UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
SED, James B. Caldwell & John Olmsted,	)	Docket No. TSCA-IV-86-0001
	)	
	)	
Respondents	)	

1. EPA approval of a process for destroying PCB capacitors and removing the PCBs from the metal residue to non-detectable levels does not exempt the PCB capacitors or any residue from which the PCBs had not been removed from the storage for disposal requirements.

2. Respondents who leave PCB waste material in place where it has been stored with no intention of removing it have unlawfully disposed of that material.

3. Financial inability of Respondents to fulfill their obligations to dispose of PCB material does not absolve Respondents from liability for failure to properly dispose of PCBs.

4. Penalty for a violation not charged in the complaint denied where Complainant had failed to satisfactorily explain why it had not sought an amendment to the complaint.

5. President and chief operting officer of insolvent corporation who was directly involved in making and carrying out the corporate decisions that gave rise to the improper disposal violation held individually liable for the violation.

6. Proposed penalty of $2 million against individual Respondent reduced to $35,000 because evidence shows that individual is unable to pay a larger penalty.

Appearances for Complainant: Edwin Schwartz, Esquire
Lawrence H. Neville, Esqurie
U.S. Environmental Protection Agency
Region IV
345 Courtland Street
Atlanta, Georgia 30365

Appearances for Respondent: Scott V. Lowry, Esquire
337 West Main Street
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INITIAL DECISION

This is a proceeding under the Toxic Substances Control Act ("TSCA"), § 16(a), 15 U.S.C. § 2615(a), for the assessment of civil penalties for alleged violations of the rule issued under § 6 of the Act, 15 U.S.C. § 2605, regulating polychlorinated biphenyls ("PCBs"), 40 C.F.R. Part 761. 1/ The complaint issued by the United States Environmental Protection Agency, Region IV ("EPA"), charged Respondents SED, Inc., James B. Caldwell and John Olmsted in six counts with several violations of the rule. Two of these violations were abandoned by the EPA at the time of the hearing leaving Respondents charged with improperly disposing of PCBs by abandoning them and improperly storing drums of PCBs stored for disposal by failing to display on the drums the date they were placed in storage. A penalty of $2,270,000 was requested. 2/

Respondents answered denying the alleged violations and contesting the imposition of a penalty. Respondents Caldwell and Olmsted requested a hearing. Respondent SED, Inc. stated that it did not have the financial ability to defend and, therefore, did not request a hearing.

1/ TSCA, § 16(a) provides in pertinent part as follows: (1) Any person who violates a provision of § 15 shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation. Each day such violation continues shall, for the purpose of this subsection, constitute a separate violation of § 15."

TSCA, § 15, makes it unlawful for any person to (1) fail or refuse to comply with . . . (c) any rule promulgated . . . under § 6."

2/ The alleged violations abandoned by the EPA were those charged in Counts V and VI that Respondents had unlawfully distributed PCBs in commerce and that required records of PCBs had not been adequately maintained, for which violations a penalty of $154,000 was requested.

A hearing was held in Brookfield, Waukesha County, Wisconsin on June 7 and 8, 1988. Respondent Caldwell was the only respondent appearing at the hearing. Respondent Olmsted filed a "Prehearing Conference Statements and Motions" prior to the hearing stating that he was unable to arrange the necessary funding to permit his attending the hearing. At his request, Olmsted without payment of the cost of reproduction has been furnished with a copy of the transcript and exhibits admitted into evidence. 3/

Proposed findings of fact and conclusions of law with supporting briefs have been filed by the EPA and Respondents Caldwell and Olmsted. On consideration of the entire record and the parties' submissions, the following initial decision is rendered. All proposed findings of fact inconsistent with this decision are rejected.

The Facts

SED is a Wisconsin corporation incorporated in 1979. It was organized by Caldwell and Olmsted who each initially owned 50% of the stock. Subsequently, two other shareholders were added and thereafter Caldwell and Olmsted each owned 40% of the stock. Caldwell and Olmsted were the sole directors and have been the only directors during the period that SED was active. Since 1980, and for the entire period that SED was active, Caldwell was the president and chief operating officer. Olmsted served as as Vice President and Secretary of SED and had the responsibility for the engineering and technical part of SED's operations. After April 1983, Olmsted left

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3/ See Order dated August 9, 1988.

full-time employment of SED but remained as vice-president and a 40% shareholder. 4/

SED operated as an intermediate handler in the disposal of waste PCB materials. Persons and organizations having waste PCB materials to dispose of would pay SED to take title to the waste PCB material, safely transport it and legally dispose of it. SED would haul the waste PCB material to one of its facilities and separate the PCBs from the PCB waste material where possible. Material which had been cleaned up and made free of PCBs was sold if it had commercial value. Liquid PCBs and PCB materials that could not be decontaminated to safe levels were stored pending shipment to an approved disposal facility. SED itself did not have the capability for legally disposing of the PCB molecule. 5/

An example of SED's charges is shown in its advertising brochure. SED would charge a customer whose PCB waste it had contracted to take a

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4/ Order denying motions for accelerated decisions, etc., dated August 19, 1987, at 2-3. Official notice is taken of the facts stated in the first paragraph following the heading, "The Personal Liability of Caldwell and Olmsted" on p. 2, which are set forth herein. These facts are consistent with the evidence introduced at the hearing. See Transcript (herafter "Tr.") at 174, 177-78, 179, 203; Complainant's Exhibit (hereafter "CX") 5.

The EPA also proposes a finding that after 1983, Olmsted actively participated in determining corporate strategy. It is true that I so found in my order of August 19, 1987, denying motions for an accelerated decision, etc. But such a finding is interlocutory only and subject to reexamination on review of the entire record. See 6-Pt.2 MOORE's FEDERAL PRACTICE § 56.20 [3.-4] at 56-702. For the reasons stated below at 22, this finding is now rejected.

5/ Tr. 143-50. Depending upon the concentration of PCBs, the lawful method of disposal would be by incineration, by deposit in an approved chemical waste landfill or, in some instances, by destruction in an approved high efficiency boiler. 40 C.F.R. § 761.60.

disposition charge of 57 cents per lb. of waste PCBs plus a charge for the special container SED had designed to store and transport the drums of waste PCBs, known as a SARASPAC, which ranged from $1300 to $1600 per SARASPAC depending on the location of the customer. Each SARASPAC was designed to hold four 55-gallon drums. Thus, a customer desiring to dispose of 3,925 pounds of waste liquid PCBs and 85 lbs. of rags and using seven 55-gallon drums and two SARASPACS in which to load the waste for transfer to SED, would be charged by SED as follows: 6/

Charge by weight for material transported: 4287 lbs. (includes 277 lbs. for the drums) @ 57 cents cents per lb.	$2,443.59
Less credit for one unused drum since 2 SARASPACS were used each of which had to contain 4 drums.	- 225.00
	$2,218.59
Charge for 2 SARASPACS which in this example was assumed to be $1400 each.	$2,800.00
SED's total charge	$5,018.59

SED also expected to generate income from the sale of material that it had been able to salvage by separating out the PCBs or reducing the PCB concentrations to non-detectible levels. 7/ It had developed a process for doing this with waste PCB capacitors, and on July 29, 1982, it had received approval from the EPA to "destroy" PCB capacitors by removing

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6/ CX 2.

7/ Tr. 143-44.

PCBs to a level below detectability on the metal and paper components which could then be distributed in commerce. SED was able to decontaminate and sell the metal components but it had not developed a technology for fully decontaminating the paper. 8/

In 1981, SED began operations at a facility on Radar Road, in Greensboro, North Carolina, and in 1982 opened another facility at Swing Court, in the same city. Both facilities were used to store waste PCB materials including PCB capacitors. After receiving approval from the EPA in 1982, SED carried on a capacitor processing operation at Swing Court, which, consisted of removing PCBs from the metal components to non-detectable levels of concentration so that they could be resold. 9/

Over the course of its operations in Greensboro, North Carolina, from 1981 through February 1985, SED acquired considerable quantities of waste PCB material. Almost from the start, however, the quantity of PCBs stored at the two facilities began to accumulate. The following figures compiled from SED's records tell the story: 10/

Year	PCBs and PCB items on hand at end of year (lbs)
1981	285,941
1982	1,904,589

8/ CX 3; Tr. 144-48.

9/ CX 1, 4, 5, 7.

10/ CX 7,9.

1983	4,098,112
1984	4,802,972
1985 (through February)	5,048,927

This accumulation resulted notwithstanding that SED during this period shipped out the following quantities: 11/

	Shipments to Incinerators (lbs)	Other Shipments (lbs)
1981	-0-	
1982	641,378	
1983	45,840	262,283
1984	88,318	536,776
1985 (through February)	-0-	9,639

In sum, then, SED had over 5 million pounds of waste PCB materials on hand at the end of February as shown in its records. About 4 million pounds were listed as PCB capacitors and about 1.1 million pounds as other PCB waste material. 12/

11/ CX 7, 8; Tr. 147-49. The "other shipments" includes sales of materials that were decontaminated and shipments to approved landfills. Tr. 147-48.

12/ CX 7, 13. The quantity of PCB waste material on hand as shown by SED's records may be understated. See the SED Sites Clean Up Project Report, CX 18, at 4-2, 4-9, reporting over 5.9 million pounds of PCB material shipped out from the Greensboro sites. Most of this material appears to have been incinerated, indicating that it consisted of material containing PCB's in concentration of over 500 ppm. CX 18 at 4-13.

SED's operations turned out to be unprofitable. By March 1985, it had fallen so far behind in payments on its bank loans that the bank demanded immediate payment of the unpaid principal and interest totalling about $516,000. 13/ SED's response was to tell the bank that it could not meet the demand and that it was going to liquidate the business. 14/

On April 15, 1985, SED wrote the following letter to Region IV of the EPA:

> Mr. Charles Jeter
> Regional Administrator
> US Environmental Protection Agency
> Region IV
> 345 Courtland Street, N.E.
> Atlanta, GA 30365
>
> Dear Mr. Jeter:
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> We regret to inform you that we are unable to continue in business. Our bank has taken control of our assets and is in the process of liquidating them.
>
> Accordingly, we are unable to fulfill our obligations with regard to the disposal of PCB materials which we have in our possession.
>
> In Region IV, we have material at 6219 Swing Court and at 500-E Radar Road, both in Greensboro, NC. These facilities are no longer manned, and the records have been removed and forwarded to Waukesha, Wisconsin, for safe keeping. While we no longer have an office or a telephone, you may reach us through P.O. Box 1306, Waukesha, WI 53187, to communicate your desire regarding the disposition of our records.

13/ Respondents' Ex. (hereafter "RX") 1.

14/ RX 2.

> Please recognize, in any request that you might make, that we do not have ANY money, and structure your request accordingly. Thank you.
>
> SED, Inc.
>
> James B. Caldwell
> President 15/

As SED's letter shows, by April 15, 1985, SED had deserted the two facilities at Greensboro. The huge inventory of PCB waste materials was simply left in place, as was also the process machinery. Other assets such as cash and office furniture were liquidated, and the bank loans were written off at a loss of about $497,000. 16/ Caldwell testified that he attempted to find a market for the equipment, technology or company, but discontinued his efforts after the EPA's permit to destroy capacitors was revoked in August 1985. 17/

On April 24, 1985, EPA Region IV, inspected both the Swing Court and Radar Road sites. 18/ Hazardous waste contractors hired by the landowners of the sites and acting under the direction of the EPA made a detail inventory of the PCB waste material at each site. 19/ From its examination

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15/ CX 10.

16/ RX 3; Tr. 61-62, 158, 160-61.

17/ Tr. 159-60; RX 4.

18/ Tr. 61.

19/ Tr. 65, 76; CX 16, 17.

of the conditions at both the Radar Road and Swing Court sites, the EPA determined that there was a threat of release of hazardous materials from the sites. It found that drums of PCB waste material were stacked so high that they were beginning to collapse under continuous pressure. It further found that the PCB materials as they were stored were a fire hazard, and that two nearby creeks and a trailer park next to the Swing Court facility were endangered by the threatened release of PCB contaminated materials. 20/ Invoking its authority under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), §§ 101-405 42 U.S.C. 9601-9675 the EPA had the two sites cleaned up. About 5.9 million pounds of PCB waste material were ultimately removed and properly disposed of. 21/

Discussion

Respondents argue that the PCB waste material stored at the two facilities on April 15, 1985, was "inventory" held for further processing, and was not designated for disposal until April 15, 1985, when SED terminated its operations. Respondents further argue that SED, accordingly, had one year from April 15, 1985, to dispose of the material, and since the material was properly disposed of within that time, they cannot be held liable for an improper disposal. 22/ These arguments are without merit.

20/ CX 14, Tr. 82-86.

21/ CX 18 at 4-2 through 4-13. The cost of cleanup was borne by a group of parties potentially responsible for the costs under CERCLA § 107, 42 U.S.C. § 9607. See Tr. 92.

22/ "Respondents" is used collectively to refer to the arguments by Caldwell or Olmsted or both. As noted, the corporate Respondent SED did not request a hearing and did not file a brief.

All PCB Waste Materials Stored at the Two Facilities Were Being Stored for Disposal

The PCB waste material stored at the site fell into two categories, waste capacitors that SED was permitted to destroy by removing the PCBs from the metal and paper components to non-detectable levels, and other waste material. All the PCB waste material at the time it was acquired by SED had been designated for disposal by the entity from which SED acquired the material. Respondents argue that there was no testimony from the persons or organizations from whom the material was obtained to substantiate this fact. 23/ The conclusion, however, is inescapable from the circumstances surrounding SED's acquisition of the material. SED's brochure stated that SED was taking title to waste PCB material. 24/ The fact that SED was paid to take the material further demonstrates that persons and organizations contracted with SED in order to dispose of their PCB waste material. 25/

Respondents also argue that, regardless of whether designated for disposal by the prior owner, SED did not designate these materials for disposal but held them for processing. 26/ The trouble with SED's argument is that whatever processing of the materials it did was related to the ultimate disposal of the PCB waste. This was true even with respect to separating the PCBs from the metal residues of capacitors. The approval

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23/ Caldwell's supplemental brief at 2.

24/ CX 2.

25/ Caldwell admitted to this fact. See Tr. 180-81.

26/ Caldwell's Proposed Findings of Fact and Conclusions of Law at 2; Brief at 1-2.

SED received allowed it to destroy PCB capacitors and to remove the PCBs from the metal and paper residues and offer in commerce those residues from which the PCBs had been removed to non-detectable levels. Residues containing PCBs in concentrations of 2 ppm or more had to be disposed of in accordance with the requirements of § 761.60. 27/

Contrary to what Respondents argue, the fact that the metal and paper residues resulting from the destruction of the capacitors could be distributed in commerce if PCBs were removed to non-detectable levels did not give SED a license to accumulate an "inventory" of PCB capacitors exempt from the storage for disposal requirements. 28/ The approval related solely to the destruction of the capacitors. 29/

27/ CX 3. The process consisted of draining the liquid PCBs from the capacitor and grinding up the metal and paper dielectric core material Tr. 24. The 2 ppm level was considered the level below which the PCBs would be considered as destroyed and the product no longer a PCB product. Tr. 24-25.

28/ Supplemental brief of Respondent Caldwell at 1.

29/ The EPA's approval must be considered in light of previous advice given to SED in a letter dated April 2, 1982, in which the EPA stated that EPA approval must be obtained for SED to physically separate PCBs from other material for purposes of disposal. Such disposal activity was not included in the exemption from the ban on processing and distributing PCBs and PCB Items allowed under the regulations. See 40 C.F.R. 761.20(c)(2) (formerly 761.30(c)(2)). The letter also said that while activities of processing and distributing for disposal are not subject to processing and distribution bans, they are subject to the disposal regulations. CX 22. In short, nothing stated either in the letter or in the subsequent approval gave SED grounds to assume that the capacitors prior to their destruction should not be handled the same as any other PCB material stored for disposal.

It is also readily apparent from an examination of the exemption for "excluded manufacturing operations" that SED's operation was not an excluded manufacturing operation. An "excluded manufacturing operation" is defined as one in which PCBs are inadvertently generated in small quantities. 30/ PCBs are not inadvertently generated in SED's extraction process. They are deliberately introduced into the process in the form of waste capacitors and removed from the metal and paper residues. While the metal residues from which the PCBs were removed to non-detectable levels might be considered a form of recycled PCB material, the exemption for recycled PCBs also clearly did not apply to SED's operation. That exemption pertained to those intentionally manufactured PCBs which appear in the processing of paper products or asphalt roofing materials. 31/ The waste capacitors are not used in the processing of asphalt roofing material. Nor does SED's extraction process fit the description of a "processing of paper products." To the contrary, SED was never successful in removing the PCBs from the paper residues to non-detectable levels, so that the paper residue had to be desposed of like any other PCB.

"Disposal" is defined as including "actions related to containing, transporting, destroying, degrading, decontaminating or confining PCBs and PCB Items." 32/ SED's processing of its capacitors by breaking them up and decontaminating the metal residues, is clearly an activity within this definition. SED's reading of the EPA's approval of its process as

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30/ See definition in 40 C.F.R. § 761.3.

31/ See definition in 40 C.F.R. § 761.3.

32/ See 40 C.F.R. § 761.3. Capacitors are "PCB Items." Id.

taking the capacitors out of the category of PCB material stored for disposal is justified neither by the language of the approval nor by the regulations.

The record firmly establishes, then, that all PCB waste material held by SED, including capacitors, containing PCBs in concentrations of 50 ppm or more (and metal and paper residues from capacitors containing PCBs in concentrations of 2 ppm or more) was at all times stored for disposal, and subject to the storage for disposal requirements. One of these requirements is that PCB articles or PCB containers stored for disposal before January 1, 1983, must be removed from storage and properly disposed of by January 1, 1984. PCB articles and PCB containers stored for disposal after January 1, 1983, must be removed from storage and properly disposed of within one year from the date when they were first placed in storage. 33/

The record establishes that a large proportion of the PCB waste material on hand on April 15, 1985, had been held for more than a year. It can be extrapolated from SED's own records that of the 5,048,927 pounds held by SED at the end of February 1985, when SED terminated its operation, over 4,000,000 pounds of this material must necessarily have been stored for more than a year. 34/ The presence of a large quantity of PCB material held for more than a year is also shown by an inventory that was made of the

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33/ 40 C.F.R. § 761.65(a).

34/ CX 7, 9. These records show that for the two months of January and February 1985, SED received 266,240 pounds of material and shipped 20,285 pounds leaving a net gain of 245,955 pounds. In 1984, SED received 5,963,778 pounds and shipped 5,497,679 pounds leaving a net gain of 466,099

(Footnote continued)

Radar Road site by ECOFLOW for both the EPA and the owner of the site. Over 100 of the drums left on the site had apparently been placed in storage prior to January 1, 1984. 35/ Other information further corroborated this fact. 36/

An inventory of the containers at the Swing Court site was also taken by GSX Services for the purpose of determining what remedial actions or other response measures should be taken at the site. While it did not record any information about the presence of a date on the containers, it is reasonable to assume from the evidence discussed above and the absence of any evidence

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(Footnote 34 cont'd)

pounds. CX 7. The net gains in materials for these fourteen months, thus, was 712,054 pounds. Subtracting this amount from 5,048,127 pounds on hand at the end of February leaves a balance of 4,336,783 pounds which must have been acquired prior to January 1984, and had to be disposed of by January 1, 1985 or earlier. If the balance on hand for 1984 is computed from the amounts shown in SED's records for 1985 to be on hand at the end of 1984, the total on hand for the fourteen months would be somewhat larger but the amount attributable to the period prior to January 1984 would be over 4 million pounds.

35/ See e.g., CX 16, pp. 005-012. Respondents objected to this inventory because the person doing the inventory was not available for cross-examination. The inventory was made at the direction of the EPA to obtain information about what remedial actions or other response measures should be taken at the site. Tr. 65-68, 71. It is found reliable, accordingly, as to the information contained therein except whether the date a container was placed in storage was actually missing. Since the absence of a date on the container does seem at variance with SED's procedures (see Tr. 151-52), Respondents may well be prejudiced by not being able to cross-examine on that fact. As to the other information about the drums, including the correctness of the reported date shown thereon, Respondents presumably are able to verify such information from their own knowledge of SED's operations. They were not prejudiced, accordingly, by not being able to cross-examine the preparer of the inventory on such information. In fact, Caldwell confirmed the existence of the situation shown by the inventory, namely, that SED had at each of its sites, drums of PCB material that had been held for more than a year. See Tr. 186-87.

36/ See photographs taken during the EPA's inspection in 1985. CX 6, 16.

to the contrary that many of the containers at that facility were also stored for more than a year. 37/ It is found, accordingly, that a large amount of the PCB waste material left at SED's Radar Road and Swing Court sites when SED closed down its operations consisted of PCB articles or PCB containers that had been stored for more than a year in violation of the storage for disposal regulations. 38/

SED's Unlawful Disposal of PCB Material

In April 1985, SED's financial condition had become so poor that SED had to close its operations. It quitted the facilities at Greensboro, leaving them unmanned and notified the EPA that SED was unable to fulfill its obligations with respect to the disposal of the PCB material stored

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37/ For the inventory taken by GSX Services, see CX 17.

38/ Respondents argue that they never received proper notification that they were being charged with a violation of storing PCBs for more than a year. It was pointed out that the complaint contained no such charge. Tr. 17-23, 25-26. That argument, however, was directed to whether the failure to comply with the one-year storage limitation could be made a separate violation for purposes of determining the penalty, a point that is considered below at 19-20. Respondents have cited no law and I know of none that would preclude drawing from the evidence those facts established thereby which explain the circumstances surrounding a violation that was charged by the complaint, namely, the improper disposal of drums. Here the evidence is relevant because it shows that the situation SED found itself in of having a large quantity of PCB material on hand was considerably aggravated by the failure to dispose of the material within one year.

It is unnecessary, however, to consider whether the year runs from the date SED received the materials or from the date the source from whom SED obtained the PCB material had designated the PCB material for disposal as claimed by the EPA. See Complainant's brief at 8, and Complainant's response at 2. Even if the former date was used, the record would show the accumulation of a large quantity of PCB articles and containers for more than a year.

there. The EPA contends that SED's action was a disposal of the PCB material by abandoning it. Respondents argue that it was at that point that SED designated the PCB material for disposal. It should be noted that the term "designate for disposal," as it is used in the regulations, does not apply to SED's operation. 39/ "Designate" by definition in the context in which it is used in the regulation means to "mark out," "indicate" or "specify." 40/ The common sense interpretation would be that it means the act of removing from service PCBs and PCB Items which are actually in use, such as an operating PCB capacitor or PCB transformer, and holding them thereafter for disposal. It would be meaningless to apply the term to PCBs already being stored for disposal.

The real answer to Respondents' argument, however, is that whatever construction Respondents wish to put on the letter, SED's action was still an improper disposal, for SED made it unmistakably clear that no further disposition of the material would be done by it. 41/

39/ The term "designate for disposal" is found in 40 C.F.R. § 761.65(b) in connection with the storage for disposal requirements.

40/ Websters New World Dictionary of the English Language, 397 (College Edition).

41/ Under some circumstances, SED, even if it intended to abandon the PCB waste material in the sense of relinquishing all right and title to it, would be precluded from doing so. See Midlantic National Bank v. New Jersey Dept. of Environmental Protection, 474 U.S. 494 (1986) (trustee in bankruptcy may not abandon property on which PCB-contaminated oil was stored); Moreco Energy, Inc. v. Penberthy-Houdaille, 682 F. Supp. 933 (N.D. Ill. 1988) (a generator of PCB-contaminated waste oil cannot divest itself of title to the oil to a reprocessor who never agreed to accept legal ownership or control over it). But see In re Smith-Douglas, Inc., 28 ERC 1209 (4th Cir. 1988). It is not necessary, however, to decide that question here, for however the act is described, it was still a final disposal of the material by SED.

Respondents' argue that where a company is bankrupt and has not the funds to dispose of hazardous wastes, it can only be obligated to do what SED did, namely, notify the EPA and cooperate with it in accomplishing a proper disposal so far as it can. 42/

The obvious answer is that neither the statute nor the regulations recognize any exception for persons who find the disposal requirements too costly for them to comply with. In this case, it is especially clear why this should be so. SED sought out the acquisition of the PCB material and for a time profited by doing so. The situation in which it eventually found itself of being unable to properly dispose of the PCB materials it had acquired, was one of its own making. Nor can SED take any comfort from the fact that others were forced to undertake the disposal that SED could not or would not do and pay the costs that should have been borne by SED. To construe the clean-up taken under CERCLA as absolving SED of any liability for an improper disposal is a frivolous argument. The law placed the obligation to properly dispose of the PCB materials squarely upon SED. Shifting that obligation to potentially responsible parties who may be liable for clean-up costs under CERCLA is not an authorized form of disposal under TSCA. 43/

42/ Caldwell's brief at 4.

43/ Respondents' example of a hardware store becoming insolvent and unable to dispose of hazardous waste stored on its premises, see Caldwell's brief at 3-4, is totally inappropriate. Insolvency does not relieve a person subject to RCRA from complying with his or her obligations to properly dispose of hazardous waste. Cf. Matter of Commonwealth Oil

(Footnote cont'd)

In summary, SED's quitting the Swing Court and Radar Road sites, leaving stored there a large quantity of PCB material was SED's final disposition of the PCB material and a disposal under the regulations. 44/ Accordingly, it is concluded that SED has improperly disposed of PCB waste materials in violation of 40 C.F.R. § 761.60, as charged in the complaint. 45/

The other violation charged in the complaint was of improper storage of drums containing PCBs. As alleged in the complaint, this violation was based upon SED's asserted failure to date the drums, but the EPA at

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(Footnote 43 cont'd)

Refining Co., 805 F.2d 1175 (5th Cir. 1986), cert. denied, 107 S. Ct. 3223 (1987)(EPA may compel a company to properly close a hazardous waste facility even though company is in Chapter XI bankruptcy proceedings.)

44/ In my order denying the EPA's motion for an accelerated decision, I found that a factual issue had been raised as to whether SED had "abandoned" PCB Articles, observing that abandonment involves evidence of Respondents' actual intentions with respect to the property. Order of August 19, 1987, at 4. As already noted, supra at 4, n. 4, findings made on accelerated decisions are interlocutory orders and may be re-examined on review of the entire record. Actually, SED by its letter of April 15, 1985, did manifest an intention to abandon the PCB material. It could be argued possibly that Caldwell's efforts to sell the business after April 15, 1985, showed an intention to reserve some interest in the materials, although no mention was made by Caldwell of such efforts in the April 15th letter. It is highly questionable as to how realistic it was to expect that anyone would agree to purchase or even take the large quantity of PCB material held by SED. In any event, Caldwell discontinued his efforts in August 1985, and the record is barren of any evidence that he or SED intended thereafter to do anything whatsoever with the property.

45/ Approximately 5.9 million pounds of PCB material was removed from SED's Greensboro facilities, of which some 4.7 million pounds were incinerated. CX 18, pp. 4-9 to 4-13. In general, PCB materials containing over 500 ppm PCBs have to be incinerated, while PCB materials containing between 50-500 ppm PCBs could either be incinerated or, if certain conditions were met, could be landfilled. 40 C.F.R. § 761.60. Mr. Hitchcock's testimony at Tr. 96 has obviously been reported incorrectly.

the start of the hearing sought to add another storage violation, namely, the storage of PCB Articles and PCB Containers for more than a year. 46/

The EPA relies solely on the ECOFLO report as proof that SED failed to identify in some of the drums the date they were placed in storage. 47/ On this issue, I find, however, that there is merit to Respondents claim that they were prejudiced by their inability to cross-examine with respect to the report. 48/ This particular charge of improper disposal, therefore, is dismissed for failure of proof.

There still remains the EPA's claim that included in the improper storage violation should be the charge that Respondents have stored PCB waste material for more than a year. The EPA argues that Respondents should have known that their storage of PCB Articles and PCB Containers for more than a year has at all times been an issue in this case. 49/

The fact that much of the material stored at the SED sites when SED discontinued operations had been held by SED for more than a year is so apparent from the evidence as to make it unlikely that there can be any real dispute about the fact itself. 50/ On the other hand, a Respondent

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46/ Tr. 25-26.

47/ Complainant's brief in support of proposed findings of fact, etc. at 5, 8.

48/ See, supra at 15, n. 35.

49/ Complainant's brief at 4-5.

50/ Caldwell never attempted to dispute the inference clearly drawn from SED's own records that PCBs were being accumulated for more than a year. See Tr. 186-87.

is entitled to know the violation he or she is being chaged with. I do not agree that the oblique reference in the complaint to § 761.65(a) or the reference in Complainant's motion for an accelerated decision to storage for more than a year put Respondents on notice that they would be charged with and penalized for failing to dispose of PCB materials in a year, especially when I had limited the storage for disposal violations in the motion for an accelerated decision to the charge of not dating the drums. 51/ Nor does the EPA explain why, if it intended all along to seek a penalty for failure to dispose of PCB material within a year, it still elected to handle the issue as one impliedly raised by the pleadings rather than more directly by a motion to amend the complaint. Under the circumstances, the EPA's request to assess a penalty for failure to dispose of PCB materials within a year is denied.

The Individual Liability of Respondents Caldwell and Olmsted

Since 1980, and for the entire period thereafter that SED was in business, Caldwell was the president and chief operating officer. The corporate procedures for receiving, storing, distributing and disposing of the PCBs were developed and carried out under his immediate supervision and control. 52/ Nor is this a case where Caldwell was "technically" responsible by reason of his corporate position but, in actuality, was

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51/ Order denying motion's for an accelerated decision dated August 19, 1987 at 4-5.

52/ See, supra at 3 and at 4, n. 4.

remote from the daily decisions in the operations of SED. Caldwell appears to have been directly involved in making and carrying out the corporate decisions that led to the accumulation of PCB waste material beyond what SED could reasonably be expected to handle if it were to carry out its obligations under the PCB regulations. A corporate agent through whose act, default or omission the corporation violates the law is himself guilty of that violation. See United States v. Park, 421 U.S. 658, 670-73 (1975); United States v. Conservation Chemical Co. of Illinois, 660 F. Supp. 1236, 1245-46 (N.D. Ind. 1987).

It is found, accordingly, that Respondent Caldwell is personally liable for the disposal violation found herein.

The record, however, does not support a finding of personal liability on the part of Olmsted. His responsibility appears to have been primarily in developing the technology for processing the PCB waste, and not in the purchasing, storage for disposal and distribution of PCB materials for disposal. Unlike Caldwell who remained an employee of SED until its demise in 1985, Caldwell terminated his employment in 1983. It is true that he kept his 40% stock ownership in the corporation and continued as an officer, director and consultant, but there is still lacking evidence to show that he was responsible for or directly involved in the corporate decisions on the acquisition of PCB materials and their storage and ultimate disposition. Accordingly, the complaint is dismissed as to Respondent Olmsted.

The Appropriate Penalty

For the improper disposal violation, the EPA has calculated a proposed penalty of 2 million dollars. The record fully substantiates classifying the violations at both the Radar Road and Swing Court sites as major in extent so far as the quantities of PCBs are involved. 53/ The penalty policy proposes a $25,000 maximum penalty, the highest amount statutorily allowed for each violation. 54/ In this case the EPA elected not to count each day the violation continued as a separate violation as permitted by statutue, but multiplied the $25,000 penalty by 40 which was roughly the time between April 15, 1985, the date the alleged abandonment took place, and February 27, 1986, when the complaint issued. 55/ This has resulted in the assessment of $1 million for each site. This computation also seems reasonable. The circumstances under which this violation occurred,

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53/ The EPA in its penalty calculation assumed that there were 32,710 kg of PCB waste material (12,689 lbs.) in concentrations of over 10% PCBs stored at Swing Court site and over 837,000 kg (>1.8 million pounds) of such materials stored at Radar Road. (The 8372 kg stated in the complaint and CX 20 is obviously an error in conversion of pounds to kilograms). How these precise figures were arrived at is not explained. A major violation is established however, if there are over 5000 kgs (more than 11,100 pounds) of PCBs in concentrations of 10% or more. The EPA's figures do not seem out of line given the large amount of PCB materials left at the sites and the quantity that was incinerated. It is to be noted that Caldwell has not attempted to dispute the EPA's figures in this respect, and Olmsted while questioning whether there was as much PCB material left at the sites as claimed by the EPA has not made any specific showing that tend to disprove that the quantities significantly vary from the EPA's figures.

54/ TSCA, § 16(a)(1), 15 U.S. 2615(a)(1), PCB Penalty Policy, CX 19 at 5977.

55/ CX 20; Tr. 126.

namely, what can only be called a reckless disregard of the storage requirements weigh against considering such a penalty excessive so far as the quantities of PCBs are concerned. Possibly, it could be argued that any continuing violation could not last beyond the dates the sites were cleaned up. The actual clean-up, however, did not begin until January 1986, and was not completed until June 1986. 56/ The hazards created by the unlawful disposal remained so long as PCBs were present at the site. Finally, the fact that the EPA moved promptly under its authority under CERCLA to clean-up the site should should not be considered as a mitigating circumstance, for it would work contrary to the very purposes of the Toxic Substances Act and CERCLA to do so. To construe the initiation of response and remedial measures under CERCLA as mitigating the penalties that would otherwise be imposed under TSCA, would lead to the absurd result that by acting promptly under CERCLA the EPA would thereby decrease its ability to assess an adequate penalty against and so deter the very conduct that created the environmental hazard. A construction that leads to such a result would be totally unwarranted.

The only remaining question is the ability of SED, Inc. and Caldwell to pay a proposed penalty of 2 million dollars. Complainant has offered no evidence to show that the corporate respondent has any assets with which to pay the penalty, and indeed the corporation appears to be now defunct and without any assets at all. Thus, the question is really whether Caldwell has the ability to pay such a penalty.

56/ CX 18.

I have considered the financial information submitted by Caldwell. This shows net assets of about $40,000 and current monthly income from earnings and retirement of about $3,100. 57/ The EPA argues that in considering his ability to pay, consideration must also be given to Caldwell's past earnings as an employee of SED and his future earnings potential. Past earnings which have been spent, however, are no longer available for payment of penalty, and cannot, therefore, be considered in ability to pay. Future earnings potential are relevant, because they can be a measure of one's borrowing capacity, which can be taken into account into determining ability to pay. 58/ I find that an appropriate penalty to be assessed in this case, given Caldwell's financial condition, is $35,000. No penalty is assessed against SED, Inc. because there is no evidence that SED has any assets with which to pay a penalty. Katzson Bros. Inc. v. United States Environmental Protection Agency, 839 F.2d 1396 (10th Cir. 1988).

57/ For Caldwell's net worth see RX 6. For his additional income as a part-time employee and from his retirement pension, see Tr. 167.

58/ They can also be relevant in assessing a penalty to be paid over time in installments, but that is a matter which apparently is one to be determined by the Regional Administrator and not by me. See National Coatings, Inc., RCRA (3008) Appeal No. 86-5 (January 22, 1988) at 19, n. 39.

ORDER 59/

Pursuant to § 16(a) of the Toxic Substances Control Act, 15 U.S.C. 2615(a), a civil penalty of $35,000, is hereby assessed against Respondent James B. Caldwell.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order by submitting a certified or cashier's check payable to the United States of America and mailed to:

EPA - Region 4
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

Gerald Harwood
Gerald Harwood
Chief Administrative Law Judge

DATED: December 8, 1988
Washington, D.C.

59/ Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. § 22.27(c).