until the pit was closed (Tr. 449-50). He estimated that he was on the property 10 to 20 times a year during that period. From November 7, 1973, until March 31, 1976, H&S leased the property to Emery Garlick (Tr. 325-26; H&S Exh 15). Mr. Garlick used the property for the storage of earth moving equipment (Tr. 294, 452-53). In 1973, Mr. Kovalak was employed as a master mechanic by E. W. Garlick Company (Tr. 452). He reported for work at the Textile Road property where a cement block building close to the Textile Road entrance was used as a shop (Tr. 453, 455). He testified that he walked around the site the first day he was there as an employee of E. W. Garlick and observed between 30 and 50 55-gallon drums, piles of creosoted flooring blocks and concrete in the area immediately north of the lake (Tr. 455-56). He didn't recall the precise date, but asserted that it was cold out (Tr. 462). He examined two or three of the drums to determine if they contained anything salvageable, finding that some contained an oily substance and some a liquified tar that had hardened (Tr. 457). He testified that the drums were basically

on the surface and that there was no indication of spills from the drums (Tr. 463). He did not recall any dump piles and did not know whether the drums were still there when he was last on the property in 1976 (Tr. 456, 458). He denied that there was any dumping on the property, while the Garlick equipment was there, but acknowledged that neither he nor any other employee of E. W. Garlick was there at all times (Tr. 456, 461-62).

16. Dr. Lynn S. Fichter, presently an Associate Professor of Geology at James Madison University, Harrisonburg, Virginia, was employed as an assistant driller and rodman by Atwell-Hicks during the first half of 1973 (470-72). As an employee of Atwell-Hicks, he participated in the site exploration work on the Textile Road property performed by Atwell-Hicks for H&S in April of 1973 (Tr. 474-75; Map, H&S Exh 20). Dr. Fichter's time card (H&S Exh 23) reflects that he was at the site on April 10, 17, 19 and 20, 1973. The map drawn by Dr. Fichter at the time (H&S Exh 20) bears a date of April 10, 1973 and shows dump piles in an area to the east of the north-south road and immediately north of the lake. Immediately to the north of this notation is a notation to the effect that "man on job said this area largely filled with cinders to about 8' deep." The area east of the lake, adjoining the Ford Motor Company property, contained the notation "area freshly filled." Dr. Fichter did not recall talking to the individual identified as "man on job" (Tr. 478). He remembered a strong chemical odor coming from the dump pile area, that there were bundles of rags in that area and wooden blocks scattered around, but did not recall

whether or not he saw any drums (Tr. 479-80, 487). He did not recall any indication of chemical spills and attributed the dark soil and lack of vegetation in the area to the presence of cinders (Tr. 490). The Atwell-Hicks Report (H&S Exh 7) does not mention the presence of drums and Mr. Silverman acknowledged that Atwell-Hicks did not report the presence of any barrels (Tr. 339). Dr. Fichter did see drums in the dump piles when he returned to the site in 1983 at the request of counsel for H&S (Tr. 482, 486-87). He asserted that the dump piles did not appear to have changed from the way they were in 1973 (Tr. 480). On his 1983 visit, he was impressed by the amount of vegetation on the site in contrast to the situation in 1973 when "we had a pretty clear view of just about all of the property" (Tr. 489).

17. As indicated previously (finding 8), the Thumms vacated the property on September 30, 1973. Mr. Thumm testified that there were no drums in the area north of the lake at the time (Tr. 519). He didn't recall any sludge piles, rags or chemical odors being in that area when he left (Tr. 520). Mr. Williams confirmed Mr. Thumm's testimony that there were no drums or barrels on the property when the property was vacated, asserting that the only drums he ever saw on the property were containers of crankcase oil for the machinery (Tr. 581). He stated that when a barrel was empty, it was returned to the oil company.

18. Dr. Charles Olson, a Professor of Natural Resources at the University of Michigan, qualified as an expert in photo interpretation (Tr. 371-75; Curriculum Vitae, H&S Exh 24). Testifying with reference to a

map of the property (H&S Exh 25) he made from aerial photographs taken in April of 1972 (H&S Exh 26) and June of 1973 (H&S Exh 10), Dr. Olson identified 15 cylindrical objects in an area immediately north of the northeast corner of the lake, identified as Nos. 3 and 3A, on a plastic overlay of the property (Tr. 376, 378-81, 383, 391, 392-93, 395, 397-98; H&S Exh 29). He testified that the dimensions of the objects were three feet in length and two feet in diameter, plus or minus six inches, approximating the dimensions of a 55-gallon drum, which he determined to be 35 and 1/2 inches in length and 22 and 1/2 inches in diameter (Tr. 398-99). He further testified that there could have been more such objects, hidden under vegetation, other objects or by shadows. He indicated that the barrel-like objects did not appear on the April 1972 photograph, H&S Exh 26 (Tr. 389, 413). Dr. Olson described the area bounded by a dotted line surrounding the number 3 on the map (H&S Exh 25) as an area of very dark tone, almost black on the April 1972 photograph (Tr. 386). He visited the site in late October 1984 and was asked whether he saw anything that might have produced the dark area. He replied that there were several things such as piles of old rags, papers, some oily material that looked like solidified asphalt and that the ground seemed to be stained or soaked with this similar material, giving an overall dark toned impression. The dark ground is shown on one of the photographs he took during his October 1984 visit (H&S Exh 27, photo H).

19. Under cross-examination, Dr. Olson acknowledged that he could not testify that the cylindrical objects were in fact 55-gallon drums,

but only that they were of the size to be 55-gallon drums (Tr. 408). Mr. Thumm and Mr. Williams testified that the cylindrical objects described by Dr. Olson could have been piles of dirt (Tr. 549, 600). Mr. Williams explained that a small, five-cubic-yard load of dirt would settle and wash-out so as to be of the approximate dimensions of the objects noted by Dr. Olson. Dr. Olson indicated that the only change he observed in the terrain on his October 1984 visit in the area north of the lake identified by the number 3 on H&S Exh 25 from that in the April 1972 and June 1973 photographs (H&S Exhs 26 and 10) appeared to be reshaping of the dump piles, which may have resulted from removal of the barrels (Tr. 400).

20. There was one payment remaining to be made under the land contract with the Thumms, when the drums were discovered. H&S refused to make this payment and by letter, dated October 22, 1983 (H&S Exh 16), informed the Thumms that its recent investigation disclosed that the toxic substances were present on the property prior to the closing date of the land contract. The letter stated that because of the presence of these toxic substances H&S would not be in a position to develop this property for its intended purpose,2/ that H&S regarded the contract as rescinded and enclosed a quit-claim deed conveying H&S's interest in the property to the Thumms. The Thumms refused to accept this conveyance and by letter to H&S, dated

---

2/ Mr. Silverman testified that the property was not developed, because Farmer Jack's Supermarket would not rent a store at that location (Tr. 341).

November 15, 1983 (Thumm Exh 6), counsel for the Thumms returned the quit-claim deed marked "VOID." The letter stated that the Thumms did not consider the contract rescinded and that they would not take any action to rescind the contract or foreclose on the property.

21. From April 1976 to sometime in 1977, the Textile Road site was leased to one Robert Forrester, who ran a portable welding operation and maintained equipment on the property (Tr. 296-97, 440). Between 1979 and 1981, the property was used by Village Green Management Company, a H&S unit, for the storage of construction trailers and equipment (Tr. 297-98). In April of 1984, H&S arranged for the removal of the drums from the Textile Road Property and for their proper disposal at a cost of $5,235.00 (Recovery Specialists, Inc.'s invoice, dated April 23, 1984, H&S Exh 17). The invoice reflects the removal of 49 drums.

22. When asked whether any of the drums he observed on his April 12, 1983, inspection of the Textile Road site were leaking, Mr. Hall answered in the affirmative, stating that some of the drums had visible leaks (Tr. 11). On cross-examination, however, he could not recall whether there was any liquid on the outside of any of the drums sampled and denied seeing any actual flowing or discharging from any of the drums (Tr. 60-62, 106). He stated that a sludge appeared to have run out of one or two of the drums and solidified and as to an undetermined number of drums, material appeared to have flowed out of the drums at an unknown prior time (Tr. 106-07). The soil around the drums was discolored (Tr. 64).

23. Ms. Fields testified that the drums were surrounded by what she referred to as metal filings (Tr. 175). She defined leaking as a fluid material dripping and having evident motion and stated that she could not say [any such motion] was present. She could not remember whether she saw any liquid on the outside of the drums previously sampled by Mr. Hall and could not identify any drums having leaks or discharges (Tr. 205). She indicated that some drums were corroded to the extent that material was in contact with the ground, but did not recall whether it was in liquid form or a form she thought would likely contain PCBs (Tr. 198-99).

24. Mr. Mangus initially answered in the affirmative the question of whether any of the drums he saw on the Textile Road site in 1983 were leaking their contents on the ground (Tr. 444). Under further questioning, however, he denied remembering that he saw any liquid flowing or discharging from the drums in 1983 and could not positively state that he ever saw any liquid flowing or discharging from any of the drums (Tr. 447).

25. Dr. Sheldon Simon, coordinator of the EPA Region V PCB Program, testified as to the calculation of the proposed penalty (Tr. 243-44; Concurrence Request For Administrative Action, EPA Exh 16). He testified that the penalty was calculated in accordance with the PCB Penalty Policy, 45 FR 59770 et seq., September 10, 1980 (Tr. 246). He explained that because of the potential for impact on the environment this was considered a Level 1 or the most severe type of violation (Tr. 247). This determination was based on the fact that PCBs at concentrations in excess of 50 ppm were found at two

locations on the property (EPA Exh 11). He further explained that because of the potential for impact on the environment and on groundwater, the extent of the violation was considered major (Tr. 248). He stated that this determination was based in part on the fact PCBs at a concentration of 22 ppm were found at a depth of eight feet, groundwater level, indicating the possibility of percolation and contamination. He considered that the entire area of stained soil shown on the sketch (EPA Exh 11) was contaminated, asserting that it was well over 760 square feet and in the major extent category of the matrix system (Tr. 248). He acknowledged that if the PCBs had been placed in the soil at the site prior to 1978, no penalty would be appropriate (Tr. 256). He further acknowledged that he did not consider the amount or volume of PCBs in the drums in determining the penalty (Tr. 260-61, 272-73). He had no information as to the ability of the Thumms or H&S to pay and his only knowledge of the culpability of the Thumms was based on ownership of the property (Tr. 268-69). Dr. Simon stated that because of the limited solubility of PCBs in water he wouldn't expect to find more than 50 ppm PCBs in water samples.

Conclusions

1. The evidence establishes that the drums were placed on the Textile Road property sometime prior to execution of the land contract on May 18, 1973.

2. The evidence will not support a finding that PCB soil contamination at the site is attributable to leaks or discharges from the drums.

3. Although it is clear that H&S did not authorize any dumping on the property after execution of the land contract, household trash and commercial type waste were deposited on the property at various times after the Thumms vacated the site on September 30, 1973. This dumping appears to have been chiefly household type trash, does not appear to have involved PCBs and does not appear to have extended to the area north of the pond at issue here. In any event, there is no evidence to the contrary and under the circumstances, all authorized dumping having ceased on or before execution of the land contract on May 18, 1973, the most reasonable inference is that the dumping resulting in the soil contamination occurred prior to that date.

4. A placement or disposal of PCBs which took place prior to the effective date of the regulations is not a disposal for which responsibility under the Act attaches.

5. Notwithstanding that the contention a disposal or disposals of PCBs occurring prior to the effective date of the regulations is in the nature of an affirmative defense, the burden of proof of which is on the Respondents, under § 22.24 of the Rules of Practice (40 CFR Part 22) the burden of persuasion that the violation occurred as charged in the complaint remains with Complainant. Under the circumstances present here, Complainant has not discharged that burden.

6. Complainant has not established the violations alleged in the complaint and the complaint will be dismissed.

Discussion

Although Mr. Mangus testified that the drums were on the Textile Road property the first time he was at the site to fish in 1969, it is concluded that he is mistaken as to the date. This is because the direction of the two-track as shown on the sketch drawn by Ms. Fields (EPA Exh 11) extends through the area where the dump piles and at least two of the drums were found. This is rather persuasive evidence that the dump piles and drums were deposited after construction of the two-track. According to Mr. Williams, he constructed the two-track in early 1973, while Mr. Thumm recalled that this road was constructed in the spring of 1972 or 1973. The April 1972 aerial photograph (H&S Exh 26) doesn't appear to show the two-track and it is concluded that this roadway was constructed after this photograph was taken. Some support for this conclusion is provided by Dr. Olson's testimony to the effect that the April 1972 photograph does not reflect the presence of any cylindrical, barrel-like objects.

Dr. Fichter, who as an employee of Atwell-Hicks was at the site several times during the period April 10 to April 20, 1973, and who was engaged in soil exploration work in close proximity to the location where the drums were later discovered, did not recall the presence of any drums. The map drawn by Dr. Fichter (H&S Exh 20) reflects the presence of dump piles in the drum location area and he recalled chemical odors and seeing

piles or bundles of rags and wooden blocks scattered around. Moreover, he had a "pretty clear view of just about all of the property" (finding 16). Under these circumstances, the fact that he did not recall their presence would seem to be persuasive evidence that the drums were not there. More significant, however, is Dr. Fichter's testimony that the dump piles did not appear to have changed between April of 1973 and the time of his August 1983 visit. This testimony is supported in part by Mr. Mangus, who stated that there was no change in the sludge or dump piles until the drums were removed. It is therefore concluded that the drums were on the property at the time of Dr. Fichter's April 1973 soil exploration work. This conclusion is consistent with the cylindrical, barrel-like objects Dr. Olson observed in the June 1973 aerial photograph (H&S Exh 10) and, of course, is consistent with Mr. Kovalak's testimony that he saw the drums on the Textile Road site sometime in the fall of 1973.3/

According to Mr. Kovalak, who observed the drums on the site in the fall of 1973, there was no indication of any spills from the drums. All witnesses, who observed the drums on the site and who indicated that they may have seen some active leakage or discharges, recanted this testimony on further examination (findings 22-24). Moreover, there was no testimony or evidence as to leakage from the two drums, samples from which showed PCB concentrations in excess of 50 ppm. While there was evidence of discharges from several of the drums at undetermined prior times, the sample

---

3/ Mr. Thumm and Mr. Williams are found to be credible, but mistaken witnesses, who may simply have attached no significance to the drums and thus did not recall their presence. The same may well be true of Mr. Silverman who visited the site at least once prior to April 7, 1973 and at least once thereafter and appears to have driven his car in the precise area where the drums were discovered, but who denied seeing any drums on the site until June of 1983.

of a "black material" taken from between two drums which may have resulted from a discharge therefrom, showed a PCB concentration of only 4.5 ppm. No drum was nearer than 30 feet from the point where soil and sediment samples, showing PCB concentrations in excess of 50 ppm, were taken. Thus, the evidence does not support a finding that PCB contamination at the site is attributable to discharges from the drums.

The record shows that permissible or authorized drumping on the property ceased no later than the date of the execution of the land contract, May 18, 1973. The record also shows that there were instances of unauthorized dumping after September 30, 1973, when H&S assumed possession of the property. Although this dumping involved some commercial type waste, it appears to have been chiefly household type trash and does not appear to have involved waste of the type containing PCBs here concerned. Moreover, this dumping does not appear to have extended to the stained-soil area immediately north of the pond. In any event, there is no evidence to the contrary and the most reasonable inference is that the dumping resulting in the soil contamination occurred on or before the execution of the land contract on May 18, 1973. Ms. Fields had prior experience with high PCB concentrations in wooden block factory flooring and the evidence is clear that such flooring from the adjacent Ford Motor Company plant was deposited on the property prior to May 18, 1973. Although the wood shavings sample collected by Ms. Fields was taken from a pile of wooden blocks some 200' west of the drum site and shows a PCB concentration of only 11 ppm, it is of some significance that one of the photos she took shows wooden blocks scattered around the stained-soil area. Moreover, the photo of a portion

of the stained-soil area taken by Dr. Olson in October 1984 (H&S Exh 27, Photo H) shows a wooden block or a fragment thereof. If it be regarded as tenuous to infer from these facts that the disposals resulting in the soil contamination occurred prior to May 18, 1973, it would be sheer speculation[4/] to infer that such disposals occurred after the effective date of the rule. Moreover, as pointed out infra at 31-35, the burden of establishing the violation charged remains with Complainant and if the inference that the disposals resulting in the soil contamination occurred prior to the effective date of the rule be regarded as equally probable as the inference that the disposals occurred subsequent to that date, the decision, of necessity, would be adverse to Complainant.[5/]

The note at 40 CFR 761, Subpart D (1984) provides in pertinent 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. This Subpart does not require PCBs and PCB Items landfilled prior to February 17, 1978 to be removed for disposal. However, if such PCBs or PCB Items are removed from the disposal site, they"

4/ It is well settled that inferences necessary to support a verdict or judgment may not rest on mere surmise and conjecture. Kent Lumber Co., Ltd. v. Illinois Central R. Co., 65 F.2d 663 (5th Cir. 1933).

5/ See Ft. Smith Gas Co. v. Cloud, 75 F.2d 413 (8th Cir. 1935) (Where proved facts give equal support to each two inconsistent inferences, judgment must go against party upon whom rests the burden of sustaining one of these inferences as against the other).

> "must be disposed of in accordance with this Subpart. Other Subparts are directed to the manufacture, processing, distribution in commerce, and use of PCBs and may result in some cases in disposal at an earlier date than would otherwise occur."

(See 44 FR No. 106, May 31, 1979, at 31545).

Neither the note in the initial PCB rule (43 FR No. 34, February 17, 1978, § 761.10, at 7157), nor the explanation thereof[6/] specifically provided that PCBs disposed of prior to effective date of the regulations (April 18, 1978) were considered to be in service. This omission was supplied by an Addendum to the Preamble (43 FR No. 149, August 2, 1978, at 33918-19) providing as follows:

6/ The explanation at 43 FR 7151-52 provides in part:

> Changes In § 761.10 Disposal of PCB's
>
> A new section 761.10(b)(3) has been added to the final rule to allow the use of chemical waste landfills for disposal of soil and debris contaminated with PCB's as a result of a spill or from placement of PCB's in a disposal site prior to the effective date of these regulations. Under the proposed rules, incineration would have been required. This change was made to permit the use of a more practical disposal method for the large volumes of soil and debris, such as trash, trees, lumber, and other rubbish, that may be involved in a spill clean-up operation or in removal or excavation of materials from an old disposal site, such as a pit, pond lagoon, dump, or landfill. This provision does not apply to PCB liquids, slurries, industrial sludges, damaged PCB articles, or any production wastes related to PCB processing or manufacturing; such items must be disposed of in accordance with Section 761.10(b)(1) or (2).

This explanation is subject to the interpretation that disposal in accordance with the PCB rule was only required when PCBs were removed from the disposal site.

> "Section 761.10(b)(3) states: "Soil and debris which have been contaminated with PCB's as a result of a spill or as a result of placement of PCB's in a disposal site prior to the publication date of these regulations shall be disposed of (i) in an incinerator which complies with annex I, or (ii) in a chemical waste landfill." This requirement as others, is qualified by the general Note which appears at the beginning of § 761.10. This Note specifically states that these" regulations do not require the removal of any PCB's from service earlier than would otherwise be the case. However, when they are removed from service and disposed of, disposal must be in accordance with the regulation.
>
> PCB-containing soil and debris which have been placed in a disposal site are considered to be "in service" for purposes of the applicability of the Note discussed in the last paragraph. Therefore, § 761.10 (b)(3) does not require PCB-contaminated soil or debris landfilled prior to February 17, 1978 to be removed for disposal. However, if such soil or debris is removed from the disposal site, it must be disposed of in accordance with the regulation."

The 1979 version of the Note made it clear that the Note applied to PCBs and PCB items in addition to contaminated soil and debris. In Allen Transformer Company, TSCA Appeal No. 81-3 (Final Decision, March 23, 1982), it was held that runoff or leachate from soil contaminated with PCBs as a result of a spill which occurred prior to the effective date of PCB rule was not a disposal which violates the requirements of the rule. Complainant argues that the Note, properly interpreted equates "disposal sites" with "landfills" and that it is only PCBs and PCB items landfilled prior to February 17, 1978, that do not have to be removed for proper disposition (emphasis supplied) (Posthearing Brief at 7). Complainant asserts that the PCBs involved here were not landfilled, that accordingly, the Note does not apply and that Respondents are responsible for proper disposition of PCBs at the Textile Road site irrespective of the time of placement.

Complainant further argues that Allen Transformer, supra, did not directly decide whether the term "disposal site" in the Note is meant to be broader than "landfill" and urges that to the extent dicta in that decision suggests otherwise, it be disregarded (Id. at 8). Complainant says that even if the Note be interpreted to exclude from the PCB disposal regulations soil contaminated with PCBs as a result of a disposal which occurred prior to the effective date of the regulations, the drums are fundamentally different. It is argued that to allow drums such as those at the Textile Road site to be excluded from the PCB disposal regulations (assuming they were placed on the site prior to the effective date of the regulations) would remove large quantities of PCBs from regulatory control.

Complainant acknowledges that the Note uses the terms "disposal site" and "landfill" interchangeably, and the attempt to limit the scope of "disposal site" to "landfill"[7/] is rejected. The Note simply does not distinguish between the two terms and because, as previously pointed out, the Note itself was amplified to clarify an ambiguity as to the intent of the regulations, any such distinction surely would have been clearly set forth, if intended. In Allen Transformer, supra, the Judicial Officer rejected Complainant's argument that the broad definition of disposal in

---

7/ While the regulations define the term "chemical waste landfill," 40 CFR 761.2(e) (43 FR at 7157) and 40 CFR 761.3 (1984) (44 FR, May 31, 1979, at 31543), they do not define the term "landfill." A landfill is defined as "a disposal of trash or garbage by burying it under layers of earth in low ground." Webster's New International Dictionary, 3rd Ed. 1967.

the regulation,[8/] which includes uncontrolled discharges, covered leaching or runoff from spills occurring prior to the February 17, 1978, publication date of the regulations in the following language: "However, this argument cannot be reconciled with the Agency's intention as expressed in the Note, discussed supra, where the Agency grants a blanket exemption from the disposal requirements for PCBs which were placed in a "disposal site" or "landfill" prior to February 17, 1978." (Slip Opinion at 4). This language is not consistent with the limitation of disposal site advocated by Complainant herein and even if I disagreed with the Judicial Officer's reading of the Note, which I do not, I would not be free to reach a contrary conclusion.

In view of the foregoing, soil contaminated with PCBs as a result of a disposal occurring prior to the effective date of the PCB rule is outside the coverage of the regulation and not a violation thereof. Notwithstanding Complainant's contention that the drums are fundamentally different, the same ruling is applicable. It is recognized, of course, that the drums being regarded as in service, discharges or leaks therefrom can be regarded

---

8/ Disposal is defined in the regulation (40 CFR 761.3, 1984) 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.

as disposals[9/] for the purpose of the PCB rule. This contention, however, no less than the leaching or runoff involved in Allen Transformer, supra, is simply inconsistent with the blanket exemption in the Note for PCBs placed in a landfill or disposal site prior to February 17, 1978. Even if this conclusion were otherwise, it should be emphasized that the drums have been on the site since at least May 18, 1973, that there is no evidence soil contamination at the site is attributable to leaks or discharges from the drums, no evidence of when the leaks or discharges from any of the drums occurred, and no evidence of leaks or discharges from drums containing PCBs at concentrations in excess of 50 ppm.

Complainant, relying heavily on Electric Service Company, TSCA-V-C-024 (Initial Decision, August 10, 1982), Final Decision, TSCA Appeal No. 82-2 (January 10, 1985), asserts that the contention PCBs were placed on the site prior to the effective date of the regulations is an affirmative defense, which must be proved by Respondent (Posthearing Brief at 6, 7). Complainant also relies on the general rule that where a matter is peculiarly within the knowledge or control of a party, the burden is upon him to prove it (Id. at 9). Electric Service Company, supra, is, however, clearly distinguishable and does not control here. This is because

---

9/ The definition of disposal did not include leaks until September 24, 1982. See 47 FR No. 165, August 25, 1982, at 37342 et seq. and Liberty Light and Power, TSCA Appeal No. 81-4 (Final Decision, October 27, 1981).

Respondent in that case had handled transformer oil at its facility since 1951 and discharges of oil containing PCBs were recent to the date of inspection, clearly occurring long after the effective date of the regulation, as evidenced by the fact the oil had not percolated into the soil. Here, by contrast, there is no evidence of regular handling of PCBs and no evidence of recent discharges of PCBs on the property.

Complainant takes the position that it established a prima facie case by showing the disposition of PCBs (soil contamination) in excess of the 50 ppm regulatory limit. Complainant asserts that in accordance with § 22.24 of the Rules of Practice, Electric Service Company, supra, and the rule that where a matter is peculiarly within the knowledge of one of the parties, the burden is on him to prove it, Respondents have failed to discharge their burden of proving that the disposals occurred prior to the effective date of the regulation. If it be conceded that Complainant has made out a prima facie case, it is, nevertheless, concluded that the violation charged has not been established. Section 22.24 of the Rules of Practice (40 CFR Part 22) provides:

> "§ 22.24 Burden of presentation; burden of persuasion
>
> The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence."

It is significant that the quoted rule uses the term "proving" in connection with the establishment of the violation charged, but not with respect to the Respondent's presentation of a defense. It is therefore concluded that this section is a rule as to the presentation of evidence after Complainant's establishment of prima facie case and does not change the burden of proof which remains on Complainant at all times. While Electric Service Company is susceptible of a contrary interpretation, the facts in that case, as we have seen, are clearly distinguishable.

There remains for consideration the often stated rule that where a matter is peculiarly within the knowledge of one of the parties the burden is on him to prove it.10/ This, however, is considered to be loose lanaguage and that what is actually meant is the burden of production. See, e.g. United States v. Bull Steamship Line, 146 F.Supp 210 (S.D. N.Y.),11/ affirmed 274 F.2d 877 (2nd Cir. 1960); Merriam v. Venida Blouse Corporation, et al., 23 F.Supp 659 (S.D. N.Y. 1938);12/ Wigmore on Evidence, 3rd Ed.

10/ One of the earliest statements of the purported rule is Selma, Rome and Dalton R. Co. v. United States, 139 US 560, 35 L.Ed 266 (1891) where the Court stated as follows: "Burden of proof lies on the person who wishes to support his case by a particular fact which lies more particularly within his knowledge or of which he is supposed to be cognizant." The fact at issue in that case, however, was whether plaintiff had been paid for delivery of mail for which suit was brought by the Confederate government, a fact essential to its case and obviously within plaintiff's knowledge or presumed knowledge.

11/ The Court stated: "It is often a controlling factor in deciding where to throw the burden of producing evidence--and obviously it ought to be--that the proper party to charge is he alone who could discover the truth." (emphasis supplied) (146 F.Supp at 213).

12/ "The party who is in the best position to know the facts bears the burden of explanation." 23 F.Supp. at 661.

§ 2485 and 31A C.J.S. Evidence, §§ 103 and 110. Cf. Texas Department of Community Affairs v. Burdine, 450 US 248 (1981) (burden of explanation after plaintiff has established a prima facie case in a Civil Rights Act case). Moreover, the duty of production, or of going forward with evidence, does not change or shift the burden of proof, sometimes referred to as the burden of persuasion, which remains with the plaintiff (Complainant herein) at all times.13/

Here, as indicated previously, the evidence establishes that the drums were on the site several years prior to the effective date of the regulation and there is no showing that PCB soil contamination at the site is attributable to leaks or discharges from the drums. On the contrary, the most reasonable inference is that the soil contamination is attributable to PCB disposals occurring prior to the effective date of the regulation. It follows that Complainant has failed to establish a violation of the rule as charged and the complaint will be dismissed.

13/ See 29 Am. Jur. 2d Evidence, § 131 which provides in part: "In other words, where the evidence is entirely within the possession of one of the parties to a case or where a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, it is his duty to produce it or to come forward with the proof. * * * This rule, some times referred to as the rule of convenience, is merely one as to the procedure at the trial, and does not change the burden of proof or free the plaintiff from the rule that he cannot invoke the consideration of the jury [fact finder] unless there is some substantial evidence upon which to base the essential findings in his favor."

Conclusion

The complaint is dismissed.[14/]

Dated this 26th day of April 1985.

Spencer T. Nissen
Administrative Law Judge

14/ Unless appealed in accordance with § 22.30 of the Rules of Practice (40 CFR Part 22) or unless the Administrator elects, sua sponte to review the same as therein provided, this decision will become the final order of the Administrator in accordance with § 22.27(c).