

United States  
Environmental Protection  
Agency

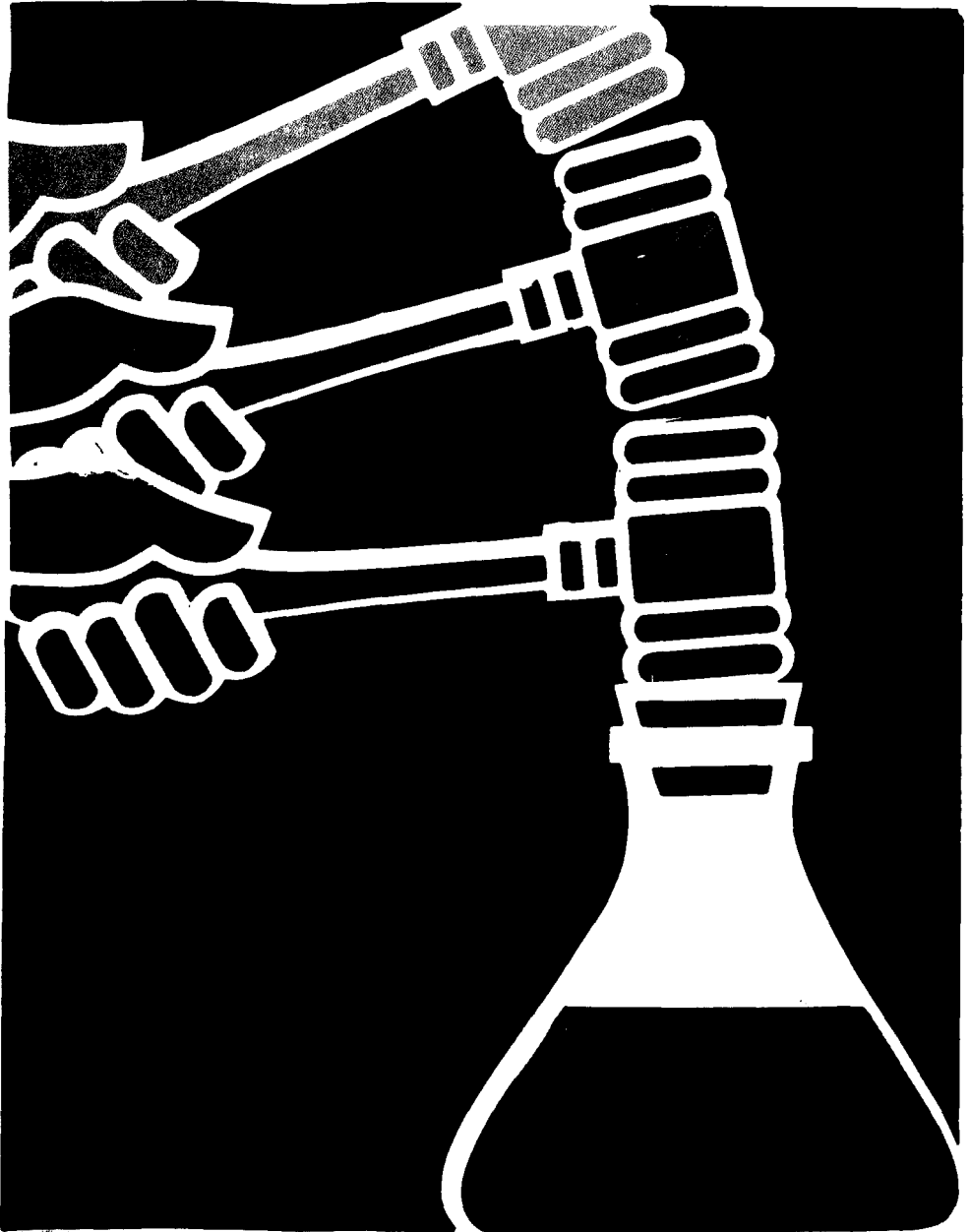
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# Toxic Substances. . . Enforcing the law



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Citizens concerned about toxic substances are joining together in communities all across the country in efforts to identify specific local problems that may be threatening their health and the environment. Identifying a specific problem is only the first step, however, and citizens discover that finding the best way to resolve it is a difficult and complex task.

There is a large body of local, state, and federal law governing toxic substances, but too often these laws do not seem to address the specific situation that has been identified. Determining the most fruitful course of action involves thoughtful and creative consideration of alternative remedies such as seeking an enforcement action under one or more of the existing statutes or applying public pressure in an attempt to get the problem resolved voluntarily. The most important consideration for citizens interested in an individual problem is to ensure that their energies are channeled in a direction that has the greatest possibility for results.

Although a remedy through enforcement action is often seen as the quickest and most obvious alternative solution to a toxics problem, concerned citizens are often frustrated when they meet what is apparent inaction on the part of government officials asked to respond to their problem. This brochure has been designed to help citizens understand the enforcement process, the constraints on this process, the opportunities for action enforcement may provide, and the ways in which citizens can participate in enforcement programs.

The focus of this brochure will be on enforcement of the federal Toxic Substances Control Act (TSCA), since TSCA clearly states the intent to prevent unreasonable risk of injury to health or the environment presented by exposure to toxic chemicals. Each environmental statute, however, presents comparable limitations and opportunities to consider when exploring the possibility of resolving a problem through enforcement action.

## **Overview of the Toxic Substances Control Act**

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The Toxic Substances Control Act (TSCA), Public Law 94-469, was enacted in 1976 to "regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances." TSCA was designed to correct the current lack of health and safety information about chemical substances and to prevent unreasonable risk of injury to health or the environment presented by exposure to toxic substances.

To carry out the mandate of TSCA, the U.S. Environmental Protection Agency (EPA) is authorized to obtain from industry data on the production, use, and health and environmental effects of chemical substances. If this information shows that controls are warranted, EPA may regulate the manufacture, processing, distribution in commerce, use, and disposal of a chemical substance.

TSCA is an extremely complex law. To help understand how TSCA works, it is useful to think of it in two phases. In the first phase, health and safety data is gathered and analyzed to determine the risks posed by a chemical. In the second phase, various controls can be placed on the manufacture, use, or distribution and sale of chemicals that have been found to pose a risk to health or the environment. These controls are based on the information gathered in the first phase.

There are several stages of information gathering during the first phase, and each chemical will be at a stage of investigation consistent with the current state of knowledge about its toxic effects. Agency experts expect to find that of the approximately 70,000 chemicals known to exist, roughly 1,000 are seriously toxic. EPA has classified many of these existing chemicals based on the amount of scientific data currently available. For some, the Agency will adopt test rules requiring industry to perform specific tests to determine health and safety risks because an inadequate amount of data currently exists. Such tests may take several years to perform. For other chemicals, the Agency has a significant amount of information regarding toxic effects but lacks sufficient data regarding the nature and extent to which people or the environment will be exposed to the chemical during its manufacture or use. EPA must obtain such exposure information before it can make a decision regarding appropriate controls. In other cases, much is known about risks and exposure, but an extensive analysis is needed to determine the best way to control the chemical without causing undue loss of jobs, shortage of consumer products, or other unwanted effects.

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The end result of this process is the development of a control regulation specifically designed for the individual chemical. Chemical control regulations can ban or restrict manufacture, impose quality control procedures for production, prohibit or restrict distribution in commerce, prohibit or restrict uses, and establish procedures for disposal of the chemical.

This two-phased approach applies to existing chemicals. However, if a company wants to begin manufacturing a new chemical or use an existing chemical in a significantly new way, the company must notify EPA in advance. The notice must include information about exposure and toxicity. The Agency reviews the information and decides whether the production or new use can be allowed, and if allowed, under what restrictions. This process helps ensure that new chemicals or uses will not be introduced unless their safety has been demonstrated and that any needed controls will be in place prior to production.

Each time the Agency proposes a rule to require the reporting of information or testing of a chemical, it must justify why the information is needed, including an analysis of the cost of obtaining it. Since chemical control regulations may result in significant changes in the industries which manufacture or use the chemical, the need for the regulations must be supported by extensive scientific, technical, and economic analyses.

The process of gathering data about a chemical, evaluating the risks, and designing a control regulation can take many years. The large number of chemicals that are potential candidates for control regulation has required the Agency to set priorities based on known or suspected degrees of risk as well as on the level of information that is currently available. Because of resource limitations, the Agency simply cannot work on all chemicals with the same degree of intensity at the same time.

Citizens hoping to use TSCA as a means for resolving an immediate local problem must first determine at what stage of this lengthy process the chemical in question lies. If they find that the chemical is under consideration for a testing rule or that the Agency has already asked industry for clear indication that a control regulation is a long way off and that some other statute may provide more immediate relief. By contrast, if a chemical control regulation is in place or under intensive development, TSCA may provide the strongest or most explicit remedy.

This is not to imply that there is no role for citizens under TSCA. There are a number of ways in which citizens can influence what happens: they can participate at all stages of the various rulemaking activities, petition for Agency action on a particular chemical, and assist in the enforcement of regulations that are in place. The possibilities for citizens participation in enforcement will be discussed in the remainder of this brochure.

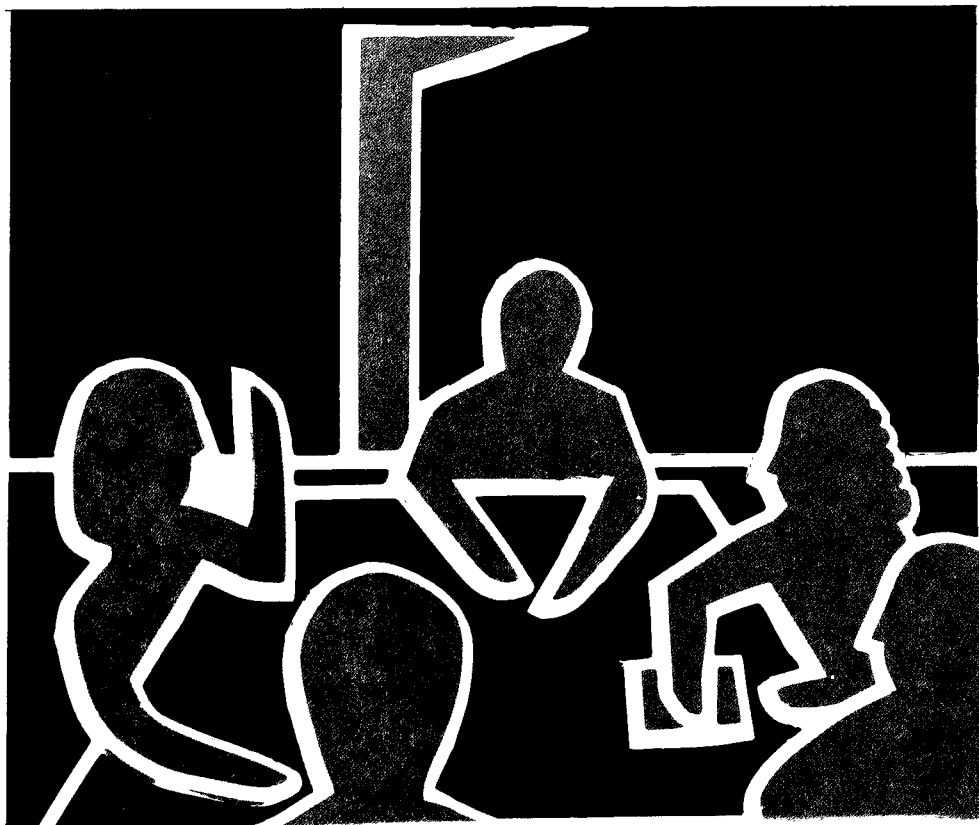
## **Enforcement Provisions of TSCA**

It is unlawful to fail or refuse to comply with rules, orders, and/or requirements of testing, premanufacture notification, or chemical control rules; to use for commercial purposes substances manufactured in violation of premanufacture notification, chemical control, or imminent hazard rules; or to fail or refuse to establish or maintain records or submit reports required by any rule under the Act.

Any person who violates TSCA is subject to a civil penalty of up to \$25,000 per day per violation. In determining the specific civil penalty to be applied against a violator, EPA must consider the nature, circumstances, and gravity of harm of the violation as well as factors concerning the financial and compliance status of the violator.

The statute also allows for civil court actions to provide for immediate injunctive relief to correct serious problems.

If a person knowingly or willfully violates the Act, he may receive a criminal fine of up to \$25,000 per day per violation and/or be imprisoned for up to one year.



## **The Enforcement Program**

### **Rulemaking Stage**

An important consideration in the drafting of a rule is ensuring that it is enforceable. EPA enforcement officials assist in drafting regulations to make sure that the requirements are sufficiently specific to tell the regulated community what is and is not lawful conduct under the regulation. During the drafting period, enforcement personnel begin outlining strategies for enforcing provisions of the draft rule. Various alternative means of detecting possible violations are explored, including how inspections could be used to monitor compliance. This exercise helps pinpoint possible deficiencies in the rule and is the first step in preparing for an enforcement program once the rule is adopted.

### **Enforcement Strategies**

As the rule passes from the draft to the proposed and then final regulation stages, the enforcement staff continues refining the enforcement strategy. Each enforcement strategy identifies the industry groups that will be affected by the rule, defines the ways in which the rule can potentially be violated, and the ways violations might be detected.

Since enforcement resources are limited, it would be impossible to inspect every facility subject to the rule. So that resources can be used most effectively, the strategy also attempts to direct compliance monitoring activities to segments of the regulated community which can be expected to have the strongest incentive to violate and/or whose violations will have the greatest effect on health or the environment. The result is a neutral administrative inspection scheme which provides for inspections of a pre-selected sampling from target groups. A portion of the inspection resources are reserved for response to complaints and emergency situations.

In addition, the strategy identifies ways to foster voluntary compliance with the requirements. Central to this part of the strategy is the design of a program to inform members of each affected industry of the requirements.

These strategies are developed for each rule proposed under TSCA. While rulemaking and strategy development are in progress, enforcement personnel review comments received from industry and the public, and attempt to address those which have an implication for enforcement.

Interested individuals who review proposed rules should analyze the potential for enforcement of the rule's provisions and include their concerns about enforcement in their comments. Such comments can be incorporated in the rule itself and the strategy for its enforcement. Enforcement strategies become public documents, and comments and suggestions from interested groups will be considered as the strategy is actually implemented.

## Enforcement Priority Setting

The level of overall TSCA enforcement activity is based on the resources available, determined through the budget process. The national budget ultimately reflects the relative priority of each environmental program the Agency administers, and then the relative priority of the Agency's entire program to other national programs such as defense, health and welfare, and education.

To arrive at priorities for enforcement of TSCA regulations, enforcement staff analyze the seriousness of the potential harm to human health or the environment if violations of a regulation should occur. Projections are made of the number of inspections that would be needed to provide minimum and maximum enforcement of each regulation in the budget year. The overall TSCA enforcement budget based on these projections competes with budgets from other Agency programs, including the budget from the Office of Toxic Substances which has primary responsibility for developing TSCA rules.

The proposed overall Agency budget is approved by the Office of Management and Budget and presented to Congress. The final national budget establishes relative priorities for meeting the country's many pressing problems.

## Compliance Monitoring

### Inspection Scheduling

Compliance monitoring activities begin once a regulation takes effect. Inspections are scheduled on the basis of the strategy and neutral administrative inspection scheme described earlier, or in response to a complaint or emergency situation.

It is important to remember the two phases of TSCA, because inspection activity related to the *data gathering* phase is different from that which takes place after a *chemical control* regulation has been adopted. The potential role for private citizens is different for each.

For the various data gathering rules, EPA is mostly concerned that complete, accurate data is being reported. Inspections to discover a failure to report or reporting of false or inaccurate data necessarily involve thorough review of company files and records. Such documents would not be available to people outside the firm itself, and there would even be limited access by the firm's own employees. EPA does encourage citizens who have reason to suspect reporting violations to inform the Agency, since tips are one good way for the Agency to learn about possible violations. However, it is recognized that only a limited number of individuals would be in a position to observe this kind of violation.

The potential for citizen or worker complaints is much greater for violations of chemical control rules, particularly those which involve the physical handling of the chemical (such as marking, storage, transportation, or disposal of the chemical). If a suspected violation is observed, the citizen should contact the appropriate EPA Regional office. It is important to provide as much information about the situation as possible so that EPA will be able to determine the appropriate response. (See sections below for suggestions on how to make a good complaint and for a list of EPA Regional offices.)

## TSCA Inspections

TSCA authorizes inspection of any facility where chemical substances or mixtures are manufactured, processed, stored, or held before or after distribution in commerce to ensure compliance with the Act and any rules or orders issued under the Act.

There are a number of procedural requirements that must be followed to ensure that the inspection has been conducted under proper authority and jurisdiction. If they are not carefully followed, it is possible that information collected during the inspection will be inadmissible in an administrative or civil court proceeding.





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To determine whether the company is complying with a TSCA rule or order, the inspector may review company records, perform a physical inspection of facility operations, and/or collect samples. If the inspector encounters a suspected violation, he or she must fully document the circumstances. This may involve such activities as photocopying relevant records, photographing the area, and taking samples of the chemical substance. Samples are sealed and sent to a laboratory, accompanied by a form which is signed by each person who handles the sample. This "chain of custody" procedure ensures that the sample has been under control at all times and that no one has tampered with it.

America's system of justice rests on the principle of due process, and this principle applies to enforcement of environmental laws just as it does to any other law. The findings on an inspection may result in economic (civil) penalties, or in extreme cases, criminal penalties being levied against violators. Adherence to procedural requirements during the inspection and at all subsequent stages of the enforcement process ensures that evidence is collected and handled properly and that the rights of the alleged violator are protected.

## **Enforcement Actions**

### **Routine Cases**

After the inspection, the inspector prepares a report on the inspection, attaching all pertinent documents, photographs, and laboratory analysis reports. The report is reviewed by EPA attorneys, assisted by technical experts, to determine whether violations were found and if there is sufficient evidence to prosecute an enforcement case. Then a decision is made about the kind of enforcement action to be taken, based on the seriousness of the violation.

For minor violations, such as "paper" or "technical" violations, a notice of noncompliance is usually issued. The notice informs the company of the condition that is in violation and tells the company what it must do to come into compliance.

For violations of a more serious nature, an administrative civil complaint is filed. The formal complaint states the part(s) of the law and regulations that have allegedly been violated and the facts which support the allegation(s). The complaint also specifies a proposed civil penalty amount to be levied against the violator. This amount is determined by applying the specific penalty policy for the TSCA rule violated; each penalty policy discusses how the nature, circumstances, and gravity of harm are to be considered for all the possible violations of the rule. The complaint may also propose specific actions that the company should take to correct the problem and a timetable for their completion.

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The case may be settled or resolved in several different ways. Since EPA seeks to correct the problem as soon as possible, attempts to settle the case early in the process are often desirable. Sometimes, negotiations take place between EPA and the company prior to a formal hearing, resulting in a settlement regarding the penalty and/or corrective action that will be taken. When the facts or the proposed penalty are in dispute, the case is heard by an administrative law judge who makes a preliminary decision on the facts and proposed remedies. The preliminary decision may be adjusted before a final order is issued, and the company may appeal the administrative decision to a federal District Court.

### **Imminent Hazard and Other Injunctive Relief Cases**

Sometimes an inspection reveals the existence of a serious situation which would present an irreparable harm to health or the environment if not corrected immediately. In such instances, EPA might ask the U.S. Department of Justice to seek a court order under the imminent hazard provision of TSCA to compel action to remedy the problem. To obtain this action from the U.S. District Court requires a strong degree of proof that damage is occurring or would occur if the situation were not corrected. EPA may also ask the District Court for seizure of the substance(s) involved.

Under another provision of TSCA, U.S. District Courts may stop a violation of or compel compliance with TSCA or any of its rules or orders. They may also seize any substances or articles containing substances manufactured, processed, or distributed in commerce in violation of the Act or its rules or orders.

### **Employee Protection**

TSCA contains an employee protection clause (Section 23). An employer may not discharge or otherwise discriminate against an employee who participates in a TSCA proceeding (such as by reporting possible violation). If an employee believes he has been discriminated against, he should file a complaint with the Secretary of Labor within 30 days of the discriminatory action.

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The mere existence of TSCA (and other toxics-related laws) does not automatically mean that citizens are now protected from the dangers of toxic substances. The regulatory process is lengthy and complex. Deciding the appropriate means for regulating a toxic chemical requires careful evaluation of the chemical itself and the impact of any controls proposed. Furthermore, enforcement of environmental laws and regulations involves more than simple implementation of the written requirements.

EPA's enforcement effort is subject to many influences and constraints. Each year, Congress establishes an enforcement budget after listening to the Agency's presentation of needs as well as the arguments of regulated industry and public interest groups. The enforcement budget competes with other Agency programs as well as other national programs. Consequently, the level of enforcement is linked to changing national priorities.

Because of its limited resources, EPA enforcement programs cannot monitor every potential violator of environmental laws and regulations. To make the best use of limited resources, enforcement strategies are designed which target compliance monitoring to those areas where it is expected to have the most impact. The enforcement actions which are taken as a result of these inspections are expected to have a dual impact: to bring the violating company into compliance and to serve notice to others of the need to comply or risk enforcement action.

In addition to financial constraints, the effectiveness of enforcement is hampered by the difficulties in gathering admissible evidence against violators which meets the standard of proof required. Procuring samples and linking them to a specific source presents many technical problems. And proving to the court that the chemical or problem in question causes actual or potential harm may be difficult because convincing data regarding health and environmental effects is largely unavailable.

Citizens concerned about a specific problem should explore several alternative strategies. In addition to considering TSCA and other federal statutes, citizens should investigate state statutes and local ordinances to determine if they might be applied to the problem. If one agency is unable to respond because of jurisdictional or other constraints, there may be another agency that could. In large agencies, individual departments may differ in their ability to help.

It is also important to seek relief outside of the legal system. Courts and bureaucracies move slowly; it may be advantageous to mount a public education campaign in addition to or instead of a legal battle. Such a campaign may put sufficient pressure on the company involved that it may resolve the situation voluntarily.

## **How to Make A Good Complaint.**

EPA assigns a high priority to citizen complaints. However, limited resources make it impossible to respond to every complaint, so complaints must be screened to determine if, when, and how the Agency will respond. Many times, when a complaint is filed, the information given is not sufficient for this screening to take place. In other cases, specific locations and descriptions are not given, making it impossible to investigate.

A complaint that is timely and contains detailed information has the best chance for successful investigation. To the extent that is possible, a person making a complaint regarding a suspected toxics violation should provide the information outlined below.

### **Background Information**

- Name and telephone number of the complainant (may be held confidential)
- Name, address, and telephone number of the company involved

- Type of business conducted by the company involved

### **Physical Description of the Problem**

- The exact location of the pollution
- The kind of material seen (e.g., liquid or solid)
- The color and odor of the material
- The length of time the problem has been going on

### **Human Exposure**

- Whether the complainant or any other person has been exposed
- Whether workers in the area are protected
- Whether the problem is in or near a residential area
- Whether the problem area is accessible to the public (e.g., no fence)

### **Environmental Harm Potential**

- Whether there is a barrier to contain the spill
- Whether there are further pollution possibilities (e.g., nearby waterways, wildlife, agricultural production)

## **Regional Contacts**

### **REGION 1**

Air Compliance Section  
JFK Federal Building  
Boston, MA 02203  
(617) 223-5610

### **REGION 2**

Toxic Substances Inspection  
Station  
26 Federal Plaza, Room 1009  
New York, NY 10007  
(212) 340-6669

### **REGION 3**

Environmental Emergency Branch  
Curtis Building, 6th and Walnut  
Philadelphia, PA. 19106  
(215) 597-9075

### **REGION 4**

Pesticides and Toxic Substances  
Branch  
345 Courtland St., N.E.  
Atlanta, GA. 30308  
(404) 257-3821

### **REGION 5**

Toxic Substances Office  
230 South Dearborn St.  
Chicago, IL 60604  
(312) 886-6002

### **REGION 6**

Compliance Monitoring Section  
First International Building  
1201 Elm St.  
Dallas, TX 75270  
(214) 729-2724

### **REGION 7**

Toxics and Pesticides Enforcement  
Section  
324 E. 11th St.  
Kansas City, MO. 64106  
(816) 758-3036

### **REGION 8**

Field Operations Section  
1860 Lincoln St.  
Denver, CO 80295  
(303) 327-4137

### **REGION 9**

Air and Hazardous Materials  
Branch, Enforcement Division  
215 Fremont St.  
San Francisco, CA 94105  
(415) 556-6150

### **REGION 10**

Enforcement Section  
1200 6th Ave.  
Seattle, WA 98101  
(206) 339-1090

### **EPA HEADQUARTERS**

Pesticides and Toxic Substances  
Enforcement Division  
401 M St., S.W. EN-342  
Washington, D.C. 20460  
(202) 755-0970