United States
Environmental Protection
Agency

EPA

Toxic Substances Control Act

Compliance/Enforcement Guidance Manual

Government Institutes, Inc.

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PUBLISHER'S NOTE

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This material was prepared by EPA's Pesticides and Toxic Substances Compliance Monitoring Staff and Office of Enforcement and Compliance Monitoring.

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Chapter One

Overview

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1 Purpose of the Manual

The purpose of this manual is to provide guidance to compliance/enforcement personnel on the substantive and procedural requirements necessary for ensuring compliance and preparing enforcement cases under the Toxic Substances Control Act (TSCA).

The manual describes the processes of case development and judicial proceedings including: analyzing evidence collected during a compliance inspection to determine its sufficiency in documenting a suspected violation; issuing an enforcement action; presenting evidence in an adjudicatory hearing; and monitoring compliance with consent decrees.

Reservation

The policies and procedures set forth herein and the internal office procedures adopted pursuant hereto are intended solely for the guidance of United States Environmental Protection Agency personnel. These policies and procedures are not intended to be relied upon to create a right or benefit (substantive or procedural) enforceable at law by a party to litigation with the United States Environmental Protection Agency. The Agency reserves the right to take any action that is alleged to be at variance with these policies and procedures or that is not in compliance with internal office procedures.

The Update System

As revised or additional material is developed for the manual, it will be distributed to all manual holders. A transmittal form will accompany and explain these changes. The revised or additional pages will be identical to the original page, but with added identification at the bottom of the page.

TSCA Compliance/Enforcement	Page	Guidance Manual (Year) Revised

When revisions entail the addition of pages into the manual (i.e., when three pages in the manual are replaced by five pages), the additional pages will be numbered as follows:

Original numbering: 3-3, 3-4, 3-5, 3-6, etc.
Addition of pages: 3-3, 3-4, 3-5a, 3-5b, 3-5c, 3-6, etc.

This system will allow updates to be made quickly and easily and will avoid disruption of the chapters. New material will be numbered sequentially by chapter.

Common Acronyms and Abbreviations Used in This Manual

CFC -- Chlorofluorocarbon (Fully Halogenated Chlorofluoroalkane)

C.F.R. -- Code of Federal Regulations

CROP -- Consolidated Rules of Practice

EPA -- United States Environmental Protection Agency

FATES -- FIFRA and TSCA Enforcement System

FDA -- Food and Drug Administration

HQCDO -- Headquarters Case Development Officer

NON -- Notice of Noncompliance

OECM -- Office of Enforcement and Compliance Monitoring

PCB -- Polychlorinated Biphenyl

PMN -- Premanufacture Notice

PTSCMS -- Pesticides and Toxic Substances Compliance Monitoring Staff

RCDO -- Regional Case Development Officer

TCDD -- Dioxin (Tetrachlorodibenzo-p-dioxin)

TSCA -- Toxic Substances Control Act

U.S.C. -- United States Code

2 Overview of the Act

The Toxic Substances Control Act, Public Law 94-469, was passed by Congress in 1976 to "regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances." The Act, referred to as "TSCA," became effective on January 1, 1977, and is codified at 15 U.S.C. §2601 et seq. Regulations promulgated pursuant to the Act are found at 40 C.F.R. Parts 702 through 775.

Purpose and Scope

TSCA was enacted to correct the lack of health and safety information that had previously existed concerning chemical substances and mixtures and to prevent unreasonable risk of injury to human health and the environment from harmful chemicals. The Act, therefore, is designed to:

- Ensure that industrial data on the production, use, and resultant health and environmental effects of chemical substances or mixtures are obtained by EPA so that the degree of risk associated with such substances or mixtures can reasonably be determined; and

- Provide (if this information shows that controls are warranted) the means by which EPA may regulate the manufacture, processing, distribution in commerce, use, and disposal of chemical substances or mixtures.

Excluded from the Act are:

- Pesticides (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as pesticides.

- Tobacco or tobacco products;

- Source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 and regulations issued under such Act);

- Articles whose sale is subject to the tax imposed by Section 4181 of the Internal Revenue Code of 1954 (firearms and ammunition); and

- Food, food additives, drugs, cosmetics, or devices (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act) when manufactured, processed, or distributed in commerce for use as food, food additives, drugs, cosmetics, or devices.

Authorities and Responsibilities

The Administrator of EPA is authorized to administer the Act in a reasonable and prudent manner, often considering the economic, social, and environmental costs and benefits of actions taken under TSCA. Within EPA, several offices are responsible for providing national guidance for TSCA compliance/enforcement activities. Chapter Two contains a discussion of these offices and their responsibilities.

Synopsis of the Act

TSCA authorizes the Administrator to establish regulations that govern testing of chemical substances and mixtures, premanufacture notification for new chemical substances or significant new uses of existing substances, chemical substances or mixtures that pose an imminent hazard, and record-keeping and reporting requirements. The Act also defines TSCA's relationship with other federal laws; authorizes research and development; and provides specific authorities for inspections, subpoenas, and injunctive relief. In addition, TSCA provides for the protection of confidential business information submitted to the Agency. These provisions of the Act are briefly reviewed below (from a compliance/enforcement perspective).

Testing of Chemical Substances and Mixtures (Section 4)

The Administrator may, by regulation, require the testing of new and existing chemical substances or mixtures that may present an unreasonable risk to human health or the environment if available data on such substances or mixtures is inadequate to determine the risk. The testing of chemical substances or mixtures may consist of health and environmental effects such as carcinogenesis, mutagenesis, teratogenesis, chronic toxicity, behavioral disorders, cumulative effects or synergistic effects, or other effects that may present an unreasonable risk of injury to human health or the environment. The Agency is to set and review the standards for the tests; manufacturers and processors of chemical substances or mixtures have the burden of performing the required tests.

Manufacturing and Processing Notices (Section 5)

Manufacturers of new chemical substances and manufacturers and processors of existing chemical substances for significant new uses must notify EPA 90 days before manufacturing or processing such substances. The notification should include the name, formula, uses, production volume, and other facts that the Agency may require. Any chemical substance not listed in the TSCA Chemical Substance Inventory [see Section 8(b) of the Act] is considered "new" under this section. (Mixtures are not covered under this requirement, and there are exemptions for small quantities of chemicals used for research.) The Agency may limit the production or even prohibit the manufacture, processing, or distribution of a chemical substance that presents--or that, in the absence of sufficient information on which to base a decision regarding environmental and human health effects, may present--an unreasonable risk of injury to human health or the environment.

Regulation of Hazardous Chemical Substances and Mixtures (Section 6)

Where there is a reasonable basis to conclude that a chemical substance or mixture presents or will present an unreasonable risk of injury to human health or the environment, the Administrator is empowered to take a wide variety of regulatory actions that:

- Prohibit or limit the manufacturing, processing, or distributing in commerce of such substance or mixture;
- Require, by labeling and other means, appropriate warnings and instructions with respect to the use, distribution in commerce, or disposal of the chemical substance or mixture;
- Require recordkeeping and testing of such substance or mixture;
- Regulate the manner of disposal of the substance or mixture;
- Direct manufacturers or processors of such substance or mixture to give notice of the unreasonable risk or to replace or repurchase the substance or mixture; or
- Impose quality control procedures.

Section 6 also regulates the use, distribution, manufacture, and processing of polychlorinated biphenyls (PCBs). PCBs are the only chemical substances that are specifically addressed in the Act.

Imminent Hazards (Section 7)

The Administrator may commence an action in an appropriate district court for the seizure and/or other immediate relief against an imminently hazardous chemical substance or mixture (which is defined as one that "presents an imminent and unreasonable risk of serious or widespread injury to health or the environment").

Reporting and Retention of Information (Section 8)

The Agency may require the submission and maintenance of records and reports necessary for the effective implementation of TSCA. Under Section 8(b) of the Act, EPA is required to compile and maintain an inventory of each chemical substance manufactured or processed in the United States. The initial TSCA Chemical Substance Inventory was published on June 1, 1979.

Section 8(c) requires any person who manufactures, processes, or distributes in commerce a chemical substance or mixture to maintain records of significant adverse reactions to human health or the environment alleged to have been caused by the substance or mixture. Section 8(e) requires immediate reporting of any information that reasonably supports the conclusion that a chemical substance or mixture presents a substantial risk of injury to human health or the environment.

Relationship to Other Federal Laws (Section 9)

If a chemical substance or mixture presents or may present an unreasonable risk of injury to human health or the environment and such risk may be prevented or reduced to a sufficient extent by an action taken under a federal law not administered by EPA, EPA may refer the matter to the agency that would administer that particular law. Actions taken by EPA under TSCA are to be coordinated with the other federal laws administered by the Agency. EPA is also required to coordinate with other federal agencies for purposes of TSCA enforcement.

Research and Development (Section 10)

EPA may, in consultation with other agencies, conduct or support research, development, and monitoring activities to carry out the purposes of the Act.

Inspections and Subpoenas (Section 11)

The Act authorizes, upon presentation of proper credentials and notice, the inspection of establishments, facilities, and other premises where chemical substances or mixtures are manufactured, processed, stored, held, or conveyed. The inspection may extend to all things within the premises or conveyance that bear on whether the requirements of the Act are complied with. Financial, sales, pricing, personnel, or research data may not be inspected unless specified in the notice of inspection. In carrying out the Act, the Administrator has the authority to subpoena witnesses and documents.

Exports and Imports (Sections 12 and 13)

TSCA authorizes the regulation of exported chemical substances or mixtures and articles containing chemical substances or mixtures if it can be shown that the substances, mixtures, or articles present an unreasonable risk of injury to health within the United States or the environment of the United States. EPA may also require the testing of any exported chemical substance or mixture to determine whether such a risk exists. Any person who exports, or intends to export, a chemical substance or mixture for which the submission of testing or premarket data is required must notify the Agency of such exportation or intent to export. Notification is also required if the exported substance or mixture is subject to a regulatory order or action. The Agency is responsible for notifying the governments of importing countries of any regulatory restrictions. The recordkeeping and reporting requirements of Section 8 apply to exports.

Imported chemical substances or mixtures and articles containing chemical substances or mixtures are subject to all the requirements of TSCA. The United States Treasury Department (U.S. Customs Service) is responsible for establishing, in cooperation with EPA, procedures to ensure compliance with the Act.

Disclosure of Data (Section 14)

This section of the Act provides for the protection from disclosure of any confidential business information, such as trade secrets and privileged financial data. Any health and safety studies that have been submitted under the Act may be subject to disclosure. EPA employees are subject to criminal penalties for the willful disclosure of confidential business information.

Prohibited Acts (Section 15)

It is unlawful for any person to:

- Fail or refuse to comply with any rule promulgated or order issued under Section 4, 5, or 6 of the Act, or any requirement prescribed by Section 5 or 6;
- Use for commercial purposes a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6, a rule or order under Section 5 or 6, or an order issued in an action brought under Section 5 or 7;
- Fail or refuse to establish or maintain records; submit reports, notices, or other information; or permit access to or copying of records, as required by the Act or a rule promulgated thereunder; or

- Fail or refuse to permit entry or inspection as required by Section 11.

Penalties (Section 16)

Any person who violates a provision of Section 15 is subject to a civil penalty of up to $25,000 for each violation. Each day such a violation continues constitutes a separate violation of Section 15.

Any person who knowingly or willfully violates any provision of Section 15 may, in addition to or in lieu of any civil penalty, be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.

Specific Enforcement and Seizure (Section 17)

The district courts of the United States have jurisdiction over civil actions for the following purposes:

- To restrain any violation of Section 15;
- To restrain any person from taking any action prohibited by Section 5 or 6 or by a rule or order issued under Section 5 or 6;
- To compel the taking of any action required by or under TSCA; and
- To direct any manufacturer or processor of a chemical substance or mixture manufactured or processed in violation of Section 5 or 6 or a rule or order issued under Section 5 or 6 and distributed in commerce to give notice of such fact to distributors, to give public notice of such risk of injury, and to either replace or repurchase such substance or mixture.

The Agency may also proceed against, by process of libel for seizure and condemnation, any chemical substance or mixture that was manufactured, processed, or distributed in commerce in violation of TSCA or any rule promulgated or order issued under the Act or any article containing such a substance or mixture. Such an action may be brought in any district court of the United States in which such substance, mixture, or article is found.

Pre-emption (Section 18)

A state, or political subdivision of a state, is pre-empted from regulating toxic substances in two circumstances. First, no state may establish or retain any requirement for testing chemical substances or mixtures that is similar to a requirement promulgated under Section 4 of TSCA. Second, no state may establish or retain a rule regulating chemical substances or mixtures that are subject to a Section 5 or 6 rule or order [other than a rule under Section 6(a)(6)] unless the state or local law (1) is identical

to the requirement prescribed by the Administrator, (2) is adopted pursuant to another federal law, or (3) prohibits the end use of such substances or mixtures on that state or political subdivision.

Section 8(b) establishes a procedure in which a state, or political subdivision of a state, may petition the Administrator for an exemption from those situations where pre-emption would apply.

Judicial Review (Section 19)

Not later that 60 days after the date of the promulgation of a rule under Section 4(a), 5(a)(2), 5(b)(4), 6(a), 6(e), or 8, any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or the circuit in which the person resides or has his or her principal place of business.

Citizens' Civil Actions (Section 20)

Subject to certain limitations, any person may commence a civil action against:

- Any person who is alleged to be in violation of TSCA or any rule promulgated under Section 4, 5, or 6 or order issued under Section 5 to restrain such violation; or
- The Administrator to compel the Administrator to perform any non-discretionary act or duty under TSCA.

Attorney's fees and other court costs may be awarded if it is determined by the court that such an award is appropriate.

Citizens' Petitions (Section 21)

This section of the Act contains the procedures by which a person may petition the Administrator to initiate a proceeding for the issuance, amendment, or repeal of a rule under Section 4, 6, or 8 or an order under Section 5(e) or 6(b)(2).

National Defense Waiver (Section 22)

The Administrator must waive compliance with any provision of TSCA upon a request and determination by the President that the requested waiver is necessary in the interest of national defense.

State Programs (Section 28)

For the purpose of complementing (but not reducing) the authority of, or actions taken by, the Administrator under TSCA, the Administrator may make

grants to states for the establishment and operation of toxic substances programs. Such programs are intended to prevent or eliminate unreasonable risks to human health or the environment associated with a chemical substance or mixture within the states.

3 Toxic Substances Control Act

THE TOXIC SUBSTANCES CONTROL ACT
(PL 94-469; Enacted by Congress September 28, 1976 and Signed by the President October 11, 1976; Amended by PL 97-129, December 29, 1981)

Public Law 94–469
94th Congress

An Act

To regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

This Act may be cited as the "Toxic Substances Control Act".

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SEC. 2. FINDINGS, POLICY, AND INTENT.

(a) FINDINGS.—The Congress finds that—

(1) human beings and the environment are being exposed each year to a large number of chemical substances and mixtures;

(2) among the many chemical substances and mixtures which are constantly being developed and produced, there are some

whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk of injury to health or the environment; and

(3) the effective regulation of interstate commerce in such chemical substances and mixtures also necessitates the regulation of intrastate commerce in such chemical substances and mixtures.

(b) POLICY.—It is the policy of the United States that—

(1) adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures;

(2) adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards; and

(3) authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this Act to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.

(c) INTENT OF CONGRESS.—It is the intent of Congress that the Administrator shall carry out this Act in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this Act.

SEC. 3. DEFINITIONS.

15 USC 2602.

As used in this Act:

(1) the term "Administrator" means the Administrator of the Environmental Protection Agency.

(2)(A) Except as provided in subparagraph (B), the term "chemical substance" means any organic or inorganic substance of a particular molecular identity, including—

(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and

(ii) any element or uncombined radical.

(B) Such term does not include—

(i) any mixture,

(ii) any pesticide (as defined in the Federal Insecticide, Fungicide, and Rodenticide Act) when manufactured, processed, or distributed in commerce for use as a pesticide,

7 USC 136 note.

(iii) tobacco or any tobacco product,

(iv) any source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 and regulations issued under such Act),

42 USC 2011 note.

(v) any article the sale of which is subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 (determined without regard to any exemptions from such tax provided by section 4182 or 4221 or any other provision of such Code), and

26 USC 4181.

26 USC 4182, 4221.

(vi) any food, food additive, drug, cosmetic, or device (as such terms are defined in section 201 of the Federal Food, Drug, and Cosmetic Act) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device.

21 USC 321.

The term "food" as used in clause (vi) of this subparagraph includes poultry and poultry products (as defined in sections 4(e) and 4(f) of the Poultry Products Inspection Act), meat and meat food prod-

21 USC 453.

ucts (as defined in section 1(j) of the Federal Meat Inspection Act), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act). 21 USC 601. 21 USC 1033.

(3) The term "commerce" means trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, transportation, or commerce described in clause (A).

(4) The terms "distribute in commerce" and "distribution in commerce" when used to describe an action taken with respect to a chemical substance or mixture or article containing a substance or mixture mean to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction into commerce, or the introduction or delivery for introduction into commerce of, the substance, mixture, or article; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce.

(5) The term "environment" includes water, air, and land and the interrelationship which exists among and between water, air, and land and all living things.

(6) The term "health and safety study" means any study of any effect of a chemical substance or mixture on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a chemical substance or mixture, toxicological, clinical, and ecological studies of a chemical substance or mixture, and any test performed pursuant to this Act.

(7) The term "manufacture" means to import into the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States), produce, or manufacture. 19 USC 1202.

(8) The term "mixture" means any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined.

(9) The term "new chemical substance" means any chemical substance which is not included in the chemical substance list compiled and published under section 8(b).

(10) The term "process" means the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce—

(A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or

(B) as part of an article containing the chemical substance or mixture.

(11) The term "processor" means any person who processes a chemical substance or mixture.

(12) The term "standards for the development of test data" means a prescription of—

(A) the—

(i) health and environmental effects, and

(ii) information relating to toxicity, persistence, and other characteristics which affect health and the environment,

for which test data for a chemical substance or mixture are to be developed and any analysis that is to be performed on such data, and

(B) to the extent necessary to assure that data respecting such effects and characteristics are reliable and adequate—

(i) the manner in which such data are to be developed,

(ii) the specification of any test protocol or methodology to be employed in the development of such data, and

(iii) such other requirements as are necessary to provide such assurance.

(13) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, American Samoa, the Northern Mariana Islands, or any other territory or possession of the United States.

(14) The term "United States", when used in the geographic sense, means all of the States.

SEC. 4. TESTING OF CHEMICAL SUBSTANCES AND MIXTURES.

15 USC 2603.

(a) TESTING REQUIREMENTS.—If the Administrator finds that—

(1)(A)(i) the manufacture, distribution in commerce, processing, use, or disposal of a chemical substance or mixture, or that any combination of such activities, may present an unreasonable risk of injury to health or the environment,

(ii) there are insufficient data and experience upon which the effects of such manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture or of any combination of such activities on health or the environment can reasonably be determined or predicted, and

(iii) testing of such substance or mixture with respect to such effects is necessary to develop such data; or

(B)(i) a chemical substance or mixture is or will be produced in substantial quantities, and (I) it enters or may reasonably be anticipated to enter the environment in substantial quantities or (II) there is or may be significant or substantial human exposure to such substance or mixture,

(ii) there are insufficient data and experience upon which the effects of the manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture or of any combination of such activities on health or the environment can reasonably be determined or predicted, and

(iii) testing of such substance or mixture with respect to such effects is necessary to develop such data; and

(2) in the case of a mixture, the effects which the mixture's manufacture, distribution in commerce, processing, use, or disposal or any combination of such activities may have on health or the environment may not be reasonably and more efficiently determined or predicted by testing the chemical substances which comprise the mixture;

Rules.

the Administrator shall by rule require that testing be conducted on such substance or mixture to develop data with respect to the health and environmental effects for which there is an insufficiency of data and experience and which are relevant to a determination that the manufacture, distribution in commerce, processing, use, or disposal of such substance or mixture, or that any combination of such activities, does or does not present an unreasonable risk of injury to health or the environment.

(b)(1) TESTING REQUIREMENT RULE.—A rule under subsection (a) shall include—

(A) identification of the chemical substance or mixture for which testing is required under the rule,

Standards for development of test data.

(B) standards for the development of test data for such substance or mixture, and

Data, submittal to Administrator.

(C) with respect to chemical substances which are not new chemical substances and to mixtures, a specification of the period (which period may not be of unreasonable duration) within which the persons required to conduct the testing shall submit to

the Administrator data developed in accordance with the standards referred to in subparagraph (B).

In determining the standards and period to be included, pursuant to subparagraphs (B) and (C), in a rule under subsection (a), the Administrator's considerations shall include the relative costs of the various test protocols and methodologies which may be required under the rule and the reasonably foreseeable availability of the facilities and personnel needed to perform the testing required under the rule. Any such rule may require the submission to the Administrator of preliminary data during the period prescribed under subparagraph (C).

(2)(A) The health and environmental effects for which standards for the development of test data may be prescribed include carcinogenesis, mutagenesis, teratogenesis, behavioral disorders, cumulative or synergistic effects, and any other effect which may present an unreasonable risk of injury to health or the environment. The characteristics of chemical substances and mixtures for which such standards may be prescribed include persistence, acute toxicity, subacute toxicity, chronic toxicity, and any other characteristic which may present such a risk. The methodologies that may be prescribed in such standards include epidemiologic studies, serial or hierarchical tests, in vitro tests, and whole animal tests, except that before prescribing epidemiologic studies of employees, the Administrator shall consult with the Director of the National Institute for Occupational Safety and Health.

Review of standards.

(B) From time to time, but not less than once each 12 months, the Administrator shall review the adequacy of the standards for development of data prescribed in rules under subsection (a) and shall, if necessary, institute proceedings to make appropriate revisions of such standards.

(3)(A) A rule under subsection (a) respecting a chemical substance or mixture shall require the persons described in subparagraph (B) to conduct tests and submit data to the Administrator on such substance or mixture, except that the Administrator may permit two or more of such persons to designate one such person or a qualified third party to conduct such tests and submit such data on behalf of the persons making the designation.

(B) The following persons shall be required to conduct tests and submit data on a chemical substance or mixture subject to a rule under subsection (a):

(i) Each person who manufactures or intends to manufacture such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) with respect to the manufacture of such substance or mixture.

(ii) Each person who processes or intends to process such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) with respect to the processing of such substance or mixture.

(iii) Each person who manufactures or processes or intends to manufacture or process such substance or mixture if the Administrator makes a finding described in subsection (a)(1)(A)(ii) or (a)(1)(B)(ii) with respect to the distribution in commerce, use, or disposal of such substance or mixture.

(4) Any rule under subsection (a) requiring the testing of and submission of data for a particular chemical substance or mixture shall expire at the end of the reimbursement period (as defined in subsection (c)(3)(B)) which is applicable to test data for such substance or mixture unless the Administrator repeals the rule before such date; and a rule under subsection (a) requiring the testing of and submission of data for a category of chemical substances or mixtures shall expire with respect to a chemical substance or mixture included in the category at the end of the reimbursement period (as so defined) which is applicable to test data for such substance or mixture unless the Admin-

istrator before such date repeals the application of the rule to such substance or mixture or repeals the rule.

(5) Rules issued under subsection (a) (and any substantive amendment thereto or repeal thereof) shall be promulgated pursuant to section 553 of title 5, United States Code, except that (A) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (B) a transcript shall be made of any oral presentation; and (C) the Administrator shall make and publish with the rule the findings described in paragraph (1)(A) or (1)(B) of subsection (a) and, in the case of a rule respecting a mixture, the finding described in paragraph (2) of such subsection.

Oral presentation and written submissions.
Transcript.
Publication.

(c) EXEMPTION.—(1) Any person required by a rule under subsection (a) to conduct tests and submit data on a chemical substance or mixture may apply to the Administrator (in such form and manner as the Administrator shall prescribe) for an exemption from such requirement.

Application.

(2) If, upon receipt of an application under paragraph (1), the Administrator determines that—

(A) the chemical substance or mixture with respect to which such application was submitted is equivalent to a chemical substance or mixture for which data has been submitted to the Administrator in accordance with a rule under subsection (a) or for which data is being developed pursuant to such a rule, and

(B) submission of data by the applicant on such substance or mixture would be duplicative of data which has been submitted to the Administrator in accordance with such rule or which is being developed pursuant to such rule,

the Administrator shall exempt, in accordance with paragraph (3) or (4), the applicant from conducting tests and submitting data on such substance or mixture under the rule with respect to which such application was submitted.

(3)(A) If the exemption under paragraph (2) of any person from the requirement to conduct tests and submit test data on a chemical substance or mixture is granted on the basis of the existence of previously submitted test data and if such exemption is granted during the reimbursement period for such test data (as prescribed by subparagraph (B)), then (unless such person and the persons referred to in clauses (i) and (ii) agree on the amount and method of reimbursement) the Administrator shall order the person granted the exemption to provide fair and equitable reimbursement (in an amount determined under rules of the Administrator)—

Fair and equitable reimbursement.

(i) to the person who previously submitted such test data, for a portion of the costs incurred by such person in complying with the requirement to submit such data, and

(ii) to any other person who has been required under this subparagraph to contribute with respect to such costs, for a portion of the amount such person was required to contribute.

Rules.

In promulgating rules for the determination of fair and equitable reimbursement to the persons described in clauses (i) and (ii) for costs incurred with respect to a chemical substance or mixture, the Administrator shall, after consultation with the Attorney General and the Federal Trade Commission, consider all relevant factors, including the effect on the competitive position of the person required to provide reimbursement in relation to the person to be reimbursed and the share of the market for such substance or mixture of the person required to provide reimbursement in relation to the share of such market of the persons to be reimbursed. An order under this subparagraph shall, for purposes of judicial review, be considered final agency action.

(B) For purposes of subparagraph (A), the reimbursement period for any test data for a chemical substance or mixture is a period— Reimbursement period.

(i) beginning on the date such data is submitted in accordance with a rule promulgated under subsection (a), and

(ii) ending—

(I) five years after the date referred to in clause (i), or

(II) at the expiration of a period which begins on the date referred to in clause (i) and which is equal to the period which the Administrator determines was necessary to develop such data,

whichever is later.

(4)(A) If the exemption under paragraph (2) of any person from the requirement to conduct tests and submit test data on a chemical substance or mixture is granted on the basis of the fact that test data is being developed by one or more persons pursuant to a rule promulgated under subsection (a), then (unless such person and the persons referred to in clauses (i) and (ii) agree on the amount and method of reimbursement) the Administrator shall order the person granted the exemption to provide fair and equitable reimbursement (in an amount determined under rules of the Administrator)—

(i) to each such person who is developing such test data, for a portion of the costs incurred by each such person in complying with such rule, and

(ii) to any other person who has been required under this subparagraph to contribute with respect to the costs of complying with such rule, for a portion of the amount such person was required to contribute.

In promulgating rules for the determination of fair and equitable reimbursement to the persons described in clauses (i) and (ii) for costs incurred with respect to a chemical substance or mixture, the Administrator shall, after consultation with the Attorney General and the Federal Trade Commission, consider the factors described in the second sentence of paragraph (3)(A). An order under this subparagraph shall, for purposes of judicial review, be considered final agency action.

(B) If any exemption is granted under paragraph (2) on the basis of the fact that one or more persons are developing test data pursuant to a rule promulgated under subsection (a) and if after such exemption is granted the Administrator determines that no such person has complied with such rule, the Administrator shall (i) after providing written notice to the person who holds such exemption and an opportunity for a hearing, by order terminate such exemption, and (ii) notify in writing such person of the requirements of the rule with respect to which such exemption was granted.

(d) NOTICE.—Upon the receipt of any test data pursuant to a rule under subsection (a), the Administrator shall publish a notice of the receipt of such data in the Federal Register within 15 days of its receipt. Subject to section 14, each such notice shall (1) identify the chemical substance or mixture for which data have been received; (2) list the uses or intended uses of such substance or mixture and the information required by the applicable standards for the development of test data; and (3) describe the nature of the test data developed. Except as otherwise provided in section 14, such data shall be made available by the Administrator for examination by any person. Publication in Federal Register.

(e) PRIORITY LIST.—(1)(A) There is established a committee to make recommendations to the Administrator respecting the chemical substances and mixtures to which the Administrator should give priority consideration for the promulgation of a rule under subsection (a). In making such a recommendation with respect to any chem- Committee to make recommendations to Administrator.

ical substance or mixture, the committee shall consider all relevant factors, including—

(i) the quantities in which the substance or mixture is or will be manufactured,

(ii) the quantities in which the substance or mixture enters or will enter the environment,

(iii) the number of individuals who are or will be exposed to the substance or mixture in their places of employment and the duration of such exposure,

(iv) the extent to which human beings are or will be exposed to the substance or mixture,

(v) the extent to which the substance or mixture is closely related to a chemical substance or mixture which is known to present an unreasonable risk of injury to health or the environment,

(vi) the existence of data concerning the effects of the substance or mixture on health or the environment,

(vii) the extent to which testing of the substance or mixture may result in the development of data upon which the effects of the substance or mixture on health or the environment can reasonably be determined or predicted, and

(viii) the reasonably foreseeable availability of facilities and personnel for performing testing on the substance or mixture.

Recommendations, list of chemical substances and mixtures.

The recommendations of the committee shall be in the form of a list of chemical substances and mixtures which shall be set forth, either by individual substance or mixture or by groups of substances or mixtures, in the order in which the committee determines the Administrator should take action under subsection (a) with respect to the substances and mixtures. In establishing such list, the committee shall give priority attention to those chemical substances and mixtures which are known to cause or contribute to or which are suspected of causing or contributing to cancer, gene mutations, or birth defects. The committee shall designate chemical substances and mixtures on the list with respect to which the committee determines the Administrator should, within 12 months of the date on which such substances and mixtures are first designated, initiate a proceeding under subsection (a). The total number of chemical substances and mixtures on the list which are designated under the preceding sentence may not, at any time, exceed 50.

Publication in Federal Register; transmittal to Administrator.

(B) As soon as practicable but not later than nine months after the effective date of this Act, the committee shall publish in the Federal Register and transmit to the Administrator the list and designations required by subparagraph (A) together with the reasons for the committee's inclusion of each chemical substance or mixture on the list. At least every six months after the date of the transmission to the Administrator of the list pursuant to the preceeding sentence, the committee shall make such revisions in the list as it determines to be necessary and shall transmit them to the Administrator together with the committee's reasons for the revisions. Upon receipt of any such revision,

List revision, publication in Federal Register.

the Administrator shall publish in the Federal Register the list with such revision, the reasons for such revision, and the designations made under subparagraph (A).

Comments.

The Administrator shall provide reasonable opportunity to any interested person to file with the Administrator written comments on the committee's list, any revision of such list by the committee, and designations made by the committee, and shall make such comments available to the public.

Publication in Federal Register.

Within the 12-month period beginning on the date of the first inclusion on the list of a chemical substance or mixture designated by the committee under subparagraph (A) the Administrator shall with respect to such chemical substance or mixture either initiate a rulemaking proceeding under subsection (a) or if such a proceeding is not initiated within such

period, publish in the Federal Register the Administrator's reason for not initiating such a proceeding.

(2)(A) The committee established by paragraph (1)(A) shall consist of eight members as follows: Membership.

(i) One member appointed by the Administrator from the Environmental Protection Agency.

(ii) One member appointed by the Secretary of Labor from officers or employees of the Department of Labor engaged in the Secretary's activities under the Occupational Safety and Health Act of 1970.

(iii) One member appointed by the Chairman of the Council on Environmental Quality from the Council or its officers or employees.

(iv) One member appointed by the Director of the National Institute for Occupational Safety and Health from officers or employees of the Institute.

(v) One member appointed by the Director of the National Institute of Environmental Health Sciences from officers or employees of the Institute.

(vi) One member appointed by the Director of the National Cancer Institute from officers or employees of the Institute.

(vii) One member appointed by the Director of the National Science Foundation from officers or employees of the Foundation.

(viii) One member appointed by the Secretary of Commerce from officers or employees of the Department of Commerce.

(B)(i) An appointed member may designate an individual to serve on the committee on the member's behalf. Such a designation may be made only with the approval of the applicable appointing authority and only if the individual is from the entity from which the member was appointed.

(ii) No individual may serve as a member of the committee for more than four years in the aggregate. If any member of the committee leaves the entity from which the member was appointed, such member may not continue as a member of the committee, and the member's position shall be considered to be vacant. A vacancy in the committee shall be filled in the same manner in which the original appointment was made.

(iii) Initial appointments to the committee shall be made not later than the 60th day after the effective date of this Act. Not later than the 90th day after such date the members of the committee shall hold a meeting for the selection of a chairperson from among their number.

(C)(i) No member of the committee, or designee of such member, shall accept employment or compensation from any person subject to any requirement of this Act or of any rule promulgated or order issued thereunder, for a period of at least 12 months after termination of service on the committee.

(ii) No person, while serving as a member of the committee, or designee of such member, may own any stocks or bonds, or have any pecuniary interest, of substantial value in any person engaged in the manufacture, processing, or distribution in commerce of any chemical substance or mixture subject to any requirement of this Act or of any rule promulgated or order issued thereunder.

(iii) The Administrator, acting through attorneys of the Environmental Protection Agency, or the Attorney General may bring an action in the appropriate district court of the United States to restrain any violation of this subparagraph.

(D) The Administrator shall provide the committee such administrative support services as may be necessary to enable the committee to carry out its function under this subsection.

(f) REQUIRED ACTIONS.—Upon the receipt of—

(1) any test data required to be submitted under this Act, or

(2) any other information available to the Administrator,

which indicates to the Administrator that there may be a reasonable basis to conclude that a chemical substance or mixture presents or will present a significant risk of serious or widespread harm to human beings from cancer, gene mutations, or birth defects, the Administrator shall, within the 180-day period beginning on the date of the receipt of such data or information, initiate appropriate action under section 5, 6, or 7 to prevent or reduce to a sufficient extent such risk or publish in the Federal Register a finding that such risk is not unreasonable. For good cause shown the Administrator may extend such period for an additional period of not more than 90 days. The Administrator shall publish in the Federal Register notice of any such extension and the reasons therefor. A finding by the Administrator that a risk is not unreasonable shall be considered agency action for purposes of judicial review under chapter 7 of title 5, United States Code. This subsection shall not take effect until two years after the effective date of this Act.

Publication in Federal Register.

5 USC 701.

(g) PETITION FOR STANDARDS FOR THE DEVELOPMENT OF TEST DATA.—A person intending to manufacture or process a chemical substance for which notice is required under section 5(a) and who is not required under a rule under subsection (a) to conduct tests and submit data on such substance may petition the Administrator to prescribe standards for the development of test data for such substance. The Administrator shall by order either grant or deny any such petition within 60 days of its receipt. If the petition is granted, the Administrator shall prescribe such standards for such substance within 75 days of the date the petition is granted. If the petition is denied, the Administrator shall publish, subject to section 14, in the Federal Register the reasons for such denial.

Infra.

Publication in Federal Register.

SEC. 5. MANUFACTURING AND PROCESSING NOTICES.

15 USC 2604.

(a) IN GENERAL.—(1) Except as provided in subsection (h), no person may—

(A) manufacture a new chemical substance on or after the 30th day after the date on which the Administrator first publishes the list required by section 8(b), or

(B) manufacture or process any chemical substance for a use which the Administrator has determined, in accordance with paragraph (2), is a significant new use,

unless such person submits to the Administrator, at least 90 days before such manufacture or processing, a notice, in accordance with subsection (d), of such person's intention to manufacture or process such substance and such person complies with any applicable requirement of subsection (b).

(2) A determination by the Administrator that a use of a chemical substance is a significant new use with respect to which notification is required under paragraph (1) shall be made by a rule promulgated after a consideration of all relevant factors, including—

(A) the projected volume of manufacturing and processing of a chemical substance,

(B) the extent to which a use changes the type or form of exposure of human beings or the environment to a chemical substance,

(C) the extent to which a use increases the magnitude and duration of exposure of human beings or the environment to a chemical substance, and

(D) the reasonably anticipated manner and methods of manufacturing, processing, distribution in commerce, and disposal of a chemical substance.

(b) SUBMISSION OF TEST DATA.—(1)(A) If (i) a person is required by subsection (a)(1) to submit a notice to the Administrator before beginning the manufacture or processing of a chemical substance, and (ii) such person is required to submit test data for such sub-

stance pursuant to a rule promulgated under section 4 before the submission of such notice, such person shall submit to the Administrator such data in accordance with such rule at the time notice is submitted in accordance with subsection (a)(1).

(B) If—

(i) a person is required by subsection (a)(1) to submit a notice to the Administrator, and

(ii) such person has been granted an exemption under section 4(c) from the requirements of a rule promulgated under section 4 before the submission of such notice,

such person may not, before the expiration of the 90 day period which begins on the date of the submission in accordance with such rule of the test data the submission or development of which was the basis for the exemption, manufacture such substance if such person is subject to subsection (a)(1)(A) or manufacture or process such substance for a significant new use if the person is subject to subsection (a)(1)(B).

(2)(A) If a person—

(i) is required by subsection (a)(1) to submit a notice to the Administrator before beginning the manufacture or processing of a chemical substance listed under paragraph (4), and

(ii) is not required by a rule promulgated under section 4 before the submission of such notice to submit test data for such substance,

such person shall submit to the Administrator data prescribed by subparagraph (B) at the time notice is submitted in accordance with subsection (a)(1).

(B) Data submitted pursuant to subparagraph (A) shall be data which the person submitting the data believes show that—

(i) in the case of a substance with respect to which notice is required under subsection (a)(1)(A), the manufacture, processing, distribution in commerce, use, and disposal of the chemical substance or any combination of such activities will not present an unreasonable risk of injury to health or the environment, or

(ii) in the case of a chemical substance with respect to which notice is required under subsection (a)(1)(B), the intended significant new use of the chemical substance will not present an unreasonable risk of injury to health or the environment.

(3) Data submitted under paragraph (1) or (2) shall be made available, subject to section 14, for examination by interested persons.

(4)(A)(i) The Administrator may, by rule, compile and keep current a list of chemical substances with respect to which the Administrator finds that the manufacture, processing, distribution in commerce, use, or disposal, or any combination of such activities, presents or may present an unreasonable risk of injury to health or the environment.

(ii) In making a finding under clause (i) that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or any combination of such activities presents or may present an unreasonable risk of injury to health or the environment, the Administrator shall consider all relevant factors, including—

(I) the effects of the chemical substance on health and the magnitude of human exposure to such substance; and

(II) the effects of the chemical substance on the environment and the magnitude of environmental exposure to such substance.

(B) The Administrator shall, in prescribing a rule under subparagraph (A) which lists any chemical substance, identify those uses, if any, which the Administrator determines, by rule under subsection (a)(2), would constitute a significant new use of such substance.

(C) Any rule under subparagraph (A), and any substantive amendment or repeal of such a rule, shall be promulgated pursuant

Oral presentation. Transcript. Publication.

to the procedures specified in section 553 of title 5, United States Code, except that (i) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions, (ii) a transcript shall be kept of any oral presentation, and (iii) the Administrator shall make and publish with the rule the finding described in subparagraph (A).

(c) EXTENSION OF NOTICE PERIOD.—The Administrator may for good cause extend for additional periods (not to exceed in the aggregate 90 days) the period, prescribed by subsection (a) or (b) before which the manufacturing or processing of a chemical substance subject to such subsection may begin. Subject to section 14, such an extension and the reasons therefor shall be published in the Federal Register and shall constitute a final agency action subject to judicial review.

Publication in Federal Register.

(d) CONTENT OF NOTICE; PUBLICATIONS IN THE FEDERAL REGISTER.—(1) The notice required by subsection (a) shall include—

(A) insofar as known to the person submitting the notice or insofar as reasonably ascertainable, the information described in subparagraphs (A), (B), (C), (D), (F), and (G) of section 8(a)(2), and

(B) in such form and manner as the Administrator may prescribe, any test data in the possession or control of the person giving such notice which are related to the effect of any manufacture, processing, distribution in commerce, use, or disposal of such substance or any article containing such substance, or of any combination of such activities, on health or the environment, and

(C) a description of any other data concerning the environmental and health effects of such substance, insofar as known to the person making the notice or insofar as reasonably ascertainable.

Such a notice shall be made available, subject to section 14, for examination by interested persons.

(2) Subject to section 14, not later than five days (excluding Saturdays, Sundays and legal holidays) after the date of the receipt of a notice under subsection (a) or of data under subsection (b), the Administrator shall publish in the Federal Register a notice which—

(A) identifies the chemical substance for which notice or data has been received;

(B) lists the uses or intended uses of such substance; and

(C) in the case of the receipt of data under subsection (b), describes the nature of the tests performed on such substance and any data which was developed pursuant to subsection (b) or a rule under section 4.

A notice under this paragraph respecting a chemical substance shall identify the chemical substance by generic class unless the Administrator determines that more specific identification is required in the public interest.

(3) At the beginning of each month the Administrator shall publish a list in the Federal Register of (A) each chemical substance for which notice has been received under subsection (a) and for which the notification period prescribed by subsection (a), (b), or (c) has not expired, and (B) each chemical substance for which such notification period has expired since the last publication in the Federal Register of such list.

(e) REGULATION PENDING DEVELOPMENT OF INFORMATION.—(1)(A) If the Administrator determines that—

(i) the information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of a chemical substance with respect to which notice is required by subsection (a); and

(ii)(I) in the absence of sufficient information to permit the Administrator to make such an evaluation, the manufacture, processing, distribution in commerce, use, or disposal of such substance, or any combination of such activities, may present an unreasonable risk of injury to health or the environment, or

(II) such substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance,

the Administrator may issue a proposed order, to take effect on the expiration of the notification period applicable to the manufacturing or processing of such substance under subsection (a), (b), or (c), to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of such substance or to prohibit or limit any combination of such activities. Proposed order.

(B) A proposed order may not be issued under subparagraph (A) respecting a chemical substance (i) later than 45 days before the expiration of the notification period applicable to the manufacture or processing of such substance under subsection (a), (b), or (c), and (ii) unless the Administrator has, on or before the issuance of the proposed order, notified, in writing, each manufacturer or processor, as the case may be, of such substance of the determination which underlies such order.

(C) If a manufacturer or processor of a chemical substance to be subject to a proposed order issued under subparagraph (A) files with the Administrator (within the 30-day period beginning on the date such manufacturer or processor received the notice required by subparagraph (B)(ii)) objections specifying with particularity the provisions of the order deemed objectionable and stating the grounds therefor, the proposed order shall not take effect.

(2)(A)(i) Except as provided in clause (ii), if with respect to a chemical substance with respect to which notice is required by subsection (a), the Administrator makes the determination described in paragraph (1)(A) and if— Injunction, application.

(I) the Administrator does not issue a proposed order under paragraph (1) respecting such substance, or

(II) the Administrator issues such an order respecting such substance but such order does not take effect because objections were filed under paragraph (1)(C) with respect to it,

the Administrator, through attorneys of the Environmental Protection Agency, shall apply to the United States District Court for the District of Columbia or the United States district court for the judicial district in which the manufacturer or processor, as the case may be, of such substance is found, resides, or transacts business for an injunction to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of such substance (or to prohibit or limit any combination of such activities).

(ii) If the Administrator issues a proposed order under paragraph (1)(A) respecting a chemical substance but such order does not take effect because objections have been filed under paragraph (1)(C) with respect to it, the Administrator is not required to apply for an injunction under clause (i) respecting such substance if the Administrator determines, on the basis of such objections, that the determinations under paragraph (1)(A) may not be made.

(B) A district court of the United States which receives an application under subparagraph (A)(i) for an injunction respecting a chemical substance shall issue such injunction if the court finds that—

(i) the information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental

effects of a chemical substance with respect to which notice is required by subsection (a); and

(ii)(I) in the absence of sufficient information to permit the Administrator to make such an evaluation, the manufacture, processing, distribution in commerce, use, or disposal of such substance, or any combination of such activities, may present an unreasonable risk of injury to health or the environment, or

(II) such substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance.

(C) Pending the completion of a proceeding for the issuance of an injunction under subparagraph (B) respecting a chemical substance, the court may, upon application of the Administrator made through attorneys of the Environmental Protection Agency, issue a temporary restraining order or a preliminary injunction to prohibit the manufacture, processing, distribution in commerce, use, or disposal of such a substance (or any combination of such activities) if the court finds that the notification period applicable under subsection (a), (b), or (c) to the manufacturing or processing of such substance may expire before such proceeding can be completed.

(D) After the submission to the Administrator of test data sufficient to evaluate the health and environmental effects of a chemical substance subject to an injunction issued under subparagraph (B) and the evaluation of such data by the Administrator, the district court of the United States which issued such injunction shall, upon petition, dissolve the injunction unless the Administrator has initiated a proceeding for the issuance of a rule under section 6(a) respecting the substance. If such a proceeding has been initiated, such court shall continue the injunction in effect until the effective date of the rule promulgated in such proceeding or, if such proceeding is terminated without the promulgation of a rule, upon the termination of the proceeding, whichever occurs first.

(f) PROTECTION AGAINST UNREASONABLE RISKS.—(1) If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance with respect to which notice is required by subsection (a), or that any combination of such activities, presents or will present an unreasonable risk of injury to health or environment before a rule promulgated under section 6 can protect against such risk, the Administrator shall, before the expiration of the notification period applicable under subsection (a), (b), or (c) to the manufacturing or processing of such substance, take the action authorized by paragraph (2) or (3) to the extent necessary to protect against such risk.

Proposed rule.

(2) The Administrator may issue a proposed rule under section 6(a) to apply to a chemical substance with respect to which a finding was made under paragraph (1)—

(A) a requirement limiting the amount of such substance which may be manufactured, processed, or distributed in commerce,

(B) a requirement described in paragraph (2), (3), (4), (5), (6), or (7) of section 6(a), or

(C) any combination of the requirements referred to in subparagraph (B).

Publication in Federal Register.

Such a proposed rule shall be effective upon its publication in the Federal Register. Section 6(d)(2)(B) shall apply with respect to such rule.

(3)(A) The Administrator may—

Proposed order.

(i) issue a proposed order to prohibit the manufacture, processing, or distribution in commerce of a substance with respect to

which a finding was made under paragraph (1), or

(ii) apply, through attorneys of the Environmental Protection Agency, to the United States District Court for the District of Columbia or the United States district court for the judicial district in which the manufacturer, or processor, as the case may be, of such substance, is found, resides, or transacts business for an injunction to prohibit the manufacture, processing, or distribution in commerce of such substance. Injunction application.

A proposed order issued under clause (i) respecting a chemical substance shall take effect on the expiration of the notification period applicable under subsection (a), (b), or (c) to the manufacture or processing of such substance.

(B) If the district court of the United States to which an application has been made under subparagraph (A)(ii) finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance with respect to which such application was made, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment before a rule promulgated under section 6 can protect against such risk, the court shall issue an injunction to prohibit the manufacture, processing, or distribution in commerce of such substance or to prohibit any combination of such activities.

(C) The provisions of subparagraphs (B) and (C) of subsection (e)(1) shall apply with respect to an order issued under clause (i) of subparagraph (A); and the provisions of subparagraph (C) of subsection (e)(2) shall apply with respect to an injunction issued under subparagraph (B).

(D) If the Administrator issues an order pursuant to subparagraph (A)(i) respecting a chemical substance and objections are filed in accordance with subsection (e)(1)(C), the Administrator shall seek an injunction under subparagraph (A)(ii) respecting such substance unless the Administrator determines, on the basis of such objections, that such substance does not or will not present an unreasonable risk of injury to health or the environment.

(g) STATEMENT OF REASONS FOR NOT TAKING ACTION.—If the Administrator has not initiated any action under this section or section 6 or 7 to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance, with respect to which notification or data is required by subsection (a)(1)(B) or (b), before the expiration of the notification period applicable to the manufacturing or processing of such substance, the Administrator shall publish a statement of the Administrator's reasons for not initiating such action. Such a statement shall be published in the Federal Register before the expiration of such period. Publication of such statement in accordance with the preceding sentence is not a prerequisite to the manufacturing or processing of the substance with respect to which the statement is to be published. Publication in Federal Register.

(h) EXEMPTIONS.—(1) The Administrator may, upon application, exempt any person from any requirement of subsection (a) or (b) to permit such person to manufacture or process a chemical substance for test marketing purposes—

(A) upon a showing by such person satisfactory to the Administrator that the manufacture, processing, distribution in commerce, use, and disposal of such substance, and that any combination of such activities, for such purposes will not present any unreasonable risk of injury to health or the environment, and

(B) under such restrictions as the Administrator considers appropriate.

(2)(A) The Administrator may, upon application, exempt any person from the requirement of subsection (b)(2) to submit data for a

chemical substance. If, upon receipt of an application under the preceding sentence, the Administrator determines that—

(i) the chemical substance with respect to which such application was submitted is equivalent to a chemical substance for which data has been submitted to the Administrator as required by subsection (b)(2), and

(ii) submission of data by the applicant on such substance would be duplicative of data which has been submitted to the Administrator in accordance with such subsection,

the Administrator shall exempt the applicant from the requirement to submit such data on such substance. No exemption which is granted under this subparagraph with respect to the submission of data for a chemical substance may take effect before the beginning of the reimbursement period applicable to such data.

Fair and equitable reimbursement.

(B) If the Administrator exempts any person, under subparagraph (A), from submitting data required under subsection (b)(2) for a chemical substance because of the existence of previously submitted data and if such exemption is granted during the reimbursement period for such data, then (unless such person and the persons referred to in clauses (i) and (ii) agree on the amount and method of reimbursement) the Administrator shall order the person granted the exemption to provide fair and equitable reimbursement (in an amount determined under rules of the Administrator)—

(i) to the person who previously submitted the data on which the exemption was based, for a portion of the costs incurred by such person in complying with the requirement under subsection (b)(2) to submit such data, and

(ii) to any other person who has been required under this subparagraph to contribute with respect to such costs, for a portion of the amount such person was required to contribute.

In promulgating rules for the determination of fair and equitable reimbursement to the persons described in clauses (i) and (ii) for costs incurred with respect to a chemical substance, the Administrator shall, after consultation with the Attorney General and the Federal Trade Commission, consider all relevant factors, including the effect on the competitive position of the person required to provide reimbursement in relation to the persons to be reimbursed and the share of the market for such substance of the person required to provide reimbursement in relation to the share of such market of the persons to be reimbursed. For purposes of judicial review, an order under this subparagraph shall be considered final agency action.

Reimbursement period.

(C) For purposes of this paragraph, the reimbursement period for any previously submitted data for a chemical substance is a period—

(i) beginning on the date of the termination of the prohibition, imposed under this section, on the manufacture or processing of such substance by the person who submitted such data to the Administrator, and

(ii) ending—

(I) five years after the date referred to in clause (i), or

(II) at the expiration of a period which begins on the date referred to in clause (i) and is equal to the period which the Administrator determines was necessary to develop such data,

whichever is later.

(3) The requirements of subsections (a) and (b) do not apply with respect to the manufacturing or processing of any chemical substance which is manufactured or processed, or proposed to be manufactured or processed, only in small quantities (as defined by the Administrator by rule) solely for purposes of—

(A) scientific experimentation or analysis, or

(B) chemical research on, or analysis of such substance or another substance, including such research or analysis for the development of a product,

if all persons engaged in such experimentation, research, or analysis for a manufacturer or processor are notified (in such form and manner as the Administrator may prescribe) of any risk to health which the manufacturer, processor, or the Administrator has reason to believe may be associated with such chemical substance.

(4) The Administrator may, upon application and by rule, exempt the manufacturer of any new chemical substance from all or part of the requirements of this section if the Administrator determines that the manufacture, processing, distribution in commerce, use, or disposal of such chemical substance, or that any combination of such activities, will not present an unreasonable risk of injury to health or the environment. A rule promulgated under this paragraph (and any substantive amendment to, or repeal of, such a rule) shall be promulgated in accordance with paragraphs (2) and (3) of section 6(c).

(5) The Administrator may, upon application, make the requirements of subsections (a) and (b) inapplicable with respect to the manufacturing or processing of any chemical substance (A) which exists temporarily as a result of a chemical reaction in the manufacturing or processing of a mixture or another chemical substance, and (B) to which there is no, and will not be, human or environmental exposure.

(6) Immediately upon receipt of an application under paragraph (1) or (5) the Administrator shall publish in the Federal Register notice of the receipt of such application. The Administrator shall give interested persons an opportunity to comment upon any such application and shall, within 45 days of its receipt, either approve or deny the application. The Administrator shall publish in the Federal Register notice of the approval or denial of such an application.

Publication in Federal Register. Comments.

Publication in Federal Register.

(i) DEFINITION.—For purposes of this section, the terms "manufacture" and "process" mean manufacturing or processing for commercial purposes.

SEC. 6. REGULATION OF HAZARDOUS CHEMICAL SUBSTANCES AND MIXTURES.

15 USC 2605.

(a) SCOPE OF REGULATION.—If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:

(1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce.

(2) A requirement—

(A) prohibiting the manufacture, processing, or distribution in commerce of such substance or mixture for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement, or

(B) limiting the amount of such substance or mixture which may be manufactured, processed, or distributed in commerce for (i) a particular use or (ii) a particular use in a concentration in excess of a level specified by the Administrator in the rule imposing the requirement.

(3) A requirement that such substance or mixture or any article containing such substance or mixture be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution in commerce, or disposal or with respect to any combination of such activities. The form and content of such warnings and instructions shall be prescribed by the Administrator.

(4) A requirement that manufacturers and processors of such substance or mixture make and retain records of the processes used to manufacture or process such substance or mixture and monitor or conduct tests which are reasonable and necessary to assure compliance with the requirements of any rule applicable under this subsection.

(5) A requirement prohibiting or otherwise regulating any manner or method of commercial use of such substance or mixture.

(6)(A) A requirement prohibiting or otherwise regulating any manner or method of disposal of such substance or mixture, or of any article containing such substance or mixture, by its manufacturer or processor or by any other person who uses, or disposes of, it for commercial purposes.

(B) A requirement under subparagraph (A) may not require any person to take any action which would be in violation of any law or requirement of, or in effect for, a State or political subdivision, and shall require each person subject to it to notify each State and political subdivision in which a required disposal may occur of such disposal.

(7) A requirement directing manufacturers or processors of such substance or mixture (A) to give notice of such unreasonable risk of injury to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (B) to give public notice of such risk of injury, and (C) to replace or repurchase such substance or mixture as elected by the person to which the requirement is directed.

Any requirement (or combination of requirements) imposed under this subsection may be limited in application to specified geographic areas.

(b) QUALITY CONTROL.—If the Administrator has a reasonable basis to conclude that a particular manufacturer or processor is manufacturing or processing a chemical substance or mixture in a manner which unintentionally causes the chemical substance or mixture to present or which will cause it to present an unreasonable risk of injury to health or the environment—

(1) the Administrator may by order require such manufacturer or processor to submit a description of the relevant quality control procedures followed in the manufacturing or processing of such chemical substance or mixture; and

(2) if the Administrator determines—

(A) that such quality control procedures are inadequate to prevent the chemical substance or mixture from presenting such risk of injury, the Administrator may order the manufacturer or processor to revise such quality control procedures to the extent necessary to remedy such inadequacy; or

(B) that the use of such quality control procedures has resulted in the distribution in commerce of chemical substances or mixtures which present an unreasonable risk of injury to health or the environment, the Administrator may order the manufacturer or processor to (i) give notice of such risk to processors or distributors in commerce of any such sub-

stance or mixture, or to both, and, to the extent reasonably ascertainable, to any other person in possession of or exposed to any such substance, (ii) to give public notice of such risk, and (iii) to provide such replacement or repurchase of any such substance or mixture as is necessary to adequately protect health or the environment.

Hearing.

A determination under subparagraph (A) or (B) of paragraph (2) shall be made on the record after opportunity for hearing in accordance with section 554 of title 5, United States Code. Any manufacturer or processor subject to a requirement to replace or repurchase a chemical substance or mixture may elect either to replace or repurchase the substance or mixture and shall take either such action in the manner prescribed by the Administrator.

Statement, publication.

(c) PROMULGATION OF SUBSECTION (a) RULES.—(1) In promulgating any rule under subsection (a) with respect to a chemical substance or mixture, the Administrator shall consider and publish a statement with respect to—

(A) the effects of such substance or mixture on health and the magnitude of the exposure of human beings to such substance or mixture,

(B) the effects of such substance or mixture on the environment and the magnitude of the exposure of the environment to such substance or mixture,

(C) the benefits of such substance or mixture for various uses and the availability of substitutes for such uses, and

(D) the reasonably ascertainable economic consequences of the rule, after consideration of the effect on the national economy, small business, technological innovation, the environment, and public health.

If the Administrator determines that a risk of injury to health or the environment could be eliminated or reduced to a sufficient extent by actions taken under another Federal law (or laws) administered in whole or in part by the Administrator, the Administrator may not promulgate a rule under subsection (a) to protect against such risk of injury unless the Administrator finds, in the Administrator's discretion, that it is in the public interest to protect against such risk under this Act. In making such a finding the Administrator shall consider (i) all relevant aspects of the risk, as determined by the Administrator in the Administrator's discretion, (ii) a comparison of the estimated costs of complying with actions taken under this Act and under such law (or laws), and (iii) the relative efficiency of actions under this Act and under such law (or laws) to protect against such risk of injury.

5 USC 556, 557. Notice, publication. Written data, views, arguments, submittal. Hearing. Final rule.

(2) When prescribing a rule under subsection (a) the Administrator shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with paragraph (3); (D) promulgate, if appropriate, a final rule based on the matter in the rulemaking record (as defined in section 19(a)), and (E) make and publish with the rule the finding described in subsection (a).

Informal hearings.

(3) Informal hearings required by paragraph (2)(C) shall be conducted by the Administrator in accordance with the following requirements:

(A) Subject to subparagraph (B), an interested person is entitled—

(i) to present such person's position orally or by documentary submissions (or both), and

(ii) if the Administrator determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B)(ii)) such cross-examination of persons as the Administrator determines (I) to be appropriate, and (II) to be required for a full and true disclosure with respect to such issues.

Rules. (B) The Administrator may prescribe such rules and make such rulings concerning procedures in such hearings to avoid unnecessary costs or delay. Such rules or rulings may include (i) the imposition of reasonable time limits on each interested person's oral presentations, and (ii) requirements that any cross-examination to which a person may be entitled under subparagraph (A) be conducted by the Administrator on behalf of that person in such manner as the Administrator determines (I) to be appropriate, and (II) to be required for a full and true disclosure with respect to disputed issues of material fact.

(C)(i) Except as provided in clause (ii), if a group of persons each of whom under subparagraphs (A) and (B) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Administrator to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Administrator may make rules and rulings (I) limiting the representation of such interest for such purposes, and (II) governing the manner in which such cross-examination shall be limited.

(ii) When any person who is a member of a group with respect to which the Administrator has made a determination under clause (i) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of clause (i) the opportunity to conduct (or have conducted) cross-examination as to issues affecting the person's particular interests if (I) the person satisfies the Administrator that the person has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (II) the Administrator determines that there are substantial and relevant issues which are not adequately presented by the group representative.

Verbatim transcript. (D) A verbatim transcript shall be taken of any oral presentation made, and cross-examination conducted in any informal hearing under this subsection. Such transcript shall be available to the public.

Compensation. (4)(A) The Administrator may, pursuant to rules prescribed by the Administrator, provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding for the promulgation of a rule under subsection (a) to any person—

(i) who represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding, and

(ii) if—

(I) the economic interest of such person is small in comparison to the costs of effective participation in the proceeding by such person, or

(II) such person demonstrates to the satisfaction of the Administrator that such person does not have sufficient resources adequately to participate in the proceeding without compensation under this subparagraph.

In determining for purposes of clause (i) if an interest will substantially contribute to a fair determination of the issues to be resolved in a proceeding, the Administrator shall take into account the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues.

(B) In determining whether compensation should be provided to a person under subparagraph (A) and the amount of such compensation, the Administrator shall take into account the financial burden which will be incurred by such person in participating in the rulemaking proceeding. The Administrator shall take such action as may be necessary to ensure that the aggregate amount of compensation paid under this paragraph in any fiscal year to all persons who, in rulemaking proceedings in which they receive compensation, are persons who either—

(i) would be regulated by the proposed rule, or

(ii) represent persons who would be so regulated,

may not exceed 25 per centum of the aggregate amount paid as compensation under this paragraph to all persons in such fiscal year.

(5) Paragraph (1), (2), (3), and (4) of this subsection apply to the promulgation of a rule repealing, or making a substantive amendment to, a rule promulgated under subsection (a).

(d) EFFECTIVE DATE.—(1) The Administrator shall specify in any rule under subsection (a) the date on which it shall take effect, which date shall be as soon as feasible.

(2)(A) The Administrator may declare a proposed rule under subsection (a) to be effective upon its publication in the Federal Register and until the effective date of final action taken, in accordance with subparagraph (B), respecting such rule if— Publication in Federal Register.

(i) the Administrator determines that—

(I) the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture subject to such proposed rule or any combination of such activities is likely to result in an unreasonable risk of serious or widespread injury to health or the environment before such effective date; and

(II) making such proposed rule so effective is necessary to protect the public interest; and

(ii) in the case of a proposed rule to prohibit the manufacture, processing, or distribution of a chemical substance or mixture because of the risk determined under clause (i)(I), a court has in an action under section 7 granted relief with respect to such risk associated with such substance or mixture.

Such a proposed rule which is made so effective shall not, for purposes of judicial review, be considered final agency action.

(B) If the Administrator makes a proposed rule effective upon its publication in the Federal Register, the Administrator shall, as expeditiously as possible, give interested persons prompt notice of such action, provide reasonable opportunity, in accordance with paragraphs (2) and (3) of subsection (c), for a hearing on such rule, and either promulgate such rule (as proposed or with modifications) or revoke it; and if such a hearing is requested, the Administrator shall commence the hearing within five days from the date such request is made unless the Administrator and the person making the request agree upon a later date for the hearing to begin, and after the hearing is concluded the Administrator shall, within ten days of the conclusion of the hearing, either promulgate such rule (as proposed or with modifications) or revoke it. Notice.

Rules.

(e) POLYCHLORINATED BIPHENYLS.—(1) Within six months after the effective date of this Act the Administrator shall promulgate rules to—

(A) prescribe methods for the disposal of polychlorinated biphenyls, and

(B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities.

Requirements prescribed by rules under this paragraph shall be consistent with the requirements of paragraphs (2) and (3).

(2)(A) Except as provided under subparagraph (B), effective one year after the effective date of this Act no person may manufacture, process, or distribute in commerce or use any polychlorinated biphenyl in any manner other than in a totally enclosed manner.

(B) The Administrator may by rule authorize the manufacture, processing, distribution in commerce or use (or any combination of such activities) of any polychlorinated biphenyl in a manner other than in a totally enclosed manner if the Administrator finds that such manufacture, processing, distribution in commerce, or use (or combination of such activities) will not present an unreasonable risk of injury to health or the environment.

"Totally enclosed manner."

(C) For the purposes of this paragraph, the term "totally enclosed manner" means any manner which will ensure that any exposure of human beings or the environment to a polychlorinated biphenyl will be insignificant as determined by the Administrator by rule.

(3)(A) Except as provided in subparagraphs (B) and (C)—

(i) no person may manufacture any polychlorinated biphenyl after two years after the effective date of this Act, and

(ii) no person may process or distribute in commerce any polychlorinated biphenyl after two and one-half years after such date.

Petition for exemption.

(B) Any person may petition the Administrator for an exemption from the requirements of subparagraph (A), and the Administrator may grant by rule such an exemption if the Administrator finds that—

(i) an unreasonable risk of injury to health or environment would not result, and

(ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to health or the environment and which may be substituted for such polychlorinated biphenyl.

Terms and conditions.

An exemption granted under this subparagraph shall be subject to such terms and conditions as the Administrator may prescribe and shall be in effect for such period (but not more than one year from the date it is granted) as the Administrator may prescribe.

(C) Subparagraph (A) shall not apply to the distribution in commerce of any polychlorinated biphenyl if such polychlorinated biphenyl was sold for purposes other than resale before two and one half years after the date of enactment of this Act.

(4) Any rule under paragraph (1), (2)(B), or (3)(B) shall be promulgated in accordance with paragraphs (2), (3), and (4) of subsection (c).

(5) This subsection does not limit the authority of the Administrator, under any other provision of this Act or any other Federal law, to take action respecting any polychlorinated biphenyl.

SEC. 7. IMMINENT HAZARDS.

Civil action. 15 USC 2606.

(a) ACTIONS AUTHORIZED AND REQUIRED.—(1) The Administrator may commence a civil action in an appropriate district court of the United States—

(A) for seizure of an imminently hazardous chemical sub-

stance or mixture or any article containing such a substance or mixture,

(B) for relief (as authorized by subsection (b)) against any person who manufactures, processes, distributes in commerce, or uses, or disposes of, an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture, or

(C) for both such seizure and relief.

A civil action may be commenced under this paragraph notwithstanding the existence of a rule under section 4, 5, or 6 or an order under section 5, and notwithstanding the pendency of any administrative or judicial proceeding under any provision of this Act.

(2) If the Administrator has not made a rule under section 6(a) immediately effective (as authorized by subsection 6(d)(2)(A)(i)) with respect to an imminently hazardous chemical substance or mixture, the Administrator shall commence in a district court of the United States with respect to such substance or mixture or article containing such substance or mixture a civil action described in subparagraph (A), (B), or (C) of paragraph (1).

(b) RELIEF AUTHORIZED.—(1) The district court of the United States in which an action under subsection (a) is brought shall have jurisdiction to grant such temporary or permanent relief as may be necessary to protect health or the environment from the unreasonable risk associated with the chemical substance, mixture, or article involved in such action. Jurisdiction.

(2) In the case of an action under subsection (a) brought against a person who manufactures, processes, or distributes in commerce a chemical substance or mixture or an article containing a chemical substance or mixture, the relief authorized by paragraph (1) may include the issuance of a mandatory order requiring (A) in the case of purchasers of such substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with it; (B) public notice of such risk; (C) recall; (D) the replacement or repurchase of such substance, mixture, or article; or (E) any combination of the actions described in the preceding clauses.

(3) In the case of an action under subsection (a) against a chemical substance, mixture, or article, such substance, mixture, or article may be proceeded against by process of libel for its seizure and condemnation. Proceedings in such an action shall conform as nearly as possible to proceedings in rem in admiralty.

(c) VENUE AND CONSOLIDATION.—(1)(A) An action under subsection (a) against a person who manufactures, processes, or distributes a chemical substance or mixture or an article containing a chemical substance or mixture may be brought in the United States District Court for the District of Columbia or for any judicial district in which any of the defendants is found, resides, or transacts business; and process in such an action may be served on a defendant in any other district in which such defendant resides or may be found. An action under subsection (a) against a chemical substance, mixture, or article may be brought in any United States district court within the jurisdiction of which the substance, mixture, or article is found.

(B) In determining the judicial district in which an action may be brought under subsection (a) in instances in which such action may be brought in more than one judicial district, the Administrator shall take into account the convenience of the parties.

(C) Subpoenas requiring attendance of witnesses in an action brought under subsection (a) may be served in any judicial district.

(2) Whenever proceedings under subsection (a) involving identical chemical substances, mixtures, or articles are pending in courts in two or more judicial districts, they shall be consolidated for trial by

order of any such court upon application reasonably made by any party in interest, upon notice to all parties in interest.

(d) ACTION UNDER SECTION 6.—Where appropriate, concurrently with the filing of an action under subsection (a) or as soon thereafter as may be practicable, the Administrator shall initiate a proceeding for the promulgation of a rule under section 6(a).

(e) REPRESENTATION.—Notwithstanding any other provision of law, in any action under subsection (a), the Administrator may direct attorneys of the Environmental Protection Agency to appear and represent the Administrator in such an action.

(f) DEFINITION.—For the purposes of subsection (a), the term "imminently hazardous chemical substance or mixture" means a chemical substance or mixture which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment. Such a risk to health or the environment shall be considered imminent if it is shown that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture, or that any combination of such activities, is likely to result in such injury to health or the environment before a final rule under section 6 can protect against such risk.

SEC. 8. REPORTING AND RETENTION OF INFORMATION.

Rules.
15 USC 2607.

(a) REPORTS.—(1) The Administrator shall promulgate rules under which—

(A) each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process a chemical substance (other than a chemical substance described in subparagraph (B)(ii)) shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require, and

(B) each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process—

(i) a mixture, or

(ii) a chemical substance in small quantities (as defined by the Administrator by rule) solely for purposes of scientific experimentation or analysis or chemical research on, or analysis of, such substance or another substance, including any such research or analysis for the development of a product,

shall maintain records and submit to the Administrator reports but only to the extent the Administrator determines the maintenance of records or submission of reports, or both, is necessary for the effective enforcement of this Act.

The Administrator may not require in a rule promulgated under this paragraph the maintenance of records or the submission of reports with respect to changes in the proportions of the components of a mixture unless the Administrator finds that the maintenance of such records or the submission of such reports, or both, is necessary for the effective enforcement of this Act. For purposes of the compilation of the list of chemical substances required under subsection (b), the Administrator shall promulgate rules pursuant to this subsection not later than 180 days after the effective date of this Act.

(2) The Administrator may require under paragraph (1) maintenance of records and reporting with respect to the following insofar as known to the person making the report or insofar as reasonably ascertainable:

(A) The common or trade name, the chemical identity, and the molecular structure of each chemical substance or mixture for which such a report is required.

(B) The categories or proposed categories of use of each such substance or mixture.

(C) The total amount of each such substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use, and reasonable estimates of the amount to be manufactured or processed for each of its categories of use or proposed categories of use.

(D) A description of the byproducts resulting from the manufacture, processing, use, or disposal of each such substance or mixture.

(E) All existing data concerning the environmental and health effects of such substance or mixture.

(F) The number of individuals exposed, and reasonable estimates of the number who will be exposed, to such substance or mixture in their places of employment and the duration of such exposure.

(G) In the initial report under paragraph (1) on such substance or mixture, the manner or method of its disposal, and in any subsequent report on such substance or mixture, any change in such manner or method.

To the extent feasible, the Administrator shall not require under paragraph (1), any reporting which is unnecessary or duplicative.

(3)(A)(i) The Administrator may by rule require a small manufacturer or processor of a chemical substance to submit to the Administrator such information respecting the chemical substance as the Administrator may require for publication of the first list of chemical substances required by subsection (b).

(ii) The Administrator may by rule require a small manufacturer or processor of a chemical substance or mixture—

(I) subject to a rule proposed or promulgated under section 4, 5(b)(4), or 6, or an order in effect under section 5(e), or

(II) with respect to which relief has been granted pursuant to a civil action brought under section 5 or 7,

to maintain such records on such substance or mixture, and to submit to the Administrator such reports on such substance or mixture, as the Administrator may reasonably require. A rule under this clause requiring reporting may require reporting with respect to the matters referred to in paragraph (2).

Standards.

(B) The Administrator, after consultation with the Administrator of the Small Business Administration, shall by rule prescribe standards for determining the manufacturers and processors which qualify as small manufacturers and processors for purposes of this paragraph and paragraph (1).

(b) INVENTORY.—(1) The Administrator shall compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States. Such list shall at least include each chemical substance which any person reports, under section 5 or subsection (a) of this section, is manufactured or processed in the United States. Such list may not include any chemical substance which was not manufactured or processed in the United States within three years before the effective date of the rules promulgated pursuant to the last sentence of subsection (a)(1). In the case of a chemical substance for which a notice is submitted in accordance with section 5, such chemical substance shall be included in such list as of the earliest date (as determined by the Administrator) on which such substance was manufactured or processed in the United States. The Administrator shall first publish such a list not later than 315 days after the effective date of this Act. The Administrator shall not include in such list any chemical substance which is manufactured or processed only in small quantities (as defined by the Administrator by rule)

solely for purposes of scientific experimentation or analysis or chemical research on, or analysis of, such substance or another substance, including such research or analysis for the development of a product.

(2) To the extent consistent with the purposes of this Act, the Administrator may, in lieu of listing, pursuant to paragraph (1), a chemical substance individually, list a category of chemical substances in which such substance is included.

(c) RECORDS.—Any person who manufactures, processes, or distributes in commerce any chemical substance or mixture shall maintain records of significant adverse reactions to health or the environment, as determined by the Administrator by rule, alleged to have been caused by the substance or mixture. Records of such adverse reactions to the health of employees shall be retained for a period of 30 years from the date such reactions were first reported to or known by the person maintaining such records. Any other record of such adverse reactions shall be retained for a period of five years from the date the information contained in the record was first reported to or known by the person maintaining the record. Records required to be maintained under this subsection shall include records of consumer allegations of personal injury or harm to health, reports of occupational disease or injury, and reports or complaints of injury to the environment submitted to the manufacturer, processor, or distributor in commerce from any source. Upon request of any duly designated representative of the Administrator, each person who is required to maintain records under this subsection shall permit the inspection of such records and shall submit copies of such records.

Rules.

(d) HEALTH AND SAFETY STUDIES.—The Administrator shall promulgate rules under which the Administrator shall require any person who manufactures, processes, or distributes in commerce or who proposes to manufacture, process, or distribute in commerce any chemical substance or mixture (or with respect to paragraph (2), any person who has possession of a study) to submit to the Administrator—

(1) lists of health and safety studies (A) conducted or initiated by or for such person with respect to such substance or mixture at any time, (B) known to such person, or (C) reasonably ascertainable by such person, except that the Administrator may exclude certain types or categories of studies from the requirements of this subsection if the Administrator finds that submission of lists of such studies are unnecessary to carry out the purposes of this Act; and

(2) copies of any study contained on a list submitted pursuant to paragraph (1) or otherwise known by such person.

(e) NOTICE TO ADMINISTRATOR OF SUBSTANTIAL RISKS.—Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

(f) DEFINITIONS.—For purposes of this section, the terms "manufacture" and "process" mean manufacture or process for commercial purposes.

SEC. 9. RELATIONSHIP TO OTHER FEDERAL LAWS.

15 USC 2608.

(a) LAWS NOT ADMINISTERED BY THE ADMINISTRATOR.—(1) If the Administrator has reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment and determines, in the Administrator's discretion, that such risk may be prevented or reduced to a sufficient extent by action

taken under a Federal law not administered by the Administrator, the Administrator shall submit to the agency which administers such law a report which describes such risk and includes in such description a specification of the activity or combination of activities which the Administrator has reason to believe so presents such risk. Such report shall also request such agency— Report.

(A)(i) to determine if the risk described in such report may be prevented or reduced to a sufficient extent by action taken under such law, and

(ii) if the agency determines that such risk may be so prevented or reduced, to issue an order declaring whether or not the activity or combination of activities specified in the description of such risk presents such risk; and

(B) to respond to the Administrator with respect to the matters described in subparagraph (A).

Any report of the Administrator shall include a detailed statement of the information on which it is based and shall be published in the Federal Register. The agency receiving a request under such a report shall make the requested determination, issue the requested order, and make the requested response within such time as the Administrator specifies in the request, but such time specified may not be less than 90 days from the date the request was made. The response of an agency shall be accompanied by a detailed statement of the findings and conclusions of the agency and shall be published in the Federal Register. Publication in Federal Register.

(2) If the Administrator makes a report under paragraph (1) with respect to a chemical substance or mixture and the agency to which such report was made either—

(A) issues an order declaring that the activity or combination of activities specified in the description of the risk described in the report does not present the risk described in the report, or

(B) initiates, within 90 days of the publication in the Federal Register of the response of the agency under paragraph (1), action under the law (or laws) administered by such agency to protect against such risk associated with such activity or combination of activities,

the Administrator may not take any action under section 6 or 7 with respect to such risk.

(3) If the Administrator has initiated action under section 6 or 7 with respect to a risk associated with a chemical substance or mixture which was the subject of a report made to an agency under paragraph (1), such agency shall before taking action under the law (or laws) administered by it to protect against such risk consult with the Administrator for the purpose of avoiding duplication of Federal action against such risk.

(b) LAWS ADMINISTERED BY THE ADMINISTRATOR.—The Administrator shall coordinate actions taken under this Act with actions taken under other Federal laws administered in whole or in part by the Administrator. If the Administrator determines that a risk to health or the environment associated with a chemical substance or mixture could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in such other Federal laws, the Administrator shall use such authorities to protect against such risk unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk by actions taken under this Act. This subsection shall not be construed to relieve the Administrator of any requirement imposed on the Administrator by such other Federal laws.

(c) OCCUPATIONAL SAFETY AND HEALTH.—In exercising any authority under this Act, the Administrator shall not, for purposes of section 4(b)(1) of the Occupational Safety and Health Act of 1970, be 29 USC 651 note.

deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(d) COORDINATION.—In administering this Act, the Administrator shall consult and coordinate with the Secretary of Health, Education, and Welfare and the heads of any other appropriate Federal executive department or agency, any relevant independent regulatory agency, and any other appropriate instrumentality of the Federal Government for the purpose of achieving the maximum enforcement of this Act while imposing the least burdens of duplicative requirements on those subject to the Act and for other purposes. The Administrator shall, in the report required by section 30, report annually to the Congress on actions taken to coordinate with such other Federal departments, agencies, or instrumentalities, and on actions taken to coordinate the authority under this Act with the authority granted under other Acts referred to in subsection (b).

SEC. 10. RESEARCH, DEVELOPMENT, COLLECTION, DISSEMINATION, AND UTILIZATION OF DATA.

15 USC 2609.

(a) AUTHORITY.—The Administrator shall, in consultation and cooperation with the Secretary of Health, Education, and Welfare and with other heads of appropriate departments and agencies, conduct such research, development, and monitoring as is necessary to carry out the purposes of this Act. The Administrator may enter into contracts and may make grants for research, development, and monitoring under this subsection. Contracts may be entered into under this subsection without regard to sections 3648 and 3709 of the Revised Statutes (31 U.S.C. 529, 14 U.S.C. 5).

(b) DATA SYSTEMS.—(1) The Administrator shall establish, administer, and be responsible for the continuing activities of an interagency committee which shall design, establish, and coordinate an efficient and effective system, within the Environmental Protection Agency, for the collection, dissemination to other Federal departments and agencies, and use of data submitted to the Administrator under this Act.

(2)(A) The Administrator shall, in consultation and cooperation with the Secretary of Health, Education, and Welfare and other heads of appropriate departments and agencies design, establish, and coordinate an efficient and effective system for the retrieval of toxicological and other scientific data which could be useful to the Administrator in carrying out the purposes of this Act. Systematized retrieval shall be developed for use by all Federal and other departments and agencies with responsibilities in the area of regulation or study of chemical substances and mixtures and their effect on health or the environment.

(B) The Administrator, in consultation and cooperation with the Secretary of Health, Education, and Welfare, may make grants and enter into contracts for the development of a data retrieval system described in subparagraph (A). Contracts may be entered into under this subparagraph without regard to sections 3648 and 3709 of the Revised Statutes (31 U.S.C. 529, 41 U.S.C. 5).

(c) SCREENING TECHNIQUES.—The Administrator shall coordinate, with the Assistant Secretary for Health of the Department of Health, Education, and Welfare, research undertaken by the Administrator and directed toward the development of rapid, reliable, and economical screening techniques for carcinogenic, mutagenic, teratogenic, and ecological effects of chemical substances and mixtures.

(d) MONITORING.—The Administrator shall, in consultation and cooperation with the Secretary of Health, Education, and Welfare, establish and be responsible for research aimed at the development, in cooperation with local, State, and Federal agencies, of monitoring techniques and instruments which may be used in the detection of toxic chemical substances and mixtures and which are reliable, economical, and capable of being implemented under a wide variety of conditions.

(e) BASIC RESEARCH.—The Administrator shall, in consultation and cooperation with the Secretary of Health, Education, and Welfare, establish research programs to develop the fundamental scientific basis of the screening and monitoring techniques described in subsections (c) and (d), the bounds of the reliability of such techniques, and the opportunities for their improvement.

(f) TRAINING.—The Administrator shall establish and promote programs and workshops to train or facilitate the training of Federal laboratory and technical personnel in existing or newly developed screening and monitoring techniques.

(g) EXCHANGE OF RESEARCH AND DEVELOPMENT RESULTS.—The Administrator shall, in consultation with the Secretary of Health, Education, and Welfare and other heads of appropriate departments and agencies, establish and coordinate a system for exchange among Federal, State, and local authorities of research and development results respecting toxic chemical substances and mixtures, including a system to facilitate and promote the development of standard data format and analysis and consistent testing procedures.

SEC. 11. INSPECTIONS AND SUBPOENAS.

(a) IN GENERAL.—For purposes of administering this Act, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce. Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner. 15 USC 2610.

(b) SCOPE.—(1) Except as provided in paragraph (2), an inspection conducted under subsection (a) shall extend to all things within the premises or conveyance inspected (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of this Act applicable to the chemical substances or mixtures within such premises or conveyance have been complied with.

(2) No inspection under subsection (a) shall extend to—

(A) financial data,

(B) sales data (other than shipment data),

(C) pricing data,

(D) personnel data, or

(E) research data (other than data required by this Act or under a rule promulgated thereunder),

unless the nature and extent of such data are described with reasonable specificity in the written notice required by subsection (a) for such inspection.

(c) SUBPOENAS.—In carrying out this Act, the Administrator may by subpoena require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In the event of contumacy, failure, or refusal of any person to obey any such subpoena, any district court of the United States in which venue is proper shall have jurisdiction to order any such person to comply with such subpoena. Any failure to obey such an order of the court is punishable by the court as a contempt thereof.

SEC. 12. EXPORTS.

15 USC 2611.

(a) IN GENERAL.—(1) Except as provided in paragraph (2) and subsection (b), this Act (other than section 8) shall not apply to any chemical substance, mixture, or to an article containing a chemical substance or mixture, if—

(A) it can be shown that such substance, mixture, or article is being manufactured, processed, or distributed in commerce for export from the United States, unless such substance, mixture, or article was, in fact, manufactured, processed, or distributed in commerce, for use in the United States, and

(B) such substance, mixture, or article (when distributed in commerce), or any container in which it is enclosed (when so distributed), bears a stamp or label stating that such substance, mixture, or article is intended for export.

(2) Paragraph (1) shall not apply to any chemical substance, mixture, or article if the Administrator finds that the substance, mixture, or article will present an unreasonable risk of injury to health within the United States or to the environment of the United States. The Administrator may require, under section 4, testing of any chemical substance or mixture exempted from this Act by paragraph (1) for the purpose of determining whether or not such substance or mixture presents an unreasonable risk of injury to health within the United States or to the environment of the United States.

(b) NOTICE.—(1) If any person exports or intends to export to a foreign country a chemical substance or mixture for which the submission of data is required under section 4 or 5(b), such person shall notify the Administrator of such exportation or intent to export and the Administrator shall furnish to the government of such country notice of the availability of the data submitted to the Administrator under such section for such substance or mixture.

(2) If any person exports or intends to export to a foreign country a chemical substance or mixture for which an order has been issued under section 5 or a rule has been proposed or promulgated under section 5 or 6, or with respect to which an action is pending, or relief has been granted under section 5 or 7, such person shall notify the Administrator of such exportation or intent to export and the Administrator shall furnish to the government of such country notice of such rule, order, action, or relief.

SEC. 13. ENTRY INTO CUSTOMS TERRITORY OF THE UNITED STATES.

5 USC 2612.

(a) IN GENERAL.—(1) The Secretary of the Treasury shall refuse entry into the customs territory of the United States (as defined in

9 USC 1202.

general headnote 2 to the Tariff Schedules of the United States) of any chemical substance, mixture, or article containing a chemical substance or mixture offered for such entry if—

(A) it fails to comply with any rule in effect under this Act, or

(B) it is offered for entry in violation of section 5 or 6, a rule or order under section 5 or 6, or an order issued in a civil action brought under section 5 or 7.

Notification.

(2) If a chemical substance, mixture, or article is refused entry under paragraph (1), the Secretary of the Treasury shall notify the consignee of such entry refusal, shall not release it to the consignee, and shall cause its disposal or storage (under such rules as the Secretary of the Treasury may prescribe) if it has not been exported by the consignee within 90 days from the date of receipt of notice of such refusal, except that the Secretary of the Treasury may, pending a review by the Administrator of the entry refusal, release to the consignee such substance, mixture, or article on execution of bond for the amount of the full invoice of such substance, mixture, or article (as such value is set forth in the customs entry), together with the duty thereon. On failure to return such substance, mixture, or article for

any cause to the custody of the Secretary of the Treasury when demanded, such consignee shall be liable to the United States for liquidated damages equal to the full amount of such bond. All charges for storage, cartage, and labor on and for disposal of substances, mixtures, or articles which are refused entry or release under this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any future entry made by such owner or consignee.

(b) RULES.—The Secretary of the Treasury, after consultation with the Administrator, shall issue rules for the administration of subsection (a) of this section.

SEC. 14. DISCLOSURE OF DATA.

15 USC 2613.

(a) IN GENERAL.—Except as provided by subsection (b), any information reported to, or otherwise obtained by, the Administrator (or any representative of the Administrator) under this Act, which is exempt from disclosure pursuant to subsection (a) of section 552 of title 5, United States Code, by reason of subsection (b)(4) of such section, shall, notwithstanding the provisions of any other section of this Act, not be disclosed by the Administrator or by any officer or employee of the United States, except that such information—

(1) shall be disclosed to any officer or employee of the United States—

(A) in connection with the official duties of such officer or employee under any law for the protection of health or the environment, or

(B) for specific law enforcement purposes;

(2) shall be disclosed to contractors with the United States and employees of such contractors if in the opinion of the Administrator such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States entered into on or after the date of enactment of this Act for the performance of work in connection with this Act and under such conditions as the Administrator may specify;

(3) shall be disclosed if the Administrator determines it necessary to protect health or the environment against an unreasonable risk of injury to health or the environment; or

(4) may be disclosed when relevant in any proceeding under this Act, except that disclosure in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding.

In any proceeding under section 552(a) of title 5, United States Code, to obtain information the disclosure of which has been denied because of the provisions of this subsection, the Administrator may not rely on section 552(b)(3) of such title to sustain the Administrator's action.

(b) DATA FROM HEALTH AND SAFETY STUDIES.—(1) Subsection (a) does not prohibit the disclosure of—

(A) any health and safety study which is submitted under this Act with respect to—

(i) any chemical substance or mixture which, on the date on which such study is to be disclosed has been offered for commercial distribution, or

(ii) any chemical substance or mixture for which testing is required under section 4 or for which notification is required under section 5, and

(B) any data reported to, or otherwise obtained by, the Administrator from a health and safety study which relates to a chemical substance or mixture described in clause (i) or (ii) of subparagraph (A).

This paragraph does not authorize the release of any data which discloses processes used in the manufacturing or processing of a chemical

substance or mixture or, in the case of a mixture, the release of data disclosing the portion of the mixture comprised by any of the chemical substances in the mixture.

(2) If a request is made to the Administrator under subsection (a) of section 552 of title 5, United States Code, for information which is described in the first sentence of paragraph (1) and which is not information described in the second sentence of such paragraph, the Administrator may not deny such request on the basis of subsection (b)(4) of such section.

(c) DESIGNATION AND RELEASE OF CONFIDENTIAL DATA.—(1) In submitting data under this Act, a manufacturer, processor, or distributor in commerce may (A) designate the data which such person believes is entitled to confidential treatment under subsection (a), and (B) submit such designated data separately from other data submitted under this Act. A designation under this paragraph shall be made in writing and in such manner as the Administrator may prescribe.

(2)(A) Except as provided by subparagraph (B), if the Administrator proposes to release for inspection data which has been designated under paragraph (1)(A), the Administrator shall notify, in writing and by certified mail, the manufacturer, processor, or distributor in commerce who submitted such data of the intent to release such data. If the release of such data is to be made pursuant to a request made under section 552(a) of title 5, United States Code, such notice shall be given immediately upon approval of such request by the Administrator. The Administrator may not release such data until the expiration of 30 days after the manufacturer, processor, or distributor in commerce submitting such data has received the notice required by this subparagraph.

Notification.

(B)(i) Subparagraph (A) shall not apply to the release of information under paragraph (1), (2), (3), or (4) of subsection (a), except that the Administrator may not release data under paragraph (3) of subsection (a) unless the Administrator has notified each manufacturer, processor, and distributor in commerce who submitted such data of such release. Such notice shall be made in writing by certified mail at least 15 days before the release of such data, except that if the Administrator determines that the release of such data is necessary to protect against an imminent, unreasonable risk of injury to health or the environment, such notice may be made by such means as the Administrator determines will provide notice at least 24 hours before such release is made.

(ii) Subparagraph (A) shall not apply to the release of information described in subsection (b)(1) other than information described in the second sentence of such subsection.

(d) CRIMINAL PENALTY FOR WRONGFUL DISCLOSURE.—(1) Any officer or employee of the United States or former officer or employee of the United States, who by virtue of such employment or official position has obtained possession of, or has access to, material the disclosure of which is prohibited by subsection (a), and who knowing that disclosure of such material is prohibited by such subsection, willfully discloses the material in any manner to any person not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000 or imprisoned for not more than one year, or both. Section 1905 of title 18, United States Code, does not apply with respect to the publishing, divulging, disclosure, or making known of, or making available, information reported or otherwise obtained under this Act.

(2) For the purposes of paragraph (1), any contractor with the United States who is furnished information as authorized by subsection (a)(2), and any employee of any such contractor, shall be considered to be an employee of the United States.

(e) ACCESS BY CONGRESS.—Notwithstanding any limitation contained in this section or any other provision of law, all information

reported to or otherwise obtained by the Administrator (or any representative of the Administrator) under this Act shall be made available, upon written request of any duly authorized committee of the Congress, to such committee.

SEC. 15. PROHIBITED ACTS.

15 USC 2614.

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;

(2) use for commercial purposes a chemical substance or mixture which such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of section 5 or 6, a rule or order under section 5 or 6, or an order issued in action brought under section 5 or 7;

(3) fail or refuse to (A) establish or maintain records, (B) submit reports, notices, or other information, or (C) permit access to or copying of records, as required by this Act or a rule thereunder; or

(4) fail or refuse to permit entry or inspection as required by section 11.

SEC. 16. PENALTIES.

15 USC 2615.

(a) CIVIL.—(1) Any person who violates a provision of section 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 a violation continues shall, for purposes of this subsection, constitute a separate violation of section 15.

Hearing.

(2)(A) A civil penalty for a violation of section 15 shall be assessed by the Administrator by an order made on the record after opportunity (provided in accordance with this subparagraph) for a hearing in accordance with section 554 of title 5, United States Code. Before issuing such an order, the Administrator shall give written notice to the person to be assessed a civil penalty under such order of the Administrator's proposal to issue such order and provide such person an opportunity to request, within 15 days of the date the notice is received by such person, such a hearing on the order.

(B) In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

(C) The Administrator may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

Petition for judicial review.

(3) Any person who requested in accordance with paragraph (2)(A) a hearing respecting the assessment of a civil penalty and who is aggrieved by an order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia Circuit or for any other circuit in which such person resides or transacts business. Such a petition may only be filed within the 30-day period beginning on the date the order making such assessment was issued.

(4) If any person fails to pay an assessment of a civil penalty—

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (3), or

(B) after a court in an action brought under paragraph (3) has entered a final judgment in favor of the Administrator,

the Attorney General shall recover the amount assessed (plus interest at currently prevailing rates from the date of the expiration of the 30-day period referred to in paragraph (3) or the date of such final judgment, as the case may be) in an action brought in any appropriate district court of the United States. In such an action, the validity, amount, and appropriateness of such penalty shall not be subject to review.

(b) CRIMINAL.—Any person who knowingly or willfully violates any provision of section 15 shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.

SEC. 17. SPECIFIC ENFORCEMENT AND SEIZURE.

15 USC 2616.

(a) SPECIFIC ENFORCEMENT.—(1) The district courts of the United States shall have jurisdiction over civil actions to—

(A) restrain any violation of section 15,

(B) restrain any person from taking any action prohibited by section 5 or 6 or by a rule or order under section 5 or 6,

(C) compel the taking of any action required by or under this Act, or

(D) direct any manufacturer or processor of a chemical substance or mixture manufactured or processed in violation of section 5 or 6 or a rule or order under section 5 or 6 and distributed in commerce, (i) to give notice of such fact to distributors in commerce of such substance or mixture and, to the extent reasonably ascertainable, to other persons in possession of such substance or mixture or exposed to such substance or mixture, (ii) to give public notice of such risk of injury, and (iii) to either replace or repurchase such substance or mixture, whichever the person to which the requirement is directed elects.

(2) A civil action described in paragraph (1) may be brought—

(A) in the case of a civil action described in subparagraph (A) of such paragraph, in the United States district court for the judicial district wherein any act, omission, or transaction constituting a violation of section 15 occurred or wherein the defendant is found or transacts business, or

(B) in the case of any other civil action described in such paragraph, in the United States district court for the judicial district wherein the defendant is found or transacts business.

In any such civil action process may be served on a defendant in any judicial district in which a defendant resides or may be found: Subpoenas requiring attendance of witnesses in any such action may be served in any judicial district.

(b) SEIZURE.—Any chemical substance or mixture which was manufactured, processed, or distributed in commerce in violation of this Act or any rule promulgated or order issued under this Act or any article containing such a substance or mixture shall be liable to be proceeded against, by process of libel for the seizure and condemnation of such substance, mixture, or article, in any district court of the United States within the jurisdiction of which such substance, mixture, or article is found. Such proceedings shall conform as nearly as possible to proceedings in rem in admiralty.

SEC. 18. PREEMPTION.

15 USC 2617.

(a) EFFECT ON STATE LAW.—(1) Except as provided in paragraph (2), nothing in this Act shall affect the authority of any State or political subdivision of a State to establish or continue in effect regulation

of any chemical substance, mixture, or article containing a chemical substance or mixture.

(2) Except as provided in subsection (b)—

(A) if the Administrator requires by a rule promulgated under section 4 the testing of a chemical substance or mixture, no State or political subdivision may, after the effective date of such rule, establish or continue in effect a requirement for the testing of such substance or mixture for purposes similar to those for which testing is required under such rule; and

(B) if the Administrator prescribes a rule or order under section 5 or 6 (other than a rule imposing a requirement described in subsection (a)(6) of section 6) which is applicable to a chemical substance or mixture, and which is designed to protect against a risk of injury to health or the environment associated with such substance or mixture, no State or political subdivision of a State may, after the effective date of such requirement, establish or continue in effect, any requirement which is applicable to such substance or mixture, or an article containing such substance or mixture, and which is designed to protect against such risk unless such requirement (i) is identical to the requirement prescribed by the Administrator, (ii) is adopted under the authority of the Clean Air Act or any other Federal law, or (iii) prohibits the use of such substance or mixture in such State or political subdivision (other than its use in the manufacture or processing of other substances or mixtures).

Application.

(b) EXEMPTION.—Upon application of a State or political subdivision of a State the Administrator may by rule exempt from subsection (a)(2), under such conditions as may be prescribed in such rule, a requirement of such State or political subdivision designed to protect against a risk of injury to health or the environment associated with a chemical substance, mixture, or article containing a chemical substance or mixture if—

(1) compliance with the requirement would not cause the manufacturing, processing, distribution in commerce, or use of the substance, mixture, or article to be in violation of the applicable requirement under this Act described in subsection (a)(2), and

(2) the State or political subdivision requirement (A) provides a significantly higher degree of protection from such risk than the requirement under this Act described in subsection (a)(2) and (B) does not, through difficulties in marketing, distribution, or other factors, unduly burden interstate commerce.

SEC. 19. JUDICIAL REVIEW.

Petition.
15 USC 2618.

(a) IN GENERAL.—(1)(A) Not later than 60 days after the date of the promulgation of a rule under section 4(a), 5(a)(2), 5(b)(4), 6(a), 6(e), or 8, any person may file a petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principal place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

Jurisdiction.

(B) Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of an order issued under subparagraph (A) or (B) of section 6(b)(1) if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

Petition copies, transmittal to Administrator and Attorney General.

(2) Copies of any petition filed under paragraph (1)(A) shall be transmitted forthwith to the Administrator and to the Attorney General by the clerk of the court with which such petition was filed. The

provisions of section 2112 of title 28, United States Code, shall apply to the filing of the rulemaking record of proceedings on which the Administrator based the rule being reviewed under this section and to the transfer of proceedings between United States courts of appeals.

"Rulemaking record."

(3) For purposes of this section, the term "rulemaking record" means—

(A) the rule being reviewed under this section;

(B) in the case of a rule under section 4(a), the finding required by such section, in the case of a rule under section 5(b)(4), the finding required by such section, in the case of a rule under section 6(a) the finding required by section 5(f) or 6(a), as the case may be, in the case of a rule under section 6(a), the statement required by section 6(c)(1), and in the case of a rule under section 6(e), the findings required by paragraph (2)(B) or (3)(B) of such section, as the case may be;

(C) any transcript required to be made of oral presentations made in proceedings for the promulgation of such rule;

(D) any written submission of interested parties respecting the promulgation of such rule; and

Notice, publication in Federal Register.

(E) any other information which the Administrator considers to be relevant to such rule and which the Administrator identified, on or before the date of the promulgation of such rule, in a notice published in the Federal Register.

(b) ADDITIONAL SUBMISSIONS AND PRESENTATIONS; MODIFICATIONS.—If in an action under this section to review a rule the petitioner or the Administrator applies to the court for leave to make additional oral submissions or written presentations respecting such rule and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Administrator, the court may order the Administrator to provide additional opportunity to make such submissions and presentations. The Administrator may modify or set aside the rule being reviewed or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule with the return of such submissions and presentations.

Review.

The court shall thereafter review such new or modified rule.

(c) STANDARD OF REVIEW.—(1)(A) Upon the filing of a petition under subsection (a)(1) for judicial review of a rule, the court shall have jurisdiction (i) to grant appropriate relief, including interim relief, as provided in chapter 7 of title 5, United States Code, and (ii) except as otherwise provided in subparagraph (B), to review such rule in accordance with chapter 7 of title 5, United States Code.

(B) Section 706 of title 5, United States Code, shall apply to review of a rule under this section, except that—

(i) in the case of review of a rule under section 4(a), 5(b)(4), 6(a), or 6(e), the standard for review prescribed by paragraph (2)(E) of such section 706 shall not apply and the court shall hold unlawful and set aside such rule if the court finds that the rule is not supported by substantial evidence in the rulemaking record (as defined in subsection (a)(3)) taken as a whole;

(ii) in the case of review of a rule under section 6(a), the court shall hold unlawful and set aside such rule if it finds that—

(I) a determination by the Administrator under section 6(c)(3) that the petitioner seeking review of such rule is not entitled to conduct (or have conducted) cross-examination or to present rebuttal submissions, or

(II) a rule of, or ruling by, the Administrator under section 6(c)(3) limiting such petitioner's cross-examination or oral presentations.

has precluded disclosure of disputed material facts which was necessary to a fair determination by the Administrator of the rulemaking proceeding taken as a whole; and section 706(2)(D) shall not apply with respect to a determination, rule, or ruling referred to in subclause (I) or (II); and

(iii) the court may not review the contents and adequacy of—

(I) any statement required to be made pursuant to section 6(c)(1), or

(II) any statement of basis and purpose required by section 553(c) of title 5, United States Code, to be incorporated in the rule

except as part of a review of the rulemaking record taken as a whole.

The term "evidence" as used in clause (i) means any matter in the rulemaking record. "Evidence."

(C) A determination, rule, or ruling of the Administrator described in subparagraph (B)(ii) may be reviewed only in an action under this section and only in accordance with such subparagraph.

(2) The judgment of the court affirming or setting aside, in whole or in part, any rule reviewed in accordance with this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

(d) FEES AND COSTS.—The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate.

(e) OTHER REMEDIES.—The remedies as provided in this section shall be in addition to and not in lieu of any other remedies provided by law.

SEC. 20. CITIZENS' CIVIL ACTIONS.

(a) IN GENERAL.—Except as provided in subsection (b), any person may commence a civil action— 15 USC 2619.

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of this Act or any rule promulgated under section 4, 5, or 6 or order issued under section 5 to restrain such violation, or

(2) against the Administrator to compel the Administrator to perform any act or duty under this Act which is not discretionary.

Any civil action under paragraph (1) shall be brought in the United States district court for the district in which the alleged violation occurred or in which the defendant resides or in which the defendant's principal place of business is located. Any action brought under paragraph (2) shall be brought in the United States District Court for the District of Columbia, or the United States district court for the judicial district in which the plaintiff is domiciled. The district courts of the United States shall have jurisdiction over suits brought under this section, without regard to the amount in controversy or the citizenship of the parties. In any civil action under this subsection process may be served on a defendant in any judicial district in which the defendant resides or may be found and subpoenas for witnesses may be served in any judicial district. Jurisdiction.

(b) LIMITATION.—No civil action may be commenced—

(1) under subsection (a)(1) to restrain a violation of this Act or rule or order under this Act—

(A) before the expiration of 60 days after the plaintiff has given notice of such violation (i) to the Administrator, Notice.

and (ii) to the person who is alleged to have committed such violation, or

(B) if the Administrator has commenced and is diligently prosecuting a proceeding for the issuance of an order under section 16(a)(2) to require compliance with this Act or with such rule or order or if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with this Act or with such rule or order, but if such proceeding or civil action is commenced after the giving of notice, any person giving such notice may intervene as a matter of right in such proceeding or action; or

Notice. (2) under subsection (a)(2) before the expiration of 60 days after the plaintiff has given notice to the Administrator of the alleged failure of the Administrator to perform an act or duty which is the basis for such action or, in the case of an action under such subsection for the failure of the Administrator to file an action under section 7, before the expiration of ten days after such notification.

Rule. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by rule.

(c) GENERAL.—(1) In any action under this section, the Administrator, if not a party, may intervene as a matter of right.

(2) The court, in issuing any final order in any action brought pursuant to subsection (a), may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

(3) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of this Act or any rule or order under this Act or to seek any other relief.

(d) CONSOLIDATION.—When two or more civil actions brought under subsection (a) involving the same defendant and the same issues or violations are pending in two or more judicial districts, such pending actions, upon application of such defendants to such actions which is made to a court in which any such action is brought, may, if such court in its discretion so decides, be consolidated for trial by order (issued after giving all parties reasonable notice and opportunity to be heard) of such court and tried in—

(1) any district which is selected by such defendant and in which one of such actions is pending,

(2) a district which is agreed upon by stipulation between all the parties to such actions and in which one of such actions is pending, or

(3) a district which is selected by the court and in which one of such actions is pending.

The court issuing such an order shall give prompt notification of the order to the other courts in which the civil actions consolidated under the order are pending.

SEC. 21. CITIZENS' PETITIONS.

15 USC 2620. (a) IN GENERAL.—Any person may petition the Administrator to initiate a proceeding for the issuance, amendment, or repeal of a rule under section 4, 6, or 8 or an order under section 5(e) or (6)(b)(2).

(b) PROCEDURES.—(1) Such petition shall be filed in the principal office of the Administrator and shall set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule under section 4, 6, or 8 or an order under section 5(e), 6(b)(1)(A), or 6(b)(1)(B).

(2) The Administrator may hold a public hearing or may conduct such investigation or proceeding as the Administrator deems appropriate in order to determine whether or not such petition should be granted. Public hearing.

(3) Within 90 days after filing of a petition described in paragraph (1), the Administrator shall either grant or deny the petition. If the Administrator grants such petition, the Administrator shall promptly commence an appropriate proceeding in accordance with section 4, 5, 6, or 8. If the Administrator denies such petition, the Administrator shall publish in the Federal Register the Administrator's reasons for such denial. Publication in Federal Register.

(4)(A) If the Administrator denies a petition filed under this section (or if the Administrator fails to grant or deny such petition within the 90-day period) the petitioner may commence a civil action in a district court of the United States to compel the Administrator to initiate a rulemaking proceeding as requested in the petition. Any such action shall be filed within 60 days after the Administrator's denial of the petition or, if the Administrator fails to grant or deny the petition within 90 days after filing the petition, within 60 days after the expiration of the 90-day period. Civil action.

(B) In an action under subparagraph (A) respecting a petition to initiate a proceeding to issue a rule under section 4, 6, or 8 or an order under section 5(e) or 6(b)(2), the petitioner shall be provided an opportunity to have such petition considered by the court in a de novo proceeding. If the petitioner demonstrates to the satisfaction of the court by a preponderance of the evidence that—

(i) in the case of a petition to initiate a proceeding for the issuance of a rule under section 4 or an order under section 5(e)—

(I) information available to the Administrator is insufficient to permit a reasoned evaluation of the health and environmental effects of the chemical substance to be subject to such rule or order; and

(II) in the absence of such information, the substance may present an unreasonable risk to health or the environment, or the substance is or will be produced in substantial quantities and it enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to it; or

(ii) in the case of a petition to initiate a proceeding for the issuance of a rule under section 6 or 8 or an order under section 6(b)(2), there is a reasonable basis to conclude that the issuance of such a rule or order is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment.

the court shall order the Administrator to initiate the action requested by the petitioner. If the court finds that the extent of the risk to health or the environment alleged by the petitioner is less than the extent of risks to health or the environment with respect to which the Administrator is taking action under this Act and there are insufficient resources available to the Administrator to take the action requested by the petitioner, the court may permit the Administrator to defer initiating the action requested by the petitioner until such time as the court prescribes.

(C) The court in issuing any final order in any action brought pursuant to subparagraph (A) may award costs of suit and reasonable fees for attorneys and expert witnesses if the court determines that such an award is appropriate. Any court, in issuing its decision in an action brought to review such an order, may award costs of suit and reasonable fees for attorneys if the court determines that such an award is appropriate.

(5) The remedies under this section shall be in addition to, and not in lieu of, other remedies provided by law.

SEC. 22. NATIONAL DEFENSE WAIVER.

15 USC 2621.

The Administrator shall waive compliance with any provision of this Act upon a request and determination by the President that the requested waiver is necessary in the interest of national defense. The Administrator shall maintain a written record of the basis upon which such waiver was granted and make such record available for in camera examination when relevant in a judicial proceeding under this Act. Upon the issuance of such a waiver, the Administrator shall publish in the Federal Register a notice that the waiver was granted for national defense purposes, unless, upon the request of the President, the Administrator determines to omit such publication because the publication itself would be contrary to the interests of national defense, in which event the Administrator shall submit notice thereof to the Armed Services Committees of the Senate and the House of Representatives.

Publication in Federal Register.

Notice to congressional committee.

SEC. 23. EMPLOYEE PROTECTION.

15 USC 2622.

(a) IN GENERAL.—No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act;

(2) testified or is about to testify in any such proceeding; or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.

(b) REMEDY.—(1) Any employee who believes that the employee has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within 30 days after such alleged violation occurs, file (or have any person file on the employee's behalf) a complaint with the Secretary of Labor (hereinafter in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.

Notification.

Investigation.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within 30 days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting on behalf of the complainant) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this paragraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for agency hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

Notification.

Notice, hearing.

(B) If in response to a complaint filed under paragraph (1) the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order (i) the person who committed such violation to take affirmative action to abate the violation, (ii)

such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, (iii) compensatory damages, and (iv) where appropriate, exemplary damages. If such an order issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(c) REVIEW.—(1) Any employee or employer adversely affected or aggrieved by an order issued under subsection (b) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred. The petition for review must be filed within sixty days from the issuance of the Secretary's order. Review shall conform to chapter 7 of title 5 of the United States Code.

(2) An order of the Secretary, with respect to which review could have been obtained under paragraph (1), shall not be subject to judicial review in any criminal or other civil proceeding.

(d) ENFORCEMENT.—Whenever a person has failed to comply with an order issued under subsection (b)(2), the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory and exemplary damages. Civil actions brought under this subsection shall be heard and decided expeditiously. Civil action. Jurisdiction.

(e) EXCLUSION.—Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from the employee's employer (or any agent of the employer), deliberately causes a violation of any requirement of this Act.

SEC. 24. EMPLOYMENT EFFECTS.

(a) IN GENERAL.—The Administrator shall evaluate on a continuing basis the potential effects on employment (including reductions in employment or loss of employment from threatened plant closures) of— Evaluation. 15 USC 2623.

(1) the issuance of a rule or order under section 4, 5, or 6, or

(2) a requirement of section 5 or 6.

(b)(1) INVESTIGATIONS.—Any employee (or any representative of an employee) may request the Administrator to make an investigation of—

(A) a discharge or layoff or threatened discharge or layoff of the employee, or

(B) adverse or threatened adverse effects on the employee's employment,

allegedly resulting from a rule or order under section 4, 5, or 6 or a requirement of section 5 or 6. Any such request shall be made in writing, shall set forth with reasonable particularity the grounds for the request, and shall be signed by the employee, or representative of such employee, making the request.

(2)(A) Upon receipt of a request made in accordance with paragraph (1) the Administrator shall (i) conduct the investigation requested, and (ii) if requested by any interested person, hold public hearings on any matter involved in the investigation unless the Administrator, by order issued within 45 days of the date such hearings are requested, denies the request for the hearings because the Administrator determines there are no reasonable grounds for holding such hearings. If the Administrator makes such a determination, the Administrator shall notify in writing the person requesting the hearing of the determination and the reasons therefor and shall publish the Public hearings. Notification.

Publication in Federal Register.

determination and the reasons therefor in the Federal Register.

(B) If public hearings are to be held on any matter involved in an investigation conducted under this subsection—

(i) at least five days' notice shall be provided the person making the request for the investigation and any person identified in such request,

(ii) such hearings shall be held in accordance with section 6(c)(3), and

(iii) each employee who made or for whom was made a request for such hearings and the employer of such employee shall be required to present information respecting the applicable matter referred to in paragraph (1)(A) or (1)(B) together with the basis for such information.

Recommendations.

(3) Upon completion of an investigation under paragraph (2), the Administrator shall make findings of fact, shall make such recommendations as the Administrator deems appropriate, and shall make available to the public such findings and recommendations.

(4) This section shall not be construed to require the Administrator to amend or repeal any rule or order in effect under this Act.

SEC. 25. STUDIES.

15 USC 2624.

(a) INDEMNIFICATION STUDY.—The Administrator shall conduct a study of all Federal laws administered by the Administrator for the purpose of determining whether and under what conditions, if any, indemnification should be accorded any person as a result of any action taken by the Administrator under any such law. The study shall—

(1) include an estimate of the probable cost of any indemnification programs which may be recommended;

(2) include an examination of all viable means of financing the cost of any recommended indemnification; and

Submittal to Congress.

(3) be completed and submitted to Congress within two years from the effective date of enactment of this Act.

GAO review.

The General Accounting Office shall review the adequacy of the study submitted to Congress pursuant to paragraph (3) and shall report the results of its review to the Congress within six months of the date such study is submitted to Congress.

Consultation.

(b) CLASSIFICATION, STORAGE, AND RETRIEVAL STUDY.—The Council on Environmental Quality, in consultation with the Administrator, the Secretary of Health, Education, and Welfare, the Secretary of Commerce, and the heads of other appropriate Federal departments or agencies, shall coordinate a study of the feasibility of establishing (1) a standard classification system for chemical substances and related substances, and (2) a standard means for storing and for obtaining rapid access to information respecting such substances. A report on such study shall be completed and submitted to Congress not later than 18 months after the effective date of enactment of this Act.

Report to Congress.

SEC. 26. ADMINISTRATION OF THE ACT.

15 USC 2625.

(a) COOPERATION OF FEDERAL AGENCIES.—Upon request by the Administrator, each Federal department and agency is authorized—

(1) to make its services, personnel, and facilities available (with or without reimbursement) to the Administrator to assist the Administrator in the administration of this Act; and

(2) to furnish to the Administrator such information, data, estimates, and statistics, and to allow the Administrator access to all information in its possession as the Administrator may reasonably determine to be necessary for the administration of this Act.

(b) FEES.—(1) The Administrator may, by rule, require the payment of a reasonable fee from any person required to submit data under section 4 or 5 to defray the cost of administering this Act. Such rules shall not provide for any fee in excess of $2,500 or, in the case of a small business concern, any fee in excess of $100. In setting a fee

under this paragraph, the Administrator shall take into account the ability to pay of the person required to submit the data and the cost to the Administrator of reviewing such data. Such rules may provide for sharing such a fee in any case in which the expenses of testing are shared under section 4 or 5.

Consultation. Rule.

(2) The Administrator, after consultation with the Administrator of the Small Business Administration, shall by rule prescribe standards for determining the persons which qualify as small business concerns for purposes of paragraph (1).

(c) ACTION WITH RESPECT TO CATEGORIES.—(1) Any action authorized or required to be taken by the Administrator under any provision of this Act with respect to a chemical substance or mixture may be taken by the Administrator in accordance with that provision with respect to a category of chemical substances or mixtures. Whenever the Administrator takes action under a provision of this Act with respect to a category of chemical substances or mixtures, any reference in this Act to a chemical substance or mixture (insofar as it relates to such action) shall be deemed to be a reference to each chemical substance or mixture in such category.

Definitions.

(2) For purposes of paragraph (1):

(A) The term "category of chemical substances" means a group of chemical substances the members of which are similar in molecular structure, in physical, chemical, or biological properties, in use, or in mode of entrance into the human body or into the environment, or the members of which are in some other way suitable for classification as such for purposes of this Act, except that such term does not mean a group of chemical substances which are grouped together solely on the basis of their being new chemical substances.

(B) The term "category of mixtures" means a group of mixtures the members of which are similar in molecular structure, in physical, chemical, or biological properties, in use, or in the mode of entrance into the human body or into the environment, or the members of which are in some other way suitable for classification as such for purposes of this Act.

Establishment.

(d) ASSISTANCE OFFICE.—The Administrator shall establish in the Environmental Protection Agency an identifiable office to provide technical and other nonfinancial assistance to manufacturers and processors of chemical substances and mixtures respecting the requirements of this Act applicable to such manufacturers and processors, the policy of the Agency respecting the application of such requirements to such manufacturers and processors, and the means and methods by which such manufacturers and processors may comply with such requirements.

(e) FINANCIAL DISCLOSURES.—(1) Except as provided under paragraph (3), each officer or employee of the Environmental Protection Agency and the Department of Health, Education, and Welfare who—

(A) performs any function or duty under this Act, and

(B) has any known financial interest (i) in any person subject to this Act or any rule or order in effect under this Act, or (ii) in any person who applies for or receives any grant or contract under this Act,

shall, on February 1, 1978, and on February 1 of each year thereafter, file with the Administrator or the Secretary of Health, Education, and Welfare (hereinafter in this subsection referred to as the "Secretary"), as appropriate, a written statement concerning all such interests held by such officer or employee during the preceding calendar year. Such statement shall be made available to the public.

(2) The Administrator and the Secretary shall—

(A) act within 90 days of the effective date of this Act—

(i) to define the term "known financial interests" for purposes of paragraph (1), and

(ii) to establish the methods by which the requirement to file written statements specified in paragraph (1) will be monitored and enforced, including appropriate provisions for review by the Administrator and the Secretary of such statements; and

Report to Congress.

(B) report to the Congress on June 1, 1978, and on June 1 of each year thereafter with respect to such statements and the actions taken in regard thereto during the preceding calendar year.

(3) The Administrator may by rule identify specific positions with the Environmental Protection Agency, and the Secretary may by rule identify specific positions with the Department of Health, Education, and Welfare, which are of a nonregulatory or nonpolicymaking nature, and the Administrator and the Secretary may by rule provide that officers or employees occupying such positions shall be exempt from the requirements of paragraph (1).

(4) This subsection does not supersede any requirement of chapter 11 of title 18, United States Code.

Penalty

(5) Any officer or employee who is subject to, and knowingly violates, this subsection or any rule issued thereunder, shall be fined not more than $2,500 or imprisoned not more than one year, or both.

(f) STATEMENT OF BASIS AND PURPOSE.—Any final order issued under this Act shall be accompanied by a statement of its basis and purpose. The contents and adequacy of any such statement shall not be subject to judicial review in any respect.

Appointment.

(g) ASSISTANT ADMINISTRATOR.—(1) The President, by and with the advice and consent of the Senate, shall appoint an Assistant Administrator for Toxic Substances of the Environmental Protection Agency. Such Assistant Administrator shall be a qualified individual who is, by reason of background and experience, especially qualified to direct a program concerning the effects of chemicals on human health and the environment. Such Assistant Administrator shall be responsible for (A) the collection of data, (B) the preparation of studies, (C) the making of recommendations to the Administrator for regulatory and other actions to carry out the purposes and to facilitate the administration of this Act, and (D) such other functions as the Administrator may assign or delegate.

(2) The Assistant Administrator to be appointed under paragraph (1) shall (A) be in addition to the Assistant Administrators of the Environmental Protection Agency authorized by section 1(d) of Reorganization Plan No. 3 of 1970, and (B) be compensated at the rate of pay authorized for such Assistant Administrators.

5 USC app. II.

SEC. 27. DEVELOPMENT AND EVALUATION OF TEST METHODS.

Consultation. 15 USC 2626.

(a) IN GENERAL.—The Secretary of Health, Education, and Welfare, in consultation with the Administrator and acting through the Assistant Secretary for Health, may conduct, and make grants to public and nonprofit private entities and enter into contracts with public and private entities for, projects for the development and evaluation of inexpensive and efficient methods (1) for determining and evaluating the health and environmental effects of chemical substances and mixtures, and their toxicity, persistence, and other characteristics which affect health and the environment, and (2) which may be used for the development of test data to meet the requirements of rules promulgated under section 4. The Administrator shall consider such methods in prescribing under section 4 standards for the development of test data.

Grants or contracts, application.

(b) APPROVAL BY SECRETARY.—No grant may be made or contract entered into under subsection (a) unless an application therefor has been submitted to and approved by the Secretary. Such an application

shall be submitted in such form and manner and contain such information as the Secretary may require. The Secretary may apply such conditions to grants and contracts under subsection (a) as the Secretary determines are necessary to carry out the purposes of such subsection. Contracts may be entered into under such subsection without regard to sections 3648 and 3709 of the Revised Statutes (31 U.S.C. 529; 41 U.S.C. 5).

(c) ANNUAL REPORTS.—(1) The Secretary shall prepare and submit to the President and the Congress on or before January 1 of each year a report of the number of grants made and contracts entered into under this section and the results of such grants and contracts. Report to President and Congress.

(2) The Secretary shall periodically publish in the Federal Register reports describing the progress and results of any contract entered into or grant made under this section. Publication in Federal Register.

SEC. 28. STATE PROGRAMS.

(a) IN GENERAL.—For the purpose of complementing (but not reducing) the authority of, or actions taken by, the Administrator under this Act, the Administrator may make grants to States for the establishment and operation of programs to prevent or eliminate unreasonable risks within the States to health or the environment which are associated with a chemical substance or mixture and with respect to which the Administrator is unable or is not likely to take action under this Act for their prevention or elimination. The amount of a grant under this subsection shall be determined by the Administrator, except that no grant for any State program may exceed 75 per centum of the establishment and operation costs (as determined by the Administrator) of such program during the period for which the grant is made. 15 USC 2627.

(b) APPROVAL BY ADMINISTRATOR.—(1) No grant may be made under subsection (a) unless an application therefor is submitted to and approved by the Administrator. Such an application shall be submitted in such form and manner as the Administrator may require and shall— Grants, application.

(A) set forth the need of the applicant for a grant under subsection (a),

(B) identify the agency or agencies of the State which shall establish or operate, or both, the program for which the application is submitted,

(C) describe the actions proposed to be taken under such program,

(D) contain or be supported by assurances satisfactory to the Administrator that such program shall, to the extent feasible, be integrated with other programs of the applicant for environmental and public health protection,

(E) provide for the making of such reports and evaluations as the Administrator may require, and

(F) contain such other information as the Administrator may prescribe.

(2) The Administrator may approve an application submitted in accordance with paragraph (1) only if the applicant has established to the satisfaction of the Administrator a priority need, as determined under rules of the Administrator, for the grant for which the application has been submitted. Such rules shall take into consideration the seriousness of the health effects in a State which are associated with chemical substances or mixtures, including cancer, birth defects, and gene mutations, the extent of the exposure in a State of human beings and the environment to chemical substances and mixtures, and the extent to which chemical substances and mixtures are manufactured, processed, used, and disposed of in a State. Application approval.

(c) ANNUAL REPORTS.—Not later than six months after the end of each of the fiscal years 1979, 1980, and 1981, the Administrator shall Report to Congress.

submit to the Congress a report respecting the programs assisted by grants under subsection (a) in the preceding fiscal year and the extent to which the Administrator has disseminated information respecting such programs.

(d) AUTHORIZATION.—For the purpose of making grants under subsection (a) there are authorized to be appropriated $1,500,000 for each of the fiscal years 1982 and 1983. Sums appropriated under this subsection shall remain available until expended.

SEC. 29. AUTHORIZATION FOR APPROPRIATIONS.

There are authorized to be appropriated to the Administrator for purposes of carrying out this Act (other than sections 27 and 28 and subsections (a) and (c) through (g) of section 10 thereof) $58,646,000 for the fiscal year 1982 and $62,000,000 for the fiscal year 1983. No part of the funds appropriated under this section may be used to construct any research laboratories.

15 USC 2628.

SEC. 30. ANNUAL REPORT.

Report to President and Congress.
5 USC 2629.

The Administrator shall prepare and submit to the President and the Congress on or before January 1, 1978, and on or before January 1 of each succeeding year a comprehensive report on the administration of this Act during the preceding fiscal year. Such report shall include—

(1) a list of the testing required under section 4 during the year for which the report is made and an estimate of the costs incurred during such year by the persons required to perform such tests;

(2) the number of notices received during such year under section 5, the number of such notices received during such year under such section for chemical substances subject to a section 4 rule, and a summary of any action taken during such year under section 5(g);

(3) a list of rules issued during such year under section 6;

(4) a list, with a brief statement of the issues, of completed or pending judicial actions under this Act and administrative actions under section 16 during such year;

(5) a summary of major problems encountered in the administration of this Act; and

Recommendations.

(6) such recommendations for additional legislation as the Administrator deems necessary to carry out the purposes of this Act.

SEC. 31. EFFECTIVE DATE.

15 USC 2601 note.

Except as provided in section 4(f), this Act shall take effect on January 1, 1977.

Approved October 11, 1976.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 94-1341 accompanying H.R. 14032 (Comm. on Interstate and Foreign Commerce) and No. 94-1679 (Comm. of Conference).

SENATE REPORTS: No. 94-698 (Comm. on Commerce) and No. 94-1302 (Comm. of Conference).

CONGRESSIONAL RECORD, Vol. 122 (1976):

Mar. 26, considered and passed Senate.

Aug. 23, considered and passed House, amended, in lieu of H.R. 14032.

Sept. 28, Senate and House agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 12, No. 42:

Oct. 12, Presidential statement.

4 TSCA Regulatory Elements

The following section discusses the primary regulatory provisions that have been enacted and that pertain to TSCA's enforcement/compliance program. These regulatory elements of the Act are:

- The Friable Asbestos-Containing Material in Schools Rule;
- The Fully Halogenated Chlorofluoroalkanes (CFCs) Rule;
- The Polychlorinated Biphenyls (PCBs) Rule;
- The Premanufacture Notification (PMN) Rule; and
- The Tetrachlorodibenzo-p-dioxin (TCDD) Rule.

The Friable Asbestos-Containing Material in Schools Rule

Overview

The purpose of the Asbestos in Schools Rule (40 C.F.R. §§763.100 through 763.119) is to protect users of school buildings from exposure to concentrations of airborne asbestos that occur when friable asbestos-containing materials are damaged or disturbed. Inhaled asbestos can cause severe human health effects. Compliance with the rule will both ensure that these materials are identified and that school users are notified of the materials' presence. The rule was needed because many school districts had not responded adequately to EPA's effort under the voluntary Technical Assistance Program (TAP) to encourage schools to identify these materials and notify employees of their presence.

Summary of Rule

The Asbestos in Schools Rule is directed at local education agencies, which are defined as:

- Any local education agency as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965; and
- The governing authority of any nonprofit elementary or secondary school.

The rule consists of the following elements:

- Identification. Inspecting all school buildings for friable materials;
- Sampling. Collecting samples of the friable materials;
- Analysis. Analyzing the samples to determine whether they contain asbestos;
- Notification. Informing the Parent-Teachers Association (or parents), faculty, and other building users of the presence of asbestos; posting the notice to school employees; and distributing "A Guide for Reducing Asbestos Exposure" to custodial and maintenance personnel;
- Recordkeeping. Maintaining records that describe the actions taken to comply with the rule. This includes a statement signed by the person responsible for compliance with the rule that the regulatory requirements have been satisfied; and
- Exemptions.
  - -- Schools that were built after December 31, 1978, are exempt from all requirements of the rule.
  - -- Schools that can document that no friable asbestos-containing materials were used in building or renovating the school buildings are exempt from all requirements of the rule. Certification, as required by the rule, must be in the school's records.
  - -- Schools that completed specific requirements of the rule as part of the voluntary Technical Assistance Program (see "Compliance Assistance Guidelines") need not repeat these activities. If no asbestos was discovered by the TAP, the appropriate certification must be in the school's records.
  - -- Schools that have satisfactorily abated (see "Compliance Assistance Guidelines") asbestos-containing materials before June 28, 1983, are exempt from all requirements of the rule.
  - -- Schools that certify for the record that all friable materials will be treated as asbestos-containing materials for the purposes of this rule are exempt only from the inspection, sampling, and analysis requirements of the rule. This certification must be in the school's records.

The Fully Halogenated Chlorofluoroalkanes (CFCs) Rule

Overview

On March 17, 1978, EPA published a rule that prohibits almost all manufacturing and processing of fully halogenated chlorofluoroalkanes (also referred to as chlorofluorocarbons or CFCs) for aerosol propellant uses subject to TSCA.

The intent of the EPA rule is to reduce the emission of CFCs into the atmosphere. Such emission of CFCs causes depletion of the ozone layer, which shields the Earth's surface from harmful ultraviolet radiation. This depletion poses a serious risk to human health and the environment.

In a related rule [43 Fed. Reg. 11,301 (1978)], the United States Food and Drug Administration has banned the use of CFCs as aerosol propellants in most food, drug, and cosmetic products.

Summary of Rule

CFC manufacturers, processors, importers, and exporters may be subject to this rule. Prohibitions and specific requirements include:

- Prohibitions. The EPA rule lists prohibition on the manufacture and processing of CFCs for aerosol propellant use, unless specifically exempted by EPA. CFCs cannot be:

  -- Manufactured for any aerosol propellant use,

  -- Imported for any aerosol propellant use,

  -- Processed into any aerosol propellant article (including an article intended for export), or

  -- Distributed in commerce for processing into any aerosol propellant article;

- Exemptions. CFCs may be (1) manufactured or imported for aerosol propellant use, (2) processed or processed for export into an aerosol propellant article, or (3) distributed in commerce for processing into any aerosol propellant article only in the following cases:

  -- For use in an article that is a food additive, drug, cosmetic, or device exempted under 15 U.S.C. §2602,

  -- For those essential uses listed in 40 C.F.R. §762.58, and

  -- For special uses listed in 40 C.F.R. §762.59;

- Certification. Manufacturers of CFCs must obtain a signed statement from each person who purchases CFCs. Such statement must specify whether the CFCs are being purchased for aerosol or other uses; and

- Reporting. Manufacturers and processors of CFCs are required to file annual reports with EPA on March 31, 1980, 1981, and 1982.

The Polychlorinated Biphenyls (PCBs) Rule

Overview

Polychlorinated biphenyls (PCBs) are widely used in transformers, capacitors, hydraulic systems, and heat transfer systems. Although PCBs have long been known to be extremely toxic, only in recent years have they been found in significant concentrations in waterways and sediments throughout the world.

PCBs have been linked with various health effects including the formation of malignant and benign tumors, fetal deaths, reproductive abnormalities, and mutations.

The PCB rule is found at 40 C.F.R. Part 761.

Summary of Rule

TSCA requires that the processing, distribution in commerce, use, and disposal of PCBs be regulated and that PCBs be marked with clear and adequate warnings. Under the Interim Measures Program, owners of certain PCB units must visually inspect the units, record all leaks, and begin repair of any moderate leaks within two days of discovery. These inspections must take place once every three months, except where the unit poses an exposure risk to food and feed products, in which case it must be inspected at least once a week.

- Prohibitions. The following activities are prohibited:

  — Processing or distributing in commerce PCBs or PCB items without an authorization or exemption;

  -- Manufacturing PCBs without an exemption;

  -- Using PCBs or PCB items without an exemption; and

  -- Servicing PCB transformers that require removal of the transformer coil.

- Recordkeeping Requirements. Facilities that keep PCB transformers or capacitors must maintain annual records showing the weights of PCBs in containers and transformers, number of transformers and capacitors, dates of transfer of PCBs, and quantities of certain PCBs and PCB items remaining in service. In addition, PCB disposal and storage facilities must keep annual records of PCBs and PCB items that are received, stored, transferred, or disposed of.

- Marking Requirements. PCBs and PCB items that contain more than 50 ppm of PCBs (except PCB-contaminated transformers) and transport vehicles carrying more than 45 kilograms of PCB liquids over 50 ppm or carrying one or more PCB transformers must all be marked as containing PCBs.

- Storage Requirements. PCB articles and PCB containers stored for disposal must be stored in accordance with the PCB regulation. Specifications for storage facilities include adequate roof and walls, floor and continuous 6-inch curbing of impervious material, and a location above the 100-year flood level. Other requirements include specifications for containers and time periods for temporary storage.

- Disposal Requirements. PCB liquids and PCB items containing liquids above 500 ppm PCBs must be disposed in either an EPA-approved incinerator or any other disposal method approved by the Regional Administrator. PCB liquids and PCB items containing between 50 and 500 ppm PCBs must be disposed in an EPA-approved landfill, an EPA-approved high-efficiency boiler, an EPA-approved incinerator, or any other methods approved by the Regional Administrator.

The Premanufacture Notification (PMN) Rule

Overview

Under Section 5 of TSCA, EPA must be notified at least 90 days before a new chemical substance is manufactured or imported for commercial purposes (40 C.F.R. Part 720). A "new chemical substance" is defined as a substance not listed on the TSCA Chemical Substance Inventory (published on June 1, 1979). The Inventory is updated periodically with the addition of new chemical substances that have undergone Section 5 review and have entered commercial production. On May 13, 1983, EPA published a final rule covering the applicability of Section 5 requirements; the general procedure for submitting notices; information requirements, including a mandatory notice form; and EPA's procedures for processing information contained in the notices, including confidential business information. On September 13, 1983 (in response to industry petitions of the May 13, 1983, rule), EPA stayed indefinitely the effective dates of:

- Sections 720.36 and 720.78--Requirements concerning new chemical substances manufactured under Section 5(h)(3) research and development exemption;

- Section 720.3(y)--The definition of "possession or control"; and

- Section 720.50(c)--Data requirements on related chemicals.

Except for the sections that were stayed, the final rule went into effect on October 26, 1983. All PMNs, therefore, must be submitted to EPA on the PMN form, and notice submitters are required to comply with those provisions of the rule that are currently in effect.

Summary of Rule

In conducting its review of a new chemical substance, EPA assesses the risks associated with all phases of the life cycle of the substance, including its manufacture, import, processing, distribution in commerce, use, and disposal. The review is based on information provided by the submitter in the notice as well as information obtained through other sources. EPA also considers several different factors in conducting its review, including the potential toxicity to humans and the environment and the nonrisk factors such as the possible economic benefits and the availability of substitutes.

Notice Review Process. The notice review process has six major phases:

- Prenotice Communication. EPA provides guidance to submitters on such topics as the scope of TSCA and the PMN rule, the contents of the TSCA Chemical Substance Inventory, the notice form, Section 5 exemptions, premanufacture testing, confidentiality and generic name development, and notice review procedures.

- Process Start-up. Process start-up begins when EPA receives a notice; the 90-day review period begins on this date.

- Initial Review. During the initial (90-day) review period, EPA identifies, those chemical substances that require more detailed review and that are candidates for possible regulatory action. The initial review period ends when EPA has determined whether available data warrant a more detailed review of the substance.

- Detailed Review. The detailed review period allows EPA to assess the data gathered during the initial review period, to analyze possible regulatory or other control measures, and, if necessary, to extend the (90-day) notice review period.

- Regulatory Response. After completion of the detailed review, EPA may decide to regulate the substance during the review period in several ways:

-- Issue an order under Section 5(e) if it is found that the substance may present an unreasonable risk to human health or the environment or that it may be produced in substantial quantities (pending development of additional data);

-- Control the substance under Section 5(f) if it is found that the substance will present an unreasonable risk; or

-- Identify the substance as a candidate for regulation under Section 5(a)(2), 5(b)(4), or 8.

- Process Closeout and Entry on the Inventory. If EPA does not take action to regulate a substance during the review period, the submitter may manufacture or import the new chemical substance without restriction once the notice review period expires. When manufacture or import begins, the submitter must notify EPA of the identity of the chemical substance, its premanufacture notice number, and the date on which manufacture or import began.

Research and Development Exemptions. Manufacturers and importers of small quantities of a new chemical substance are exempt from the PMN rule if the substance is to be used solely for research and development purposes. The manufacturer or importer is required to:

- Notify all persons who come into contact with the new substance of any risk to health that may be associated with the substance;

- Label conspicuously all areas in which exposure may occur;

- Evaluate any information or test data to determine whether there is any risk to health associated with the substance;

- Evaluate any information concerning any significant adverse reaction by persons exposed to the substance that may reasonably be associated with such exposure;

- Evaluate any information provided by a supplier or any other person concerning a health risk believed to be associated with the substance; and

- Determine whether the substance is subject to any rule or order proposed or promulgated under Section 4, 5, 6, or 8(e) of the Act and whether EPA has found, under Section 5(h)(3), that any risk to health may be associated with the substance.

Test-Marketing Exemptions. Manufacturers and importers may apply for exemption from Section 5(a) or 5(b) reporting requirements for test-marketing purposes. The applicant must show that the test-marketing activities will not present any unreasonable risk to human health or the environment. Manufacture or import cannot begin, however, until EPA grants the exemption.

Confidentiality Claims. Section 14 allows the submitter to claim confidentiality for any information submitted to EPA under the Act. However, the Act also makes clear that the public interest in chemical regulation must also be considered and, in certain cases, outweighs the protection of confidential business information. Thus, Section 14 also provides that health and safety studies may be revealed if necessary to protect human health or the environment from an unreasonable risk of injury.

The Tetrachlorodibenzo-p-dioxin (TCDD) Rule

Overview

TCDD (2,3,7,8-tetrachlorodibenzo-p-dioxin) is an undesirable contaminant formed during the manufacture of certain substances. TCDD, commonly referred to as dioxin, is highly toxic and is found to be carcinogenic in laboratory animals; it has other significant adverse health effects as well.

On May 12, 1980, EPA promulgated a rule under Section 6 of TSCA prohibiting Vertac Chemical Company from disposing of certain of its wastes containing TCDD stored at the company's Jacksonville, Arkansas, facility. The rule also requires that all other persons planning to dispose of TCDD-containing wastes notify the Agency 60 days prior to intended disposal.

Summary of the Rule

Requirements Applicable to Vertac Chemical Company. The TCDD rule prohibits the removal for disposal of certain wastes containing TCDD from the Vertac Chemical Company's facility at Jacksonville, Arkansas. Vertac is required to post notices at the facility that state that contaminated wastes are being stored on-site and that removal of the wastes for disposal is prohibited. In addition, Vertac must test all waste materials for TCDD contamination and dispose of the TCDD-containing wastes in accordance with EPA's guidelines for waste disposal.

General Disposal Notification Requirements. Any person who disposes of chemical substances or mixtures for commercial purposes and who wishes to dispose of wastes containing TCDD must notify the Assistant Administrator for Pesticides and Toxic Substances 60 days prior to the disposal of such wastes. The notification is to be made by certified letter to the Assistant Administrator with a copy to the EPA Regional Administrator for the Region in which the wastes are currently stored. The notification must include, at a minimum, the following information:

- The name of the firm involved and the address of both the corporate headquarters and the specific disposal site;
- The name and telephone number of a company contact person;

- The concentration of TCDD in the waste materials and the method of detection;
- The total quantity of waste material and the number of containers involved;
- A brief description of the proposed disposal including the method of disposal and the name of any disposal firm(s) involved; and
- A summary of the present status of the waste including the method of containment and the presence or absence of:
  - -- (i) An impermeable pad,
  - -- (ii) Curbing,
  - -- (iii) Dikes,
  - -- (iv) Roof structure, and
  - -- (v) Accessibility of unauthorized persons.

The Assistant Administrator has the authority to prohibit the intended disposal by notification of the concerned party(ies) by registered mail if it is determined that:

- The proposed disposal will present an unreasonable risk; or
- There is insufficient information on which to base a finding that such an unreasonable risk is absent.

Exclusions. The TCDD rule does not apply to persons who dispose of TCDD-containing wastes at facilities permitted for disposal of TCDD under Section 3005(c) of the Resource Conservation and Recovery Act, 42 U.S.C. §6925(c).

5 Glossary

ACT -- When used in this manual, the term "Act" means the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 et seq.

ADMINISTRATIVE LAW JUDGE -- An Administrative Law Judge appointed pursuant to 5 U.S.C. §3105 (see also, 5 C.F.R. Part 930, as amended by 37 Fed. Reg. 16,789).

ADMINISTRATOR -- The Administrator of the United States Environmental Protection Agency, any employee or authorized representative of the Agency to whom the Administrator has delegated the authority to carry out his or her functions, or any other person who shall by operation of law be authorized to carry out such functions.

AFFIDAVIT -- A written statement made on oath before a notary public or other person authorized to administer oaths.

AGENCY -- The United States Environmental Protection Agency (EPA).

ARTICLE -- A manufactured item that (1) is formed to a specific shape or design during manufacture, (2) has end-use function(s) dependent in whole or in part upon its shape or design during end use, and (3) has either no change of chemical composition during its end use or only those changes of composition that have no commercial purpose separate from that of the article and that result from a chemical reaction occurring upon end use of other chemical substances, mixtures, or articles. Fluids and particles are not considered articles regardless of shape or design [40 C.F.R. §704.95].

ASBESTOS -- The asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite, and actinolite [40 C.F.R. §763.103(b)].

BYPRODUCT -- A chemical substance produced without separate commercial intent during the manufacture, processing, use, or disposal of another chemical substance(s) or mixture(s) [40 C.F.R. §704.95].

CATEGORY OF CHEMICAL SUBSTANCES -- A group of chemical substances the members of which are similar in molecular structure; in physical, chemical, or biological properties; in use; or in mode of entrance into the human

body or into the environment, or the members of which are in some other way suitable for classification as such for purposes of TSCA, except that such term does not mean a group of chemical substances that are grouped together solely on the basis of their being new chemical substances [TSCA §26(c)(2)(A)].

CATEGORY OF MIXTURES -- A group of mixtures the members of which are similar in molecular structure; in physical, chemical, or biological properties; in use; or in the mode of entrance into the human body or into the environment, or the members of which are in some other way suitable for classification as such for purposes of TSCA [TSCA §26(c)(2)(B)].

CFC(s) -- Fully halogenated chlorofluoroalkanes (also known as chlorofluorocarbons) are a family of chemical compounds that were once widely used as aerosol propellants but are now suspected of depleting the stratospheric ozone layer.

CHEMICAL SUBSTANCES -- Any organic or inorganic substances of a particular molecular identity, including any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and any chemical element or uncombined radical, except that "chemical substance" does not include:

- -- Any mixture;
- -- Any pesticide as defined in the Federal Insecticide, Fungicide, and Rodenticide Act when manufactured, processed, or distributed in commerce for use as a pesticide;
- -- Tobacco or any tobacco product;
- -- Any source material, special nuclear material, or byproduct material (as such terms are defined in the Atomic Energy Act of 1954 and regulations issued under such Act);
- -- Any article the sale of which is subject to the tax imposed by Section 4181 of the Internal Revenue Code of 1954 (determined without regard to any exemptions from such tax provided by Section 4182 or 4221 or any other provision of such code); and
- -- Any food, food additive, drug, cosmetic, or device (as such terms are defined in Section 201 of the Federal Food, Drug, and Cosmetic Act) when manufactured, processed, or distributed in commerce for use as a food, food additive, drug, cosmetic, or device [TSCA §3(2)(A)].

CIVIL COMPLAINT -- A written communication alleging one or more violations of specific provisions of TSCA or regulations promulgated thereunder [40 C.F.R. §22.03]. Each complaint must include:

- -- Reference to the provisions of the Act alleged to have been violated;

-- A concise factual statement of the violation;

-- The amount of the proposed penalty;

-- A statement of the appropriateness of the penalty;

-- Notice of the respondent's right to an adjudicatory hearing; and

-- A statement reciting the section(s) of the Act authorizing the issuance of the complaint [40 C.F.R. §22.14].

COMMERCE -- Trade, traffic, transportation, or other commerce (1) between a place in a state and any place outside of such state, or (2) that affects trade, traffic, transportation, or commerce between a place in a state and any place outside of such state [TSCA §3(3)].

COMPLAINANT -- Any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act [40 C.F.R. §22.03].

CONSENT AGREEMENT -- Any written document containing stipulations of fact; conclusions regarding material issues of law, fact, or discretion; and a specified proposed penalty acceptable to both complainant and respondent that results from any settlement conference [40 C.F.R. §22.18].

CONSENT ORDER -- An order of the Regional Administrator that assesses a civil penalty and disposes of the civil penalty proceeding.

DEFAULT ORDER -- An order issued pursuant to 40 C.F.R. §22.17 disposing of a matter of controversy between respondent and the Agency upon (1) the failure of respondent to file a timely answer to the complaint, (2) the failure of one of the parties to comply with a prehearing or hearing order of the Presiding Officer, or (3) the failure of one of the parties to appear at a conference or hearing without good cause being shown.

DISTRIBUTE IN COMMERCE (DISTRIBUTION IN COMMERCE) -- When used to describe an action taken with respect to a chemical substance or mixture or an article containing a substance or mixture, means to sell, or the sale of, the substance, mixture, or article in commerce; to introduce or deliver for introduction the substance, mixture, or article in commerce; or to hold, or the holding of, the substance, mixture, or article after its introduction into commerce [TSCA §3(4)].

DISTRICT COURT -- A United States district court, the District Court of Guam, the District Court of the Virgin Islands, and the highest court of American Samoa.

DUPLICATE SAMPLE -- A sample taken at the request of a facility official that is in every respect the same as the official sample taken by the inspector.

ENVIRONMENT -- Includes water, air, and land and the interrelationship that exists among and between water, air, land, and all living things [TSCA §3(5)].

EPA -- The United States Environmental Protection Agency.

EXPORTER -- The person who, as the principal party in interest in the export transaction, has the power and responsibility for determining and controlling the sending of the chemical substance or mixture to a destination out of the customs territory of the United States [40 C.F.R. §707.63].

FACILITY -- Any establishment, site, or other premises subject to TSCA enforcement activity.

FINAL ORDER -- An order issued by the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order disposing of a matter in controversy between the parties or an initial decision under 40 C.F.R. §22.27(c).

HEALTH AND SAFETY STUDY -- Any study of any effect of a chemical substance or mixture on human health or the environment or on both, including underlying data and epidemiological studies; studies of occupational exposure to a chemical substance or mixture; toxicological, clinical, and ecological studies of a chemical substance or mixture; and any test performed pursuant to TSCA [TSCA §3(6)].

HEALTH EFFECTS -- Terms referring to the health effects of chemical substances are defined as follows:

- -- Behavioral Disorder is a disturbance of personal function resulting from exposure to a toxic substance.
- -- Carcinogenesis is the property of a substance that causes cancer.
- -- Cumulative Effect is the accumulation of a substance within a living organism and the increasingly pronounced effects with each exposure.
- -- Mutagenesis is the property of a substance that causes changes in the genetic structure of subsequent generations.
- -- Synergistic Effect is the property of a substance that causes malformations or serious deviations from the norm in embryos and fetuses.

HEARING -- A hearing open to the public provided in Section 16(a)(2)(A) of the Act and conducted pursuant to the provisions of Chapter 5, Subchapter II of Title 5 of the United States Code, and the rules of practice found at 40 C.F.R. Part 22.

HEARING CLERK -- The Hearing Clerk, United States Environmental Protection Agency, Washington, D.C. 20460.

IMPORTER -- Any person who imports any chemical substance or any chemical substance as part of a mixture or article into the customs territory of the United States and includes (1) the person primarily liable for the payment of any duties on the merchandise, or (2) an authorized agent acting on his or her behalf [40 C.F.R. §710.2].

IMPORT IN BULK FORM -- To import a chemical substance (other than as part of a mixture or article) in any quantity, in cans, bottles, drums, barrels, packages, tanks, bags, or other containers, if the chemical substance is intended to be removed from the container and the substance has an end use or commercial purpose separate from the container [40 C.F.R. §704.95(c)(5)].

IMPURITY -- A chemical substance that is unintentionally present with another chemical substance.

INITIAL DECISION -- The decision issued by the Administrative Law Judge based upon the record of the hearing out of which the decision arises or upon the rendering of an accelerated decision. An initial decision is supported by findings of fact and conclusions regarding all material issues of law, fact, or discretion. This decision will become the final decision and order of the Administrator without further proceedings unless the decision is appealed or the Administrator orders a review of the case.

INJUNCTION -- A court order forbidding or commanding a person to perform a particular act.

INSPECTOR -- A duly designated representative of the Administrator authorized to conduct inspections, make investigations, collect documents and samples, and otherwise monitor compliance with TSCA.

INTERMEDIATE -- Any chemical substance that is consumed in whole or in part in a chemical reaction(s) used for the intentional manufacture of another chemical substance [40 C.F.R. §723.175(9)].

JUDICIAL OFFICER -- An officer or employee of the Agency designated as a judicial officer who shall meet the qualifications and perform functions provided for in 40 C.F.R. §22.04.

KNOWN TO OR REASONABLY ASCERTAINABLE -- All information in a person's possession or control, plus all information that a reasonable person similarly situated might be expected to possess, control, or know, or could obtain without unreasonable burden or cost [40 C.F.R. §723.175(10)].

MANUFACTURE -- To produce or manufacture in the United States or to import into the customs territory of the United States.

MIXTURE -- Any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination that occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined.

NEW CHEMICAL SUBSTANCE -- Any chemical substance that is not included in the inventory compiled and published under Section 8(b) of TSCA.

PARTY -- Any person, group, organization, agency, or department that participates in a hearing as complainant, respondent, or intervenor.

PCB(s) -- Any chemical substance that is limited to the biphenyl molecule and has been chlorinated to varying degrees, or any combination of substances that contains polychlorinated biphenyls.

PERSON -- Any natural or juridical person including any individual, firm, company, corporation, joint venture, partnership, sole proprietorship, association, or any other business entity; any state or political subdivision thereof; any municipality; any interstate body; and any department, agency, or instrumentality of the federal government.

PETITIONER -- Any person adversely affected by a notice of the Administrator and who requests a public hearing.

PHYSICAL SAMPLE -- A sample that is representative of a chemical substance as drawn from a container or as contained in a medium such as soil or solvent and is used to confirm the presence and concentration of a chemical substance.

PRESIDING OFFICER -- The Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer of an administrative hearing arising out of the Act.

PROCESS -- The preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce:

-- In the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture; or

-- As part of an article containing the chemical substance or mixture [TSCA §3(10)].

PROCESS FOR COMMERCIAL PURPOSES -- To process (1) for distribution in commerce, including for test-marketing purposes, or (2) for use as an intermediate.

PROCESSOR -- Any person who processes a chemical substance or mixture [TSCA §3(11)].

PROGRAMMED INSPECTION -- An inspection requiring the selection of a specific program activity that is subject to routine compliance monitoring and that results from an enforcement strategy based upon objective selection criteria.

REGIONAL ADMINISTRATOR -- The Administrator of a Regional Office of the Agency or his or her delegatee.

REGIONAL HEARING CLERK -- An individual duly authorized by the Regional Administrator to serve as hearing clerk for a given Region. Correspondence may be addressed to the Regional Hearing Clerk, United States Environmental Protection Agency (address of Regional Office.)

REGIONAL JUDICIAL OFFICER -- An Officer or employee of the Agency duly authorized by the Regional Administrator to serve as the Judicial Officer for the Region as provided in the Consolidated Rules of Practice (CROP).

RESPONDENT -- Any person proceeded against in a complaint.

SEIZURE -- The initial step in a condemnation proceeding consisting of the taking of any substance, mixture, or article manufactured, processed, or distributed in commerce in violation of TSCA.

STANDARDS FOR THE DEVELOPMENT OF TEST DATA -- A prescription of (1) the health and environmental effects and (2) the information relating to toxicity, persistence, and other characteristics that affect health and the environment, for which test data for a chemical substance or mixture are to be developed and any analysis that is to be performed on such data. These data also include, to the extent necessary to assure that data respecting such effects and characteristics are reliable and adequate:

-- The manner in which such data are to be developed;

-- The specification of any test protocol or methodology to be employed in the development of such data; and

-- Such other requirements as are necessary to provide such assurance.

STATE -- Any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Canal Zone, American Samoa, the Northern Mariana Islands, or any other territory or possession of the United States.

TOXICITY -- The property of a chemical substance or mixture to cause any adverse physiological effects.

UNITED STATES -- When used in the geographic sense, means all of the states.

UNPROGRAMMED INSPECTION ("FOR CAUSE" INSPECTION) -- An inspection in which probable violations of the Act are observed or brought to the attention of the Agency through, for example, an employee's complaint or a competitor's tip.

Chapter Two

General Operating Procedures

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Chapter Two

General Operating Procedures

Primary Office Responsibilities

The basic framework setting forth the responsibilities of each EPA office participating in enforcement activities was established by the Administrator's memorandum of July 6, 1982, entitled "General Operating Procedures for the Civil Enforcement Program" (GOP), and Memorandum of October 27, 1982, entitled "General Operating Procedures for the Criminal Enforcement Program." (See EPA's General Enforcement Policy Compendium.) This chapter describes the respective roles and relationships of the various EPA offices that are involved with TSCA administrative/civil enforcement. For procedures relating to criminal enforcement, consult Chapter Nine.

EPA's administrative/civil enforcement program includes both compliance-oriented and legal-oriented activities. The compliance-oriented activities are primarily the responsibility of EPA's program offices, and the legal-oriented activities are principally charged to OECM and the Regional Counsel's office. Because many enforcement activities involve several aspects, these activities cannot be defined as strictly "compliance" or "legal." [See, e.g., TSCA Case Flow Diagram (Exhibit 2-1), which illustrates the various enforcement components involved in TSCA case development.] Where both elements are present, the EPA attorney must be especially diligent in coordinating the legal aspects with the functions of the other participating offices. The basic relationship between the attorney and the program office is that of attorney-client.

The basic administrative/civil enforcement functions are divided among the participating offices as follows:

Regional Administrator

Program Office

- Identifies instances of noncompliance;
- Establishes priorities for handling instances of noncompliance;

- Evaluates the technical sufficiency of actions designed to remedy violations;
- Identifies for formal action those cases that cannot be resolved less formally;
- Provides technical support necessary for developing cases and conducting litigation;
- Issues written notices of noncompliance;
- Issues routine civil administrative complaints;*
- Evaluates the appropriateness of civil penalties;
- Negotiates and prepares consent agreements memorializing settlements between the Agency and respondents prior to the alleged violator's filing of an answer or failing to file an answer to a complaint;* and
- Monitors those conditions in consent decrees that require further reporting, compliance, etc.

Regional Counsel

- Acts as attorney for "client" program offices;
- Assists program office in drafting or reviewing notices of noncompliance, administrative orders, or administrative complaints;
- Ensures consistency of action with OECM guidance;
- Attends negotiations whenever outside parties are represented by counsel;
- Serves as lead attorney for the Agency in administrative proceedings originating in the Region; and
- Refers requests for equitable relief through the Regional Administrator to Headquarters for review and further referral to the Department of Justice and the appropriate United States Attorneys Office.*

* Consultation with other offices is required.

Headquarters

Program Office--PTSCMS

- Manages national program matters;
- Establishes national enforcement compliance priorities;
- Provides overall direction to and accountability measures for the enforcement compliance program;
- Provides technical support (including support for litigation activities);
- Takes lead role in preparing guidance and policy decisions on enforcement compliance issues;
- Takes lead in issuing administrative orders regarding new programs such as Section 5(a) PMN cases, asbestos cases, etc.;
- Consults with the Regions, on enforcement actions at the earliest possible stage in the case development process for the following actions:
  - -- "Non-routine" cases of first impression or those of national significance,
  - -- Injunctions, and
  - -- Seizures;
- Consults with the Regions on enforcement actions if proposed civil penalty settlements involve monetary reductions of greater than 40 percent; and
- Works with OECM in preparing joint guidance for areas in which compliance and legal issues overlap.

Office of Toxic Substances

- Has lead responsibility for rule development under TSCA;
- Determines status of whether or not a TSCA chemical is on the PMN inventory; and
- Provides technical advice as appropriate.

OECM

- Provides legal advice regarding enforcement matters to the Assistant Administrator for Pesticides and Toxic Substances;
- Acts as lead counsel on cases of national significance;

- Develops legal and enforcement policies and guidance;
- Confers with the Department of Justice on the potential impact of enforcement policy on litigation matters;
- Evaluates and analyzes strategies and program accomplishments as national manager of EPA's enforcement and compliance monitoring functions;
- Cooperates with the Assistant Administrator for Pesticides and Toxic Substances in the development of enforcement policies involving both enforcement compliance and enforcement legal activities; and
- Assists and supports the Regional Counsel lead attorneys and Department of Justice attorneys by coordinating legal activity and contributing case information to the development process.

Office of General Counsel

- Provides legal interpretation of applicable statutes and regulations to support the TSCA enforcement programs; and
- Has lead responsibility, in consultation with OECM, for defensive litigation arising out of enforcement actions (e.g., federal court challenges to EPA's civil penalty proceedings).

National Enforcement Investigations Center (NEIC)

NEIC is located in Denver, Colorado, and functions as a national technical resource and investigative unit. NEIC's expertise in investigation and evidence discovery can assist case development and provide litigation support. The OECM establishes NEIC's priorities and its availability. Regional Administrators and the Assistant Administrator for Pesticides and Toxic Substances are requested to involve NEIC on a priority basis in cases that have precedential implications, national significance, or are multi-regional in nature.

Concurrence Procedures

Generally, Headquarters has waived concurrences in routine administrative civil cases. However, consultation is required in the following instances:

- Cases of first impression;
- Cases of unusual national significance;
- Requests for reduction of civil penalties greater than 40 percent;

- Requests for equitable relief (e.g., seizures and injunctions); and
- Civil penalty appeals to the Administrator.

The consultation procedures relating to each of the above actions are discussed in the section of the manual pertaining to the individual subject matter.

State and Federal Interagency Cooperation

TSCA charges EPA with the responsibility of protecting public health and the environment from the risks associated with exposure to chemical substances or mixtures. In order to fulfill this responsibility, EPA seeks cooperation with appropriate state and federal agencies.

TSCA Pilot Enforcement Grants

Section 28 of TSCA authorizes EPA to enter into grants with states for purposes of complementing (but not reducing) the authority of the Administrator under the Act. In July of 1981, a Pilot State TSCA Enforcement Grant Program, involving five states, was initiated. The five states (California, Connecticut, Maryland, Michigan, and Ohio) conduct compliance monitoring activities related to the asbestos and PCB programs.

Federal Interagency Cooperation

United States Department of Justice (DOJ). EPA's working relationship with the Department of Justice and the United States Attorneys Office continues to be governed by the June 1977 Memorandum of Understanding between the DOJ and EPA. All criminal cases, collection and seizure actions, and warrants for inspections under TSCA must be filed by the DOJ or the United States Attorneys Office. EPA Headquarters and regional components are expected to use their best efforts to ensure that a constructive working relationship is maintained with DOJ and to provide assistance to DOJ in the preparation of those actions. (For the procedures for referring actions involving criminal cases, collection, seizure, or warrants, see the individual topics in this manual.)

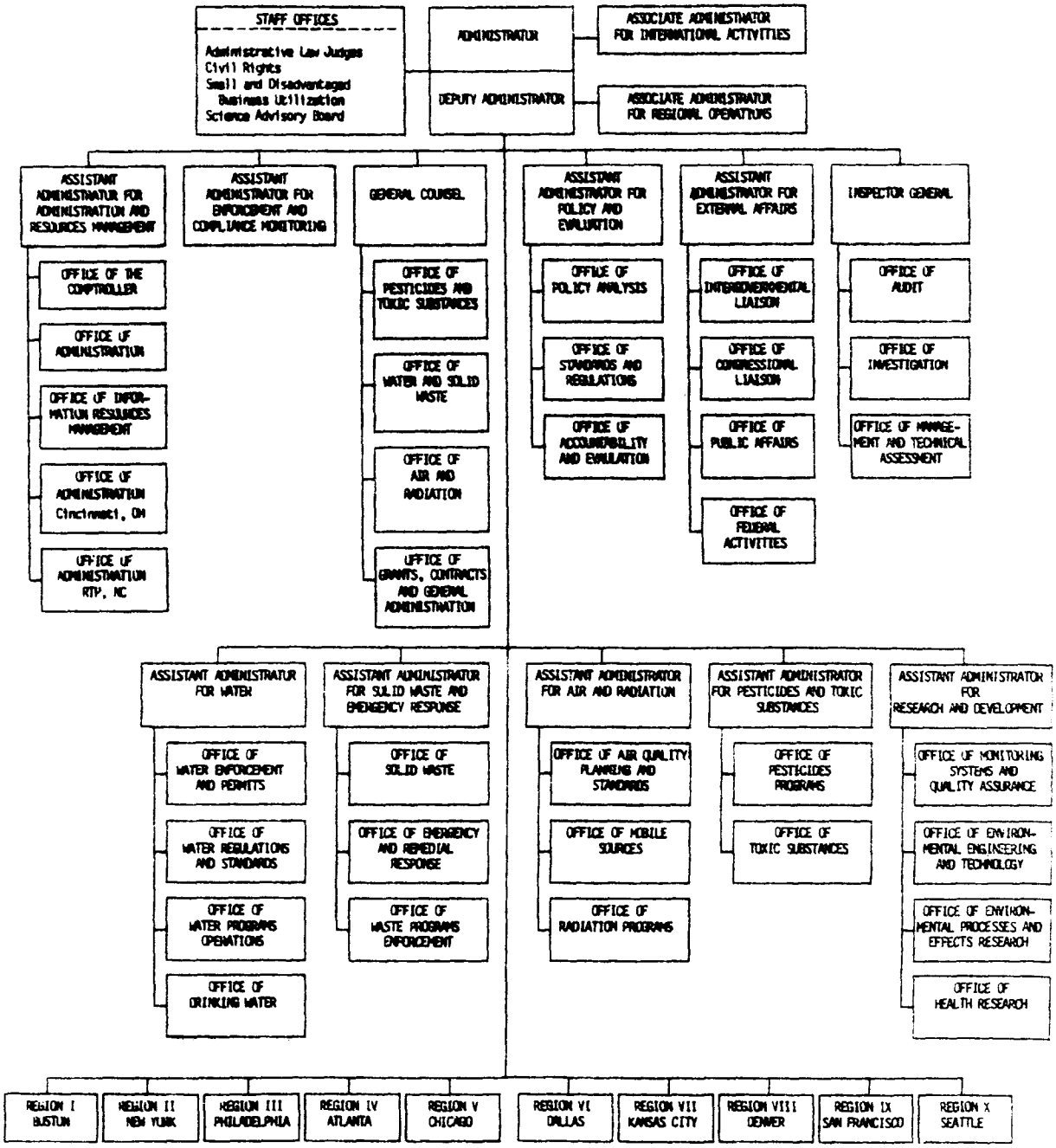
Food and Drug Administration (FDA). Under the terms of an Interagency Agreement, EPA and FDA cooperate closely on a laboratory inspection/data audit program. As part of the Interagency Agreement, FDA investigators may inspect laboratories that conduct tests pursuant to TSCA:

- To determine compliance with the Good Laboratory Practice Standards;
- To ensure that the tests were conducted in accordance with accepted protocols; and

- To ensure that final study reports fully and accurately reflect the test results.

These FDA inspections are conducted at the request of EPA.

U.S. ENVIRONMENTAL PROTECTION AGENCY



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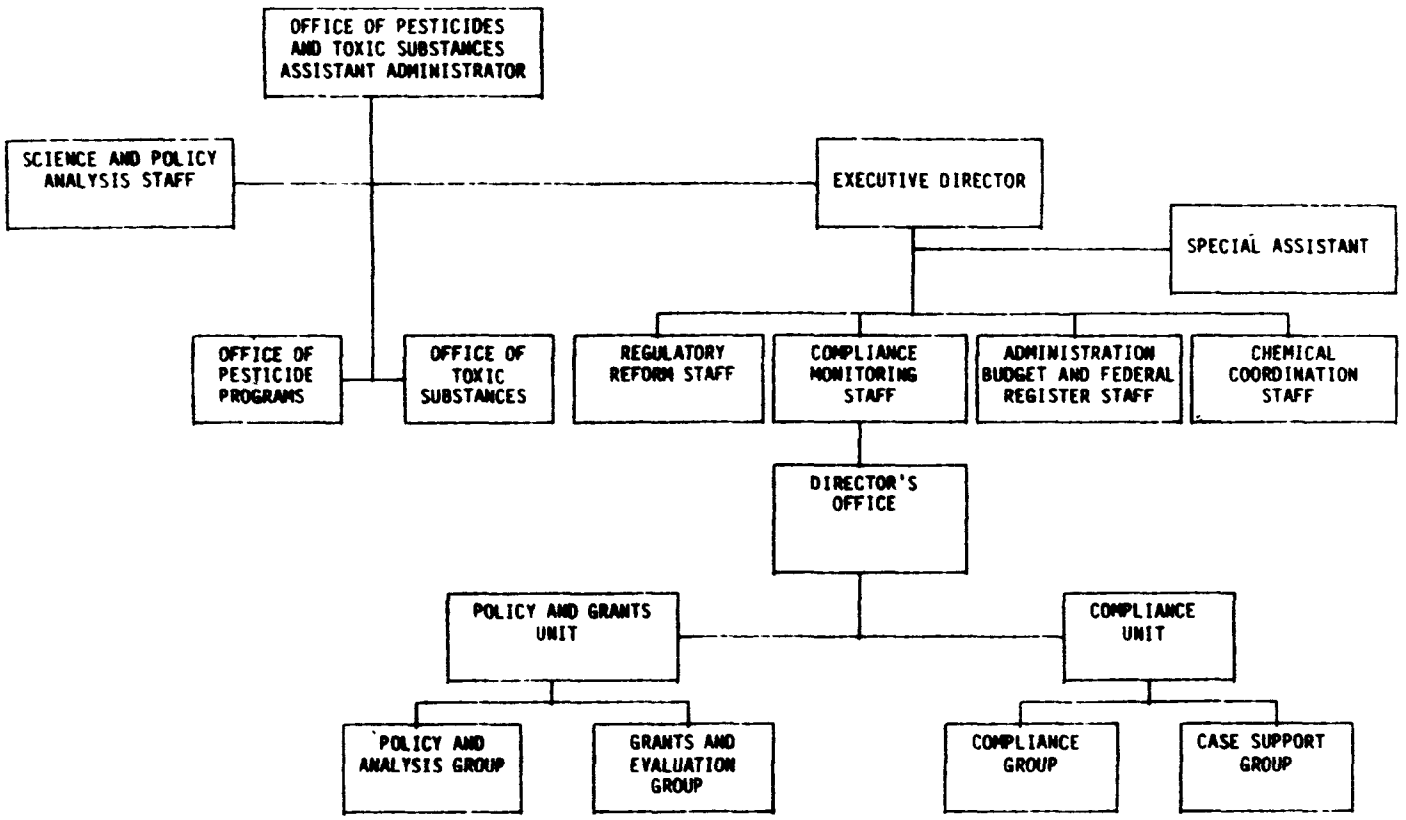

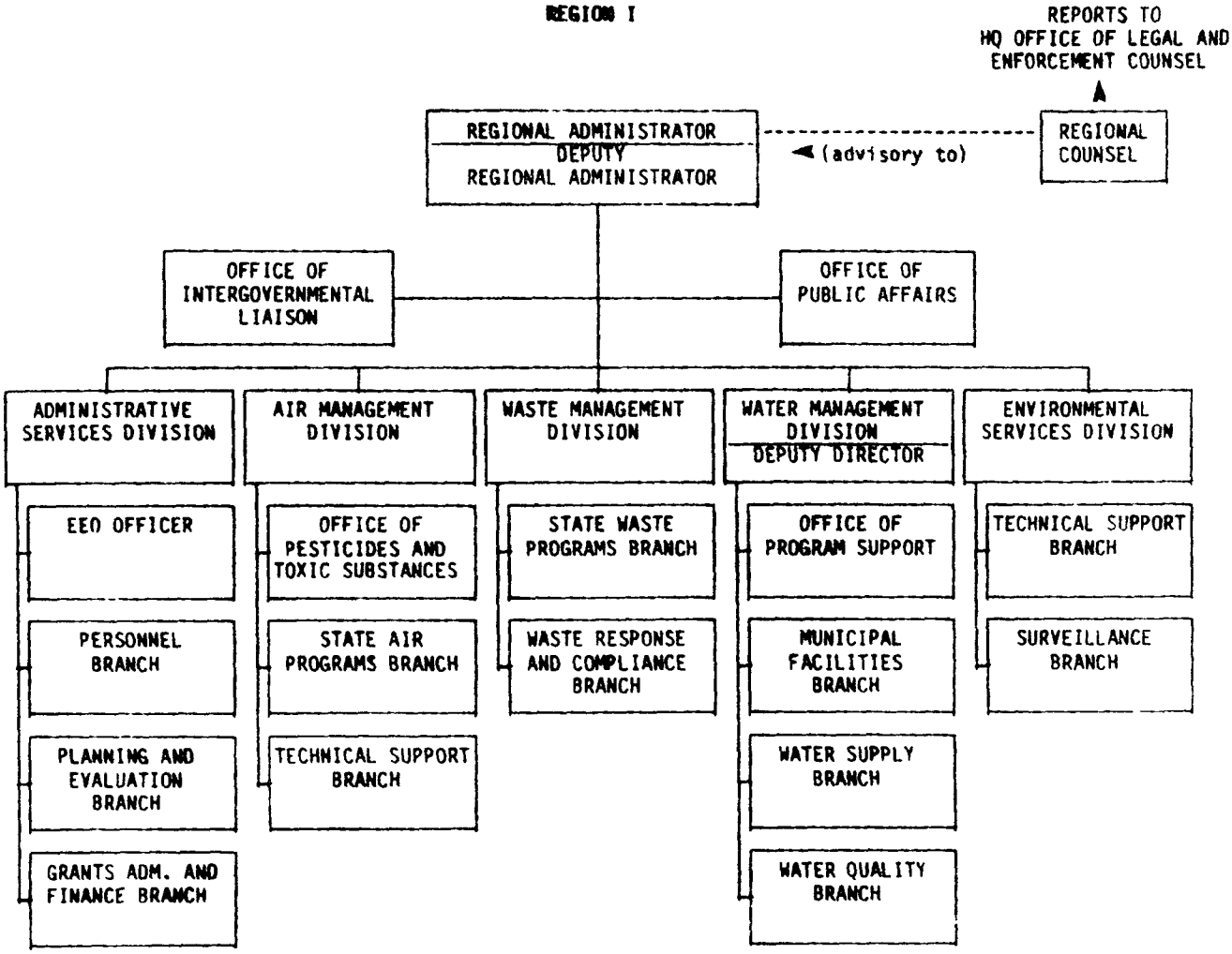
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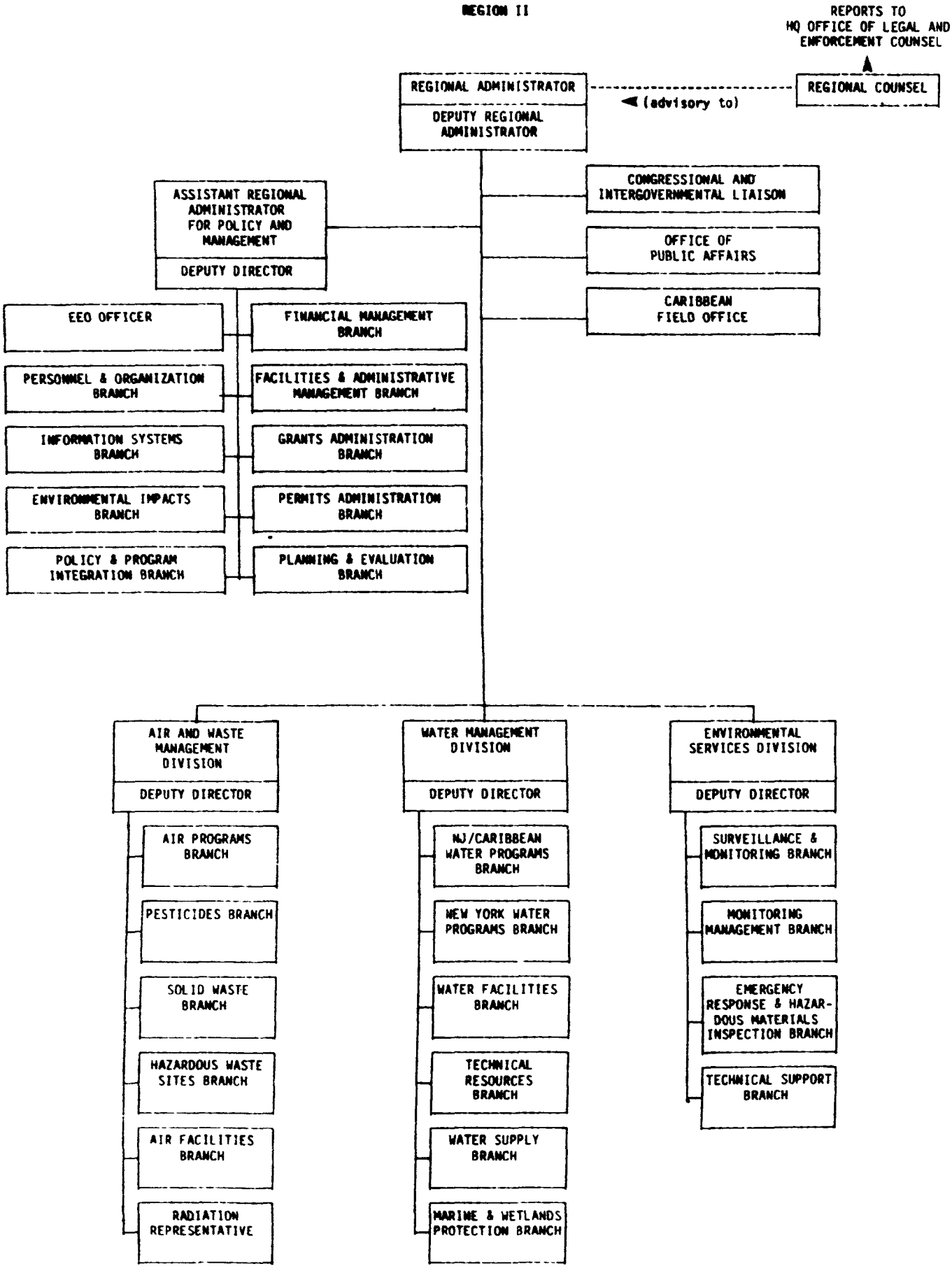
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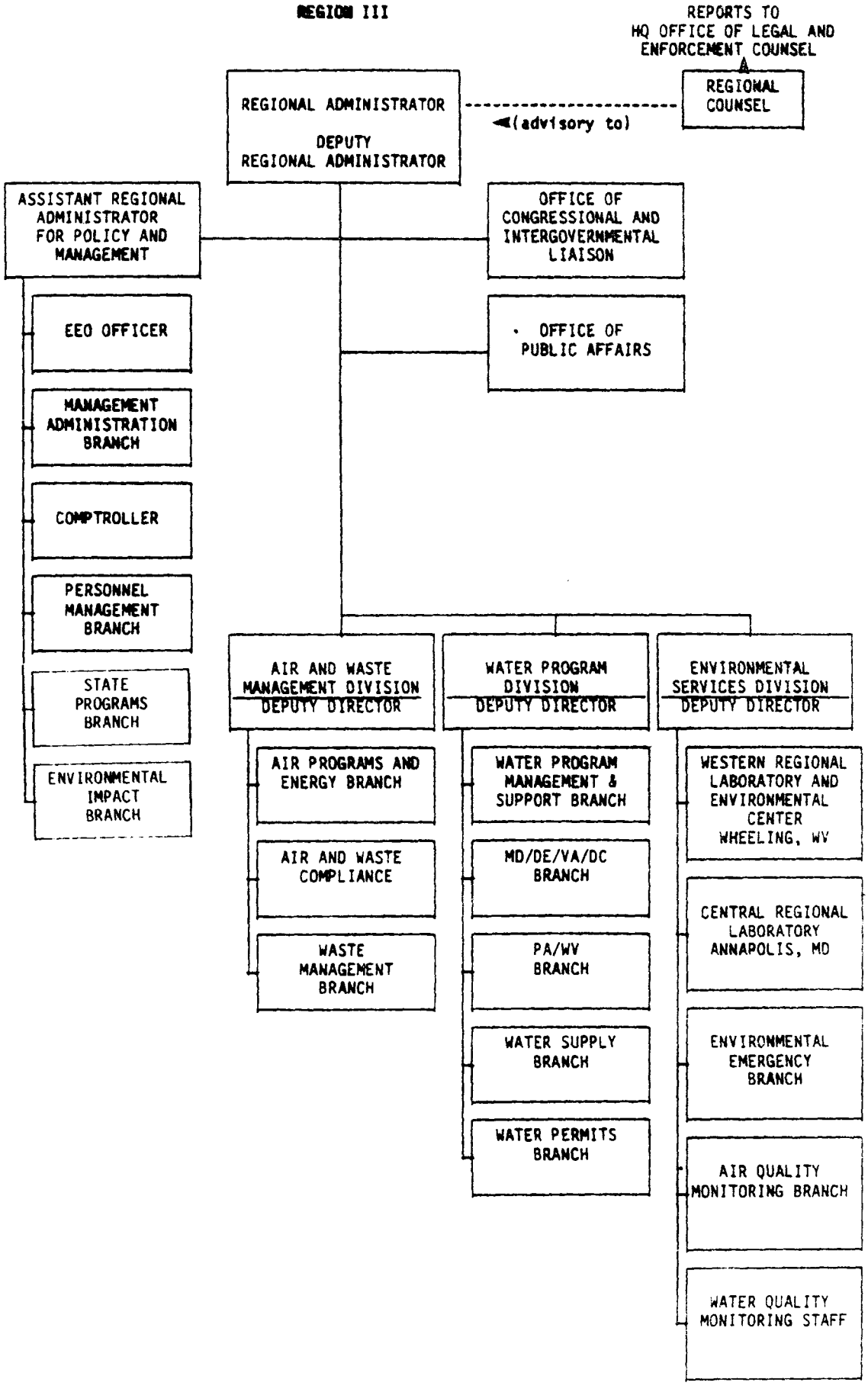
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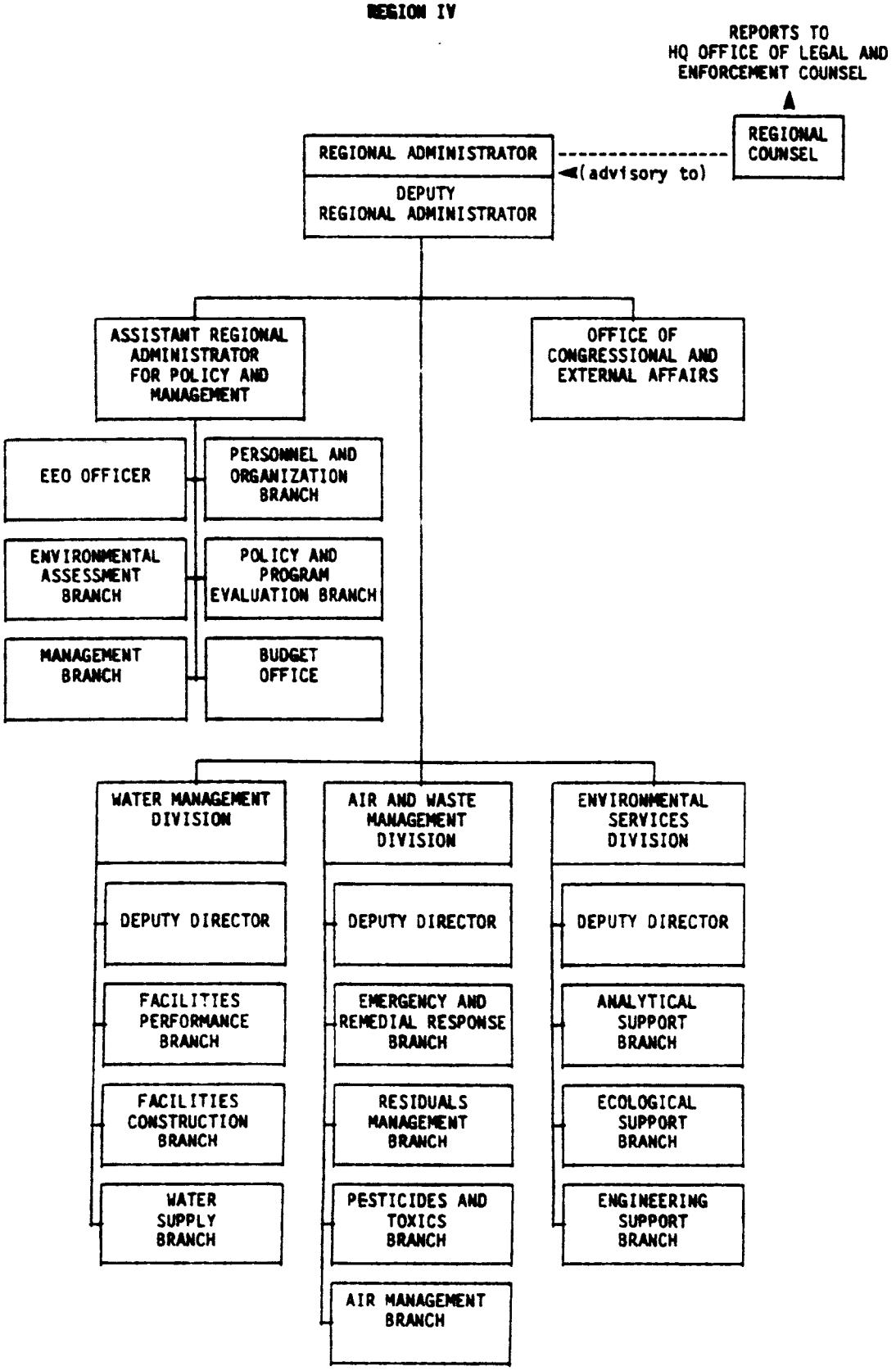
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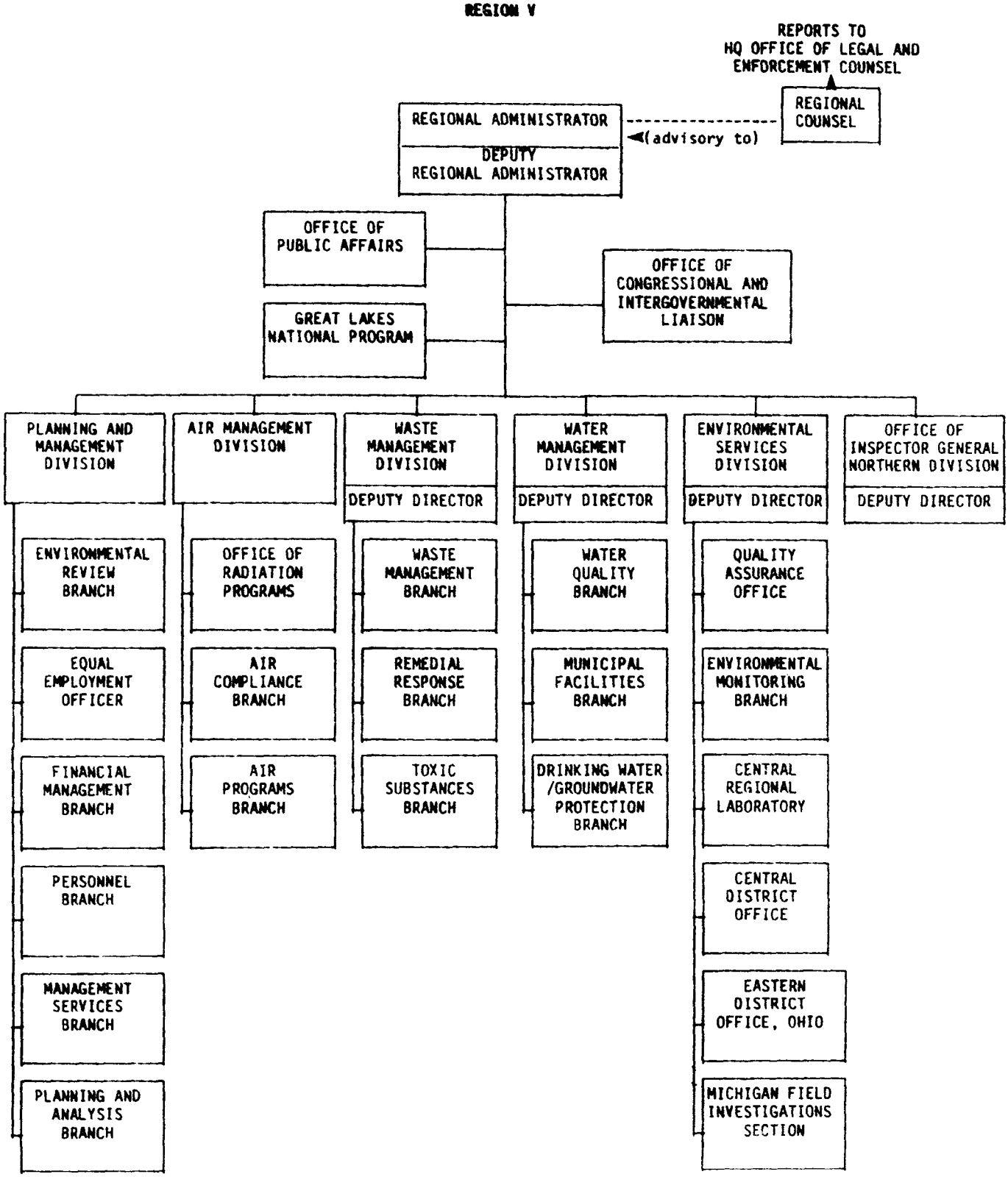
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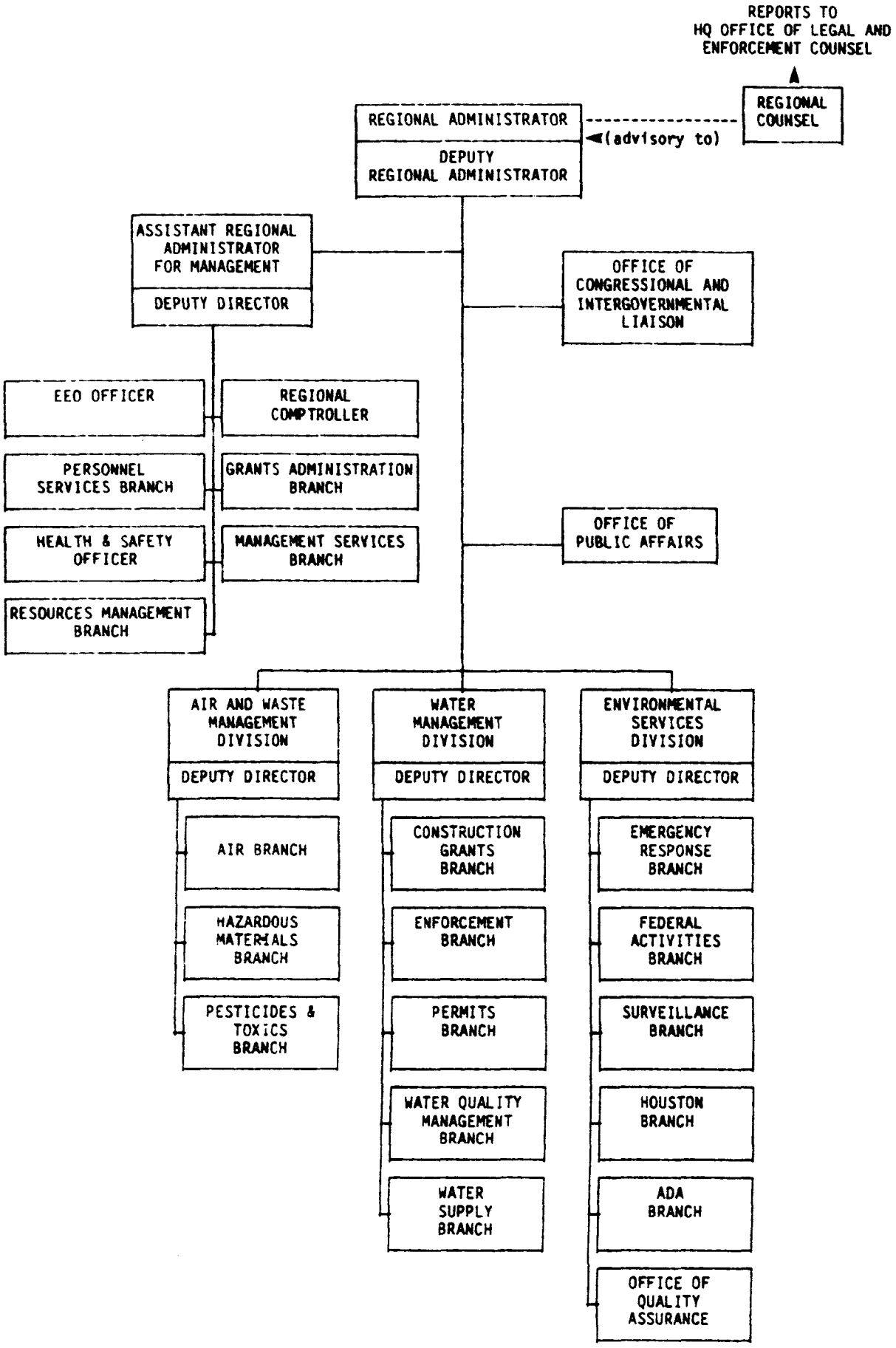
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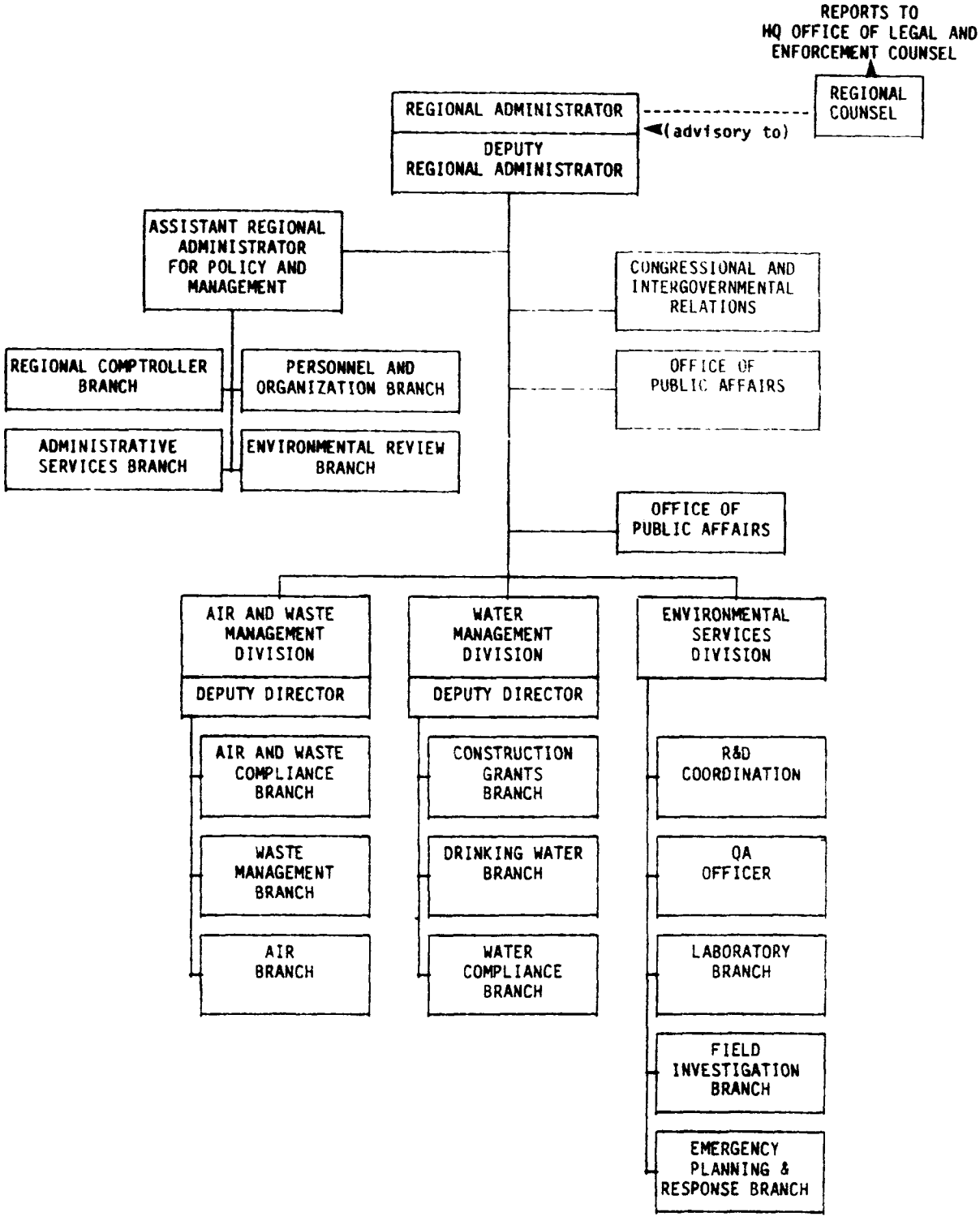
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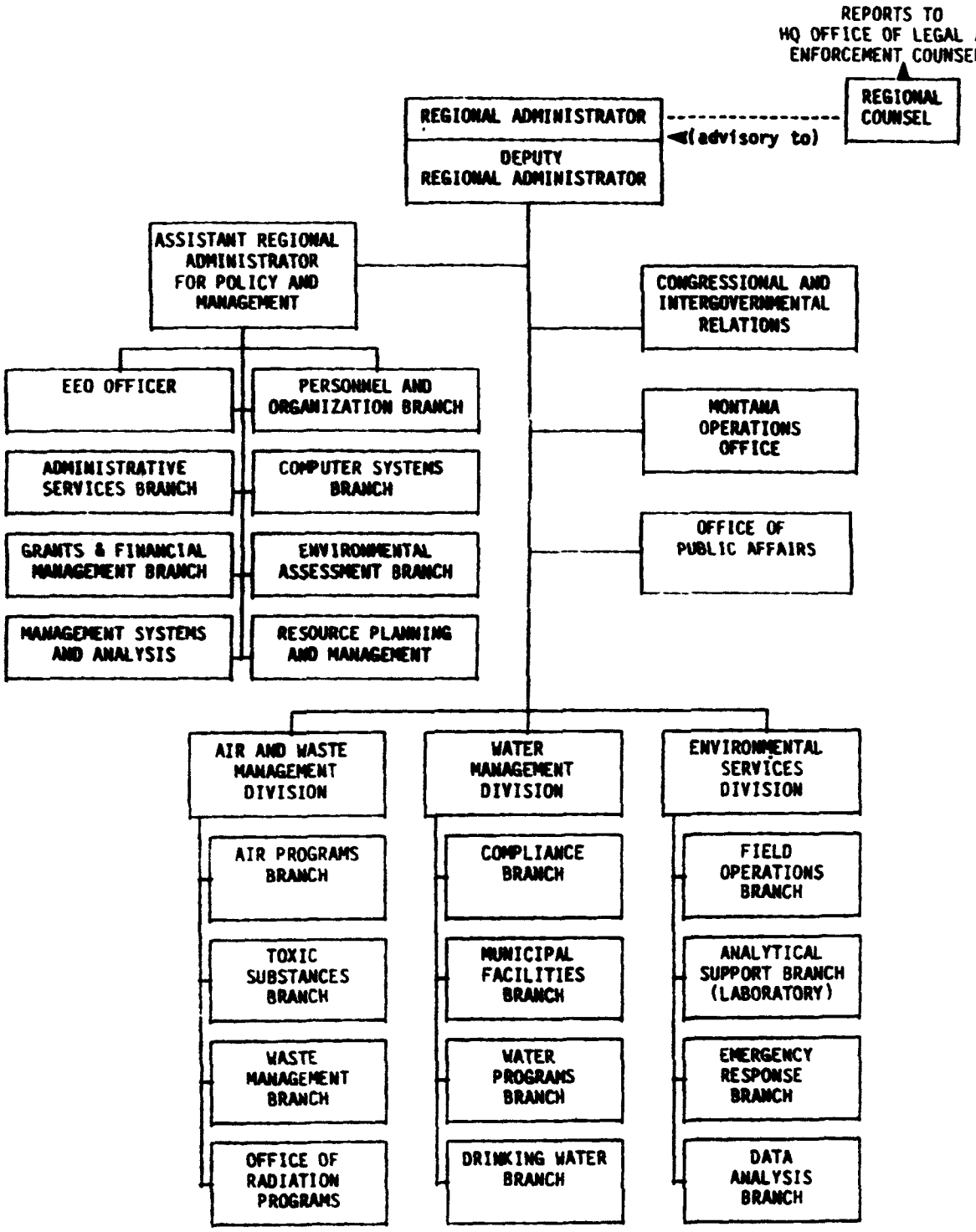
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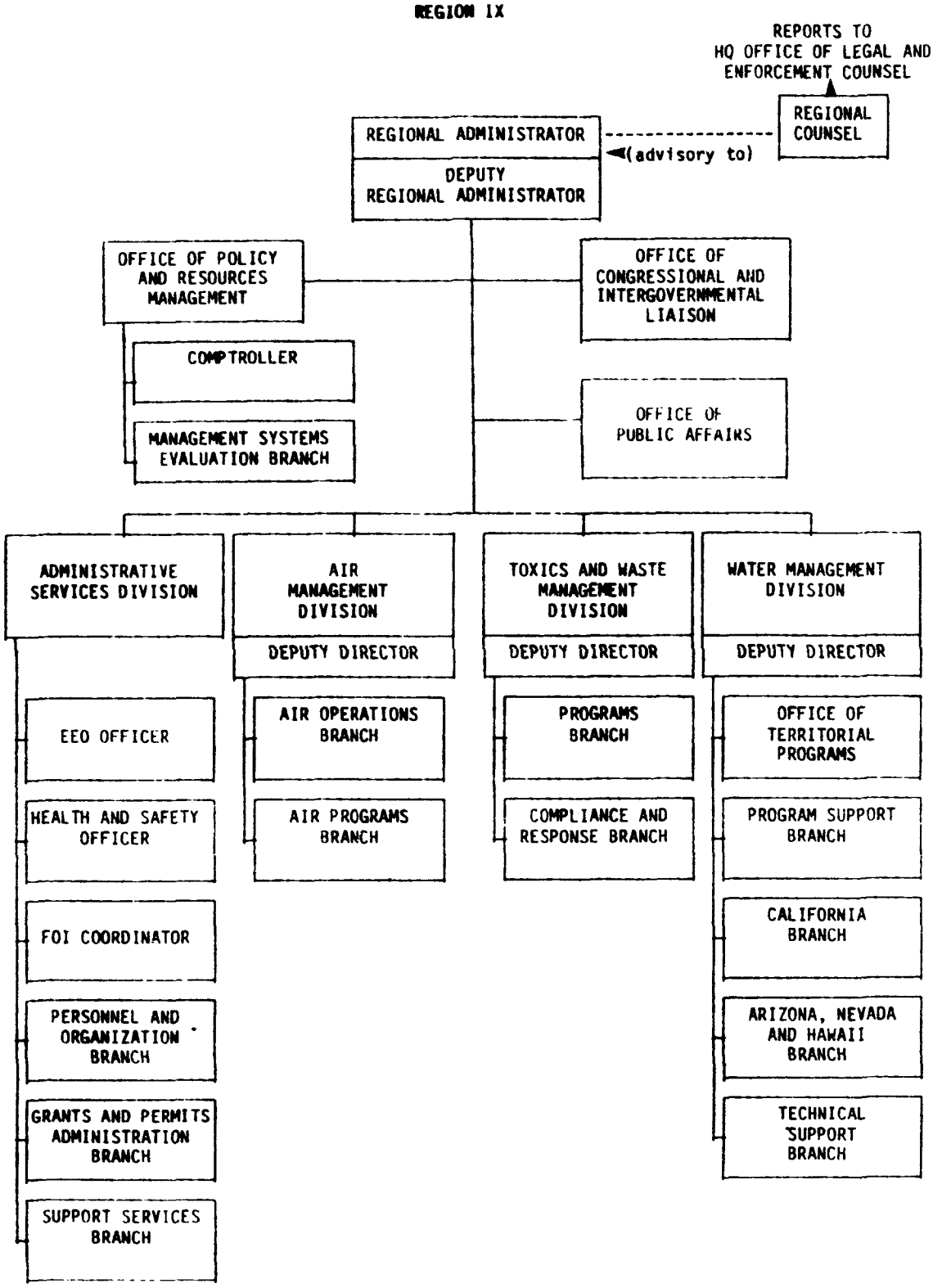
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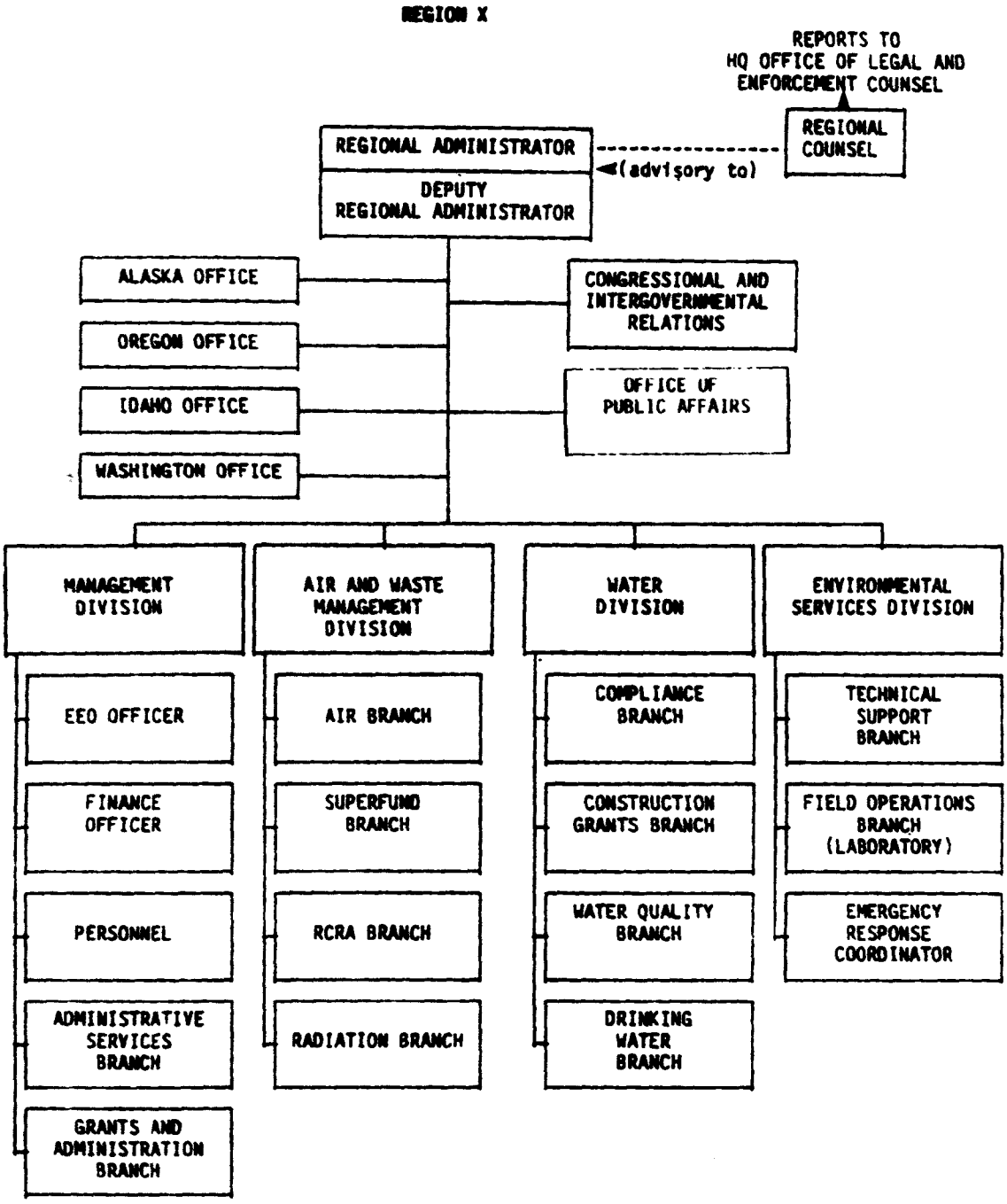
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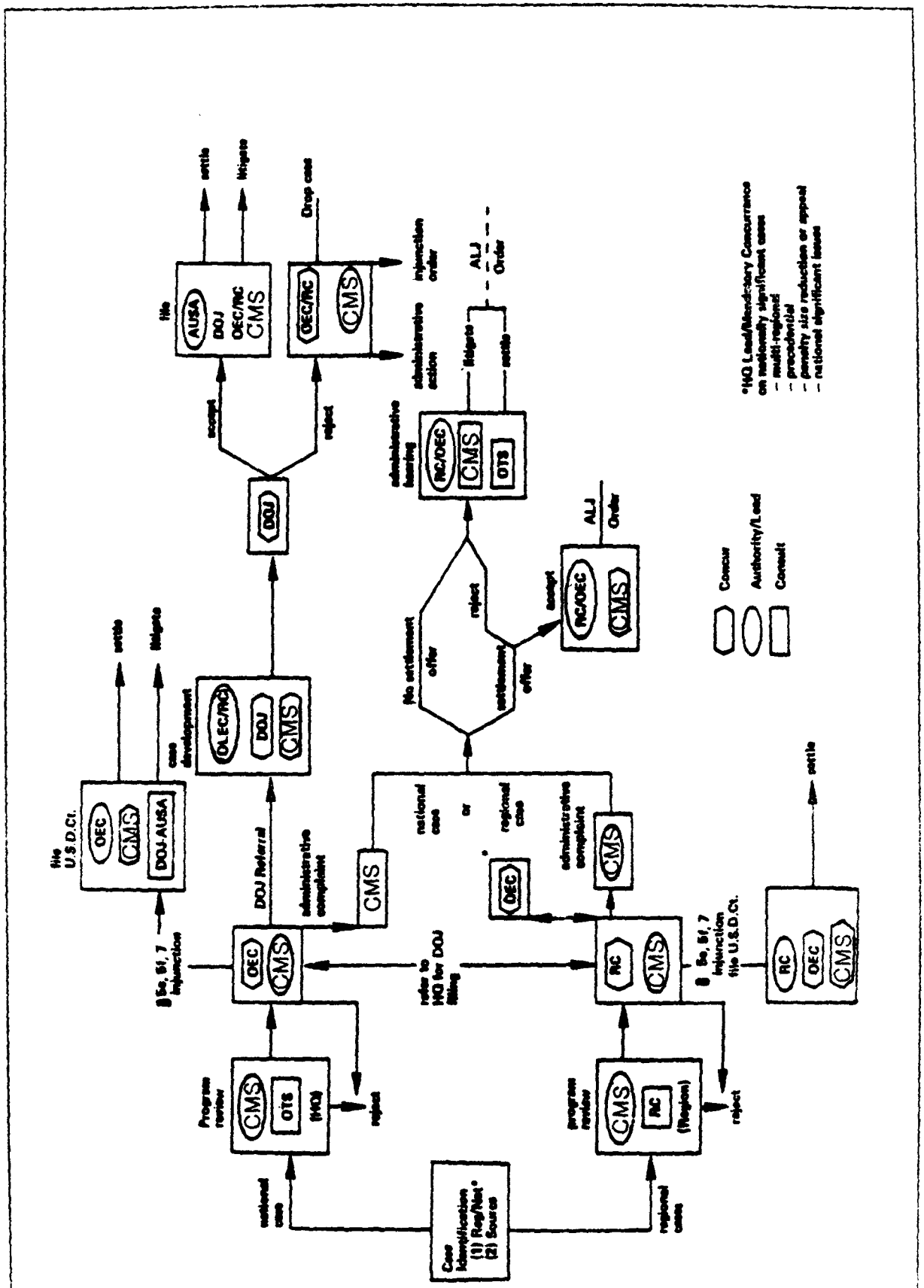
TSCA Administrative/Civil Case Flow



Chapter Three

Compliance Monitoring Procedures

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1 Introduction

Compliance monitoring is a term used to describe the means by which EPA verifies conformance with statutory and regulatory requirements. In the context of TSCA, this includes inspections and subpoenas.

In the event that an owner or operator of a regulated facility denies an inspector entry to perform an inspection, an administrative warrant can be used to gain entry into the facility. Furthermore, Section 11(c) of TSCA authorizes the Administrator to issue subpoenas requiring the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary in carrying out the Act.

This chapter briefly outlines the procedures associated with TSCA compliance monitoring activities. For detailed procedures concerning TSCA inspections, refer to the TSCA Inspection Manual.

2 Inspections

A compliance inspection is the primary enforcement mechanism used to detect and verify violations of TSCA. Facilities are selected for an inspection under a neutral administrative inspection scheme or "for cause." (See definition of an unprogrammed inspection in the Glossary.) Selection may be made, depending on the circumstances, by Headquarters or the Regional Offices.

Evidence obtained during an inspection may result in the Agency taking any of the following actions:

- Issuance of a proposed order to limit or prohibit the manufacture, processing, distribution in commerce, use, or disposal of chemical substances or mixtures found to pose an imminent danger;
- Assessment of an administrative civil penalty;
- Institution of a civil court (injunctive or seizure) action; or
- Institution of a criminal court investigation*.

Compliance inspections conducted by EPA personnel under the authority of TSCA generally will not involve the need to warn individuals of their rights under the fifth amendment of the United States Constitution. The fifth amendment provides that "No person * * * shall be compelled in any criminal case to be a witness against himself." Issues concerning this right arise whenever a person is taken into custody or otherwise has his or her freedom restricted by law enforcement officers. Because inspections under TSCA are generally not conducted by law enforcement officers and do not involve custodial situations, fifth amendment rights are not implicated.

All individuals who conduct inspections should be aware of what constitutes a custodial situation. When an individual is under arrest, he or she is

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* See Agency guidelines, entitled "The Use of Administrative Discovery Devices in the Development of Potential Criminal Cases," which may be obtained from the Criminal Enforcement Division.

clearly in custody. However, a custodial situation may also be created when, as a result of the demeanor and authority of the questioner and the physical situation, a reasonable person would not feel free to leave. These types of situations should be avoided during an administrative inspection.

Statements made to an inspector during a noncustodial administrative inspection should be given voluntarily. The term voluntary, as used in the judicial sense, relates to the circumstances surrounding the investigation and the taking of statements. Such diverse factors as the following are considered:

- Coercion or threats by the interviewer;
- Overbearing will of the interviewer;
- Promises of benefit by persons in authority;
- Deceit by the interviewer during the interrogation;
- The accused's age, experience, and level of education; and
- The accused's knowledge of his or her constitutional rights.

Confidentiality

During the course of TSCA inspections, inspectors may encounter information that is entitled to confidential treatment under Section 14 of TSCA and the EPA regulations at 40 C.F.R. Part 2. This section of the statute and the regulations are designed to protect confidential business information (CBI)* from unauthorized disclosure. Material that is CBI includes information considered to be trade secrets that could damage a company's competitive position if it became publicly known.

Because of the sensitivity of CBI material, very stringent procedures for handling this information have been established. These procedures are contained in the TSCA Confidential Business Information Security Manual, which governs access to and control of CBI documents by EPA personnel. (See Chapter Eleven for a further discussion on confidentiality.)

Because TSCA inspections may involve CBI, special inspection procedures have been developed that are designed to provide adequate notification to companies of their right to declare inspection data confidential and to ensure secure handling of this information at each stage of the

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* TSCA CBI material does not in any manner refer to classified National Security Information as defined in Executive Order 12065.

inspection. These procedures are briefly outlined in the appropriate sections of this chapter. For detailed information, consult the TSCA Inspection Manual.

2a Records and Establishment Inspections

Authority

Section 11(a) authorizes any duly designated representative of the Administrator to "inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce."

Inspections must be conducted in a prescribed manner including:

- Presentation of appropriate credentials to the owner, operator, or agent in charge of the premises or conveyance to be inspected;
- Presentation of a written Notice of Inspection* detailing the suspected violation or purpose of the inspection;
- Entry of the facility at a reasonable time and prompt completion of the inspection;
- Presentation of a TSCA Inspection Confidentiality Notice*;
- Completion of a Declaration of Confidential Business Information*; and
- Issuance of a Receipt for Samples and Documents*.

The TSCA Inspection Confidentiality Notice is used to inform facility officials of their right to claim inspection data as CBI. All documents, samples, and related data taken during an inspection that have been claimed as CBI must be listed on the Declaration of Confidential Business Information. For detailed guidance on the use of these CBI forms, refer to the TSCA Inspection Manual.

* Examples of these forms may be found in Chapter Four.

Scope

The scope of a TSCA inspection, according to TSCA Section 11(b)(1), extends to all things within the premises or conveyance inspected (including records, files, papers, processes, controls, and facilities) that have a bearing on whether the requirements of the Act applicable to the chemical substances or mixtures located within such premises or conveyance have been complied with. However, pursuant to Section 11(b)(2) of TSCA, certain types of data can only be inspected if the nature and extent of such data are described with reasonable specificity in the written Notice of Inspection. These types of data include:

- Financial data;
- Sales data (other than shipment data);
- Pricing data;
- Personnel data; and
- Research data (other than research data required by the provisions of TSCA).

Purpose

The purpose of an inspection is to ensure compliance with TSCA and with the rules promulgated under the Act. In summary, the inspector's role is:

- To inform the regulated industry of the requirements of the law; and
- To document suspected violations.

Elements of an Inspection

The elements of a TSCA inspection can be grouped into the following categories: (1) pre-inspection preparation; (2) entry; (3) opening conference; (4) sampling and documentation; (5) closing conference; and (6) report preparation. These elements are common to all inspections, but the emphasis given to the separate elements will vary with the needs of the individual inspection.

Pre-Inspection Preparation

To ensure effective use of the inspector's time, the following procedures are undertaken before beginning an inspection:

- Establishing inspection objectives and preparing an inspection plan;
- Establishing the scope of the inspection;
- Conducting a review of Agency records;
- Preparing necessary documents; and
- Preparing sampling equipment and safety equipment.

Entry

Entry procedures are followed to obtain actual physical entry into the premises. Entry involves the following steps:

- Introduction;
- Presentation of official credentials;
- Presentation of the Notice of Inspection; and
- Management of denial of entry when necessary (see Chapter Three of the TSCA Inspection Manual for entry/denial procedures and Section 2c of this chapter).

Opening Conference

After entry, the inspector conducts an opening conference with the facility's management. During the opening conference, the inspector is responsible for the following activities:

- Discussing the objectives and scope of the inspection;
- Presenting the TSCA Inspection Confidentiality Notice;
- Advising of the availability of duplicate samples;
- Providing information on TSCA and its rules; and
- Planning meetings with personnel.

Sampling and Documentation

Reviewing facility records, taking samples, and preparing documentation are the basic inspection activities. It is these activities that provide the

evidentiary support that the Agency uses in enforcement actions. The inspector's responsibilities include:

- Targeting and locating facility records;
- Inspecting facility records;
- Preparing documentation of all inspection activities;
- Inspecting conditions and taking photographs, if necessary;
- Taking necessary samples, sealing samples, and establishing "chain of custody"; and
- Operating in a safe and efficient manner.

Closing Conference

The closing conference with facility officials enables the inspector to prepare receipts, answer questions, and provide information about TSCA. At the closing conference, the inspector "wraps up" the inspection by:

- Writing necessary receipts;
- Preparing the Declaration of Confidential Business Information;
- Advising that results of analysis of samples will be furnished if and when analysis is made; and
- Discussing inspection findings.

Report Preparation

All evidence must be organized and coordinated in a comprehensive, relevant, and accurate report including:

- Inspection report forms;
- Narrative report; and
- Other documentary support.

Suspected violations are to be documented in the above reports. Compliance enforcement personnel will review the report file to determine the adequacy of the evidence. Any information needing clarification should be reviewed with the inspector.

In preparing the inspection report, CBI material preferably should be referenced in a nonconfidential manner. (As an alternative, the report could include the confidential information; however, the entire inspection report must then be treated as a confidential document.)

2b TSCA Notification Letters

Purpose

TSCA notification letters may be used for the following purposes:

- To obtain information when a full-scale, on-site inspection is not cost effective;
- To facilitate the effectiveness of an inspection; or
- To eliminate the need for an inspection.

Notification letters are generally used when deliberate noncompliance is not suspected and the likelihood of a response is good. Typical information requested by a notification letter may include the following:

- Raw materials, products, byproducts, and production levels;
- Facility layout maps identifying process areas, discharge and emission points, and waste disposal sites;
- Flow diagrams for processes and waste control, treatment and disposal systems showing where wastewater, air emissions, and solid waste sources originate;
- Description and design of pollution control and treatment systems and normal operating parameters;
- Recent self-monitoring reports and inventories for discharges and emissions;
- Self-monitoring equipment in use, normal operating levels, and available data; and
- Files of required records.

Exhibit 3-1 is a model TSCA notification letter that is intended to facilitate the effectiveness of an upcoming scheduled inspection.

Model TSCA Notification Letter

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region I
John F. Kennedy Federal Building
Boston, MA 02203

Dear Mr./Ms._____:

The Environmental Protection Agency (EPA) will conduct an inspection of your facility's premises/conveyance under the authority of Section 11 of the Toxic Substances Control Act (15 U.S.C. §2610) on _____. The purpose of the inspection is to determine compliance with the requirements of this Act applicable to the chemical substances or mixtures within your facility's premises/conveyance. The inspectors will review records, files, and papers that are either required to be maintained by this Act or are applicable to the chemical substances or mixtures within your facility's premises/conveyance; observe process operations; evaluate monitoring practices, equipment, and sites; and collect samples that may include regulated chemical substances, air, water, waste, or soil samples, or any combination thereof. In addition, the inspectors may wish to take photographs of selected subjects.

Prior to arrival, the inspectors will require certain information; we recognize that some of this material may have been submitted to EPA in the past. If such is the case and that material is the most current information, please simply refer to the title, date, and specific recipient of such documents in your response to this request.

Please provide copies of the following information to EPA within twenty (20) days of receipt of this letter:

(List information requested.)

Pursuant to regulations appearing at 40 C.F.R. Part 2, Subpart B and specifically Section 2.306, you are entitled to claim any or all the information provided to EPA or collected by EPA during the inspection as confidential business information. Such information can be disclosed by EPA only in accordance with the procedures set forth in the regulations (cited above). Any such claim for confidentiality must conform to the requirements set forth in 40 C.F.R. Section 2.203(b).

If you have any questions, please contact _____.
Thank you for your assistance in this matter.

Sincerely,

2c Warrants

An administrative warrant can be used to gain entry into an establishment when facility officials have denied entry to an inspector or have withdrawn their consent to inspect during an inspection. In certain circumstances, it may be necessary to obtain a warrant prior to an inspection. A warrant is a judicial authorization for an appropriate official (EPA inspector, U.S. Marshal, or other authorized officer) to enter a specifically described location and perform clearly defined inspection functions.

Policy

It is the policy of EPA to obtain a warrant when all other efforts to gain lawful entry have been exhausted and the inspector has carefully followed established entry/denial of entry procedures. This policy, of course, does not apply to pre-inspection warrants, which may be obtained under circumstances described later in this subchapter.

Marshall v. Barlow's, Inc.

In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), the Supreme Court addressed the need for an administrative warrant when an Occupational Health and Safety Administration inspector sought entry into a workplace where consent for the inspection was not voluntarily given by the owner. The Court concluded that an administrative warrant was required to conduct such regulatory inspections unless the industry is one with a history of extensive regulation, such as liquor or firearms.

As a matter of policy, the Agency will apply the requirements of the Barlow's decision to all TSCA inspections.

According to Barlow's, a warrant may be obtained where there is a specific reason to think that a violation has been committed (i.e., where there is probable cause, such as an employee's complaint or a competitor's tip). A warrant may also be issued if the Agency can show that the establishment to be inspected has been selected pursuant to a neutral inspection scheme.

Seeking a Warrant Before Inspection

In certain circumstances, a warrant may be obtained before an inspector begins an inspection. Such a pre-inspection warrant may be sought at the discretion of the Regional Office if:

- A violation is suspected and could be covered up within the time needed to secure a warrant;
- Prior correspondence or other contact with the facility to be inspected provides reason to believe that entry will be denied when the inspector arrives; or
- The facility is unusually remote from a magistrate or a district court, and thus obtaining a warrant would require excessive travel time.

Civil Versus Criminal Warrants

If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, a civil warrant should be secured if entry is refused.

If the primary purpose of the inspection is to gather evidence for a criminal prosecution and there is sufficient evidence available to establish probable cause for a criminal warrant, then a civil warrant should not be used to gain entry. Rather, a criminal search warrant must be obtained pursuant to Rule 41 of the Federal Rules of Criminal Procedure (Fed. R. Crim. P.). (See Agency guidelines, entitled "The Use of Administrative Discovery Devices in the Development of Potential Criminal Cases.")

Evidence obtained during a valid civil inspection is generally admissible in criminal proceedings.

Securing and Serving an Administrative Warrant

The following procedures for obtaining and serving an administrative warrant have been developed in accordance with the Barlow's decision.

Important Procedural Considerations

- The application for a warrant should be made as soon as possible after the denial of entry or withdrawal of consent.
- In order to satisfy the requirements of the Barlow's decision, the affidavit in support of the warrant must include a description of the reasons why the establishment has been chosen for inspection. The only acceptable reasons are specific probable cause or

selection of the establishment for inspection pursuant to a neutral administrative inspection scheme.

- A warrant must be served without undue delay and within the number of days stated on the document (usually 10 days). The warrant will usually direct that it be served during daylight hours.

- Because the inspection is limited by the terms of the warrant, it is very important to specify to the greatest extent possible the areas intended for inspection, records to be inspected, samples to be taken, etc. A vague, overly broad warrant, probably will not be signed by the magistrate.

- If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the U.S. Attorney.

Procedures for Obtaining a Warrant

1. Contact the Regional Counsel's Office. The inspector should discuss with the Regional Counsel's Office the facts regarding the denial or withdrawal of consent or the circumstances that give rise to the need for a pre-inspection warrant. A joint determination will then be made as to whether or not to seek a warrant.

2. Contact Headquarters Pesticides and Toxic Substances Program Office. The Regional Office should notify Headquarters PTSCMS prior to obtaining a warrant.

3. Contact the United States Attorneys Office. After a decision has been made to obtain a warrant, the designated regional official should contact the U.S. Attorney for the district in which the property is located. The Agency should assist the United States Attorneys Office in the preparation of the warrant and affidavit.

4. Apply for the Warrant. The application for a warrant should identify the statutes and regulations under which the Agency is seeking the warrant. The name and location of the site or establishment to be inspected should be clearly identified, and, if possible, the owner and/or operator should be named. The application can be a one- or two-page document if all factual requirements for seeking the warrant are stated in the affidavit, and the application so states. The application is to be signed by the U.S. Attorney. (See Exhibit 3-2.)

5. Prepare the Affidavit. The affidavit in support of the warrant application is a crucial document. It is a statement reduced to writing, and sworn to or affirmed before a notary public, that describes in consecutively numbered paragraphs all of the facts in support of warrant issuance; and it should be prepared by a person with firsthand knowledge of those facts, most likely the inspector. (See Exhibit 3-3.)

6. Prepare the Warrant for Signature. A proposed warrant should be prepared for the magistrate's signature. Once signed, the warrant is an enforceable document. The warrant should contain a "return of service" or "certificate of service" that will indicate upon whom the warrant was served. This part of the warrant is to be dated and signed by the inspector after the warrant is served. (See Exhibit 3-4.)

7. Serve the Warrant. The warrant is served on the facility owner or the agent in charge and the inspection will normally commence or continue. Where there is probability that entry will still be refused, or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal. In this case, the U.S. Marshal is principally charged with executing the warrant, and the inspector should abide by the U.S. Marshal's decisions.

8. Perform the Inspection. The inspection should be conducted strictly in accordance with the warrant. If sampling is authorized, all procedures must be followed carefully, including presentation of receipts for all samples taken. If records or other property is authorized to be taken, the inspector must issue a receipt for the property and maintain an inventory of anything removed from the premises. This inventory will be examined by the magistrate to ensure that the warrant's authority has not been exceeded.

9. Return the Warrant. After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant (i.e., the U.S. Marshal or whoever performs the inspection) must sign the return of service form indicating to whom the warrant was served and the date of service. The executed warrant is then returned to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

Model Application for Administrative Warrant

UNITED STATES DISTRICT COURT

_____DISTRICT OF_____

IN THE MATTER OF:) Docket No. _____
)
) Case No. _____
)
)
)
) Application for an
) Administrative Warrant
)
)
)
)
)

NOW COMES a duly designated representative of the Administrator of the United States Environmental Protection Agency, by and through _____(name)_____, United States Attorney for the _____ District of _____ and applies for an administrative warrant of entry, inspection, reproduction of records, photography, and sampling to determine compliance with the Toxic Substances Control Act, 15 U.S.C. §2601 et seq., and as authorized by Section 11 of the Act, 15 U.S.C. §2610, of the premises at (description of the premises) in the possession, custody, or control of the (name of company or owner). In support of this application, the duly designated representative of the Administrator respectfully submits an affidavit and a proposed warrant.

Respectfully submitted,

(Signature of U.S. Attorney)
United States Attorney for the
_____ District of _____

_____(Date)_____

Model Affidavit in Support of Application for an Administrative Warrant

UNITED STATES DISTRICT COURT

_____DISTRICT OF_____

IN THE MATTER OF:) Docket No. _____
) Case No. _____
) Affidavit in Support of Application for an Administrative Warrant

State of _____:

County of _____:

(Name of Affiant) _____, being duly sworn upon his(her) oath, according to law, deposes and says:

1. I am compliance/enforcement officer with the (division), United States Environmental Protection Agency, Region _____, and a duly designated representative of the Administrator of the United States Environmental Protection Agency for the purpose of conducting inspections pursuant to Section 11 of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. I hereby apply for an administrative warrant of entry, inspection, reproduction of records, photography, and sampling of the premises in the possession, custody, or control of the (name of company or owner).

2. (Name of establishment, premises, or conveyance) is a (describe business) that the undersigned compliance officer of the United States Environmental Protection Agency has reason to believe is in violation of the Toxic Substances Control Act. This belief is based upon the following facts and information: (Describe with particularity the reasons why a violation is suspected and the specific facts that give rise to probable cause or summarize the neutral administrative inspection scheme used to select the premises for inspection.)

3. The entry, inspection, reproduction of records, photography, and sampling will be carried out with reasonable promptness, and a copy of the results of analyses performed on any samples or material collected will be furnished to the owner or operator of the subject premises.

4. The compliance/enforcement officer may be accompanied by one or more compliance officers of the United States Environmental Protection Agency.

5. A return will be made to the court at the completion of the inspection, reproduction of records, photography, and sampling.

(Signature of Affiant) _____

(Title _____

(Division) _____

Region ( )
United States Environmental
Protection Agency

Before me, a notary public of the State of _____, County of _____, on this _____ day of _____, 19__, personally appeared _____, and upon oath stated that the facts set forth in this application are true to his(her) knowledge and belief.

(Signature of Notary) _____

A Notary Public of _____

My Commission Expires _____

Model Administrative Warrant

UNITED STATES DISTRICT COURT

_____DISTRICT OF_____

IN THE MATTER OF:) Docket No. _____
) Case No. _____
) Warrant of Entry, Inspection, Reproduction of Records, Photography, and Sampling

To _____(name)_____, _____(title)_____, United States Environmental Protection Agency, Region _____, and any other duly designated representatives of the Administrator of the United States Environmental Protection Agency:

Application having been made by the United States Attorney on behalf of the United States Environmental Protection Agency (EPA) for a warrant of entry, inspection, reproduction of records, photography, and sampling to determine compliance with regulations under the Toxic Substances Control Act, 15 U.S.C. §2601 et seq.; and, the court being satisfied that there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied;

IT IS HEREBY ORDERED that EPA through its duly designated representatives _____(names of representatives)_____ is hereby entitled and authorized to have entry upon the following described premises:

(Describe premises.)

IT IS FURTHER ORDERED that entry, inspection, reproduction of records, photography, and sampling shall be conducted during regular working hours or at other reasonable times, within reasonable limits, and in a reasonable manner.

IT IS FURTHER ORDERED that the warrant shall be for the purpose of conducting an entry, inspection, reproduction of records, photography, and sampling pursuant to 15 U.S.C. §2610 consisting of the following activities:

(Describe specific activities. For example:

(• Entry to, upon, or through the above-described premises including all buildings, structures, equipment, machines, devices, materials, and sites to inspect, sample, monitor, and investigate the said premises.

(• Access to and reproduction of all records pertaining to or relating to the use, storage, handling, and disposal of polychlorinated biphenyls (PCBs).

(• Inspection, including photographing, of any equipment, methods, or sites used to store, or dispose of PCBs at the facility.)

IT IS FURTHER ORDERED that, if any property is seized, the duly designated representative or representatives shall leave a receipt for the property taken and prepare a written inventory of the property seized and return this warrant with the written inventory before me within 10 days from the date of the inspection.

IT IS FURTHER ORDERED that this warrant shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist the representatives of the United States Environmental Protection Agency in such manner as may be reasonable, necessary, and required.

(Signature of Magistrate)

(Date)

RETURN OF SERVICE

I hereby certify that a copy of the within warrant was served by presenting a copy of same to (facility owner or agent) on (date) at (location of establishment or place).

(Signature of person making service)

(Official title)

RETURN

Inspection of the establishment described in this warrant was completed on (date).

(Signature of person conducting the inspection)

3 Subpoenas

Authority

Section 11(c) of TSCA authorizes the Administrator, in carrying out the Act, to issue subpoenas requiring the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the Administrator deems necessary.*

Policy

As a general rule, subpoenas can be used whenever the information sought will assist the Administrator in implementing TSCA. Subpoenas are particularly useful in two situations. First, data may often be sought from persons who are not directly subject to the provisions of the Act. Although such persons cannot be compelled to keep records or to submit information under Section 4, 5, 6, 8, 12, or 13 of the Act, data can nonetheless be obtained through the issuance of a Section 11 subpoena if such data is relevant to any lawful purpose of TSCA.

The second situation in which subpoenas may be useful is to facilitate the effectiveness of an inspection or to eliminate the need for an inspection. For example, where the EPA is interested in reviewing a large volume of material at the Agency rather than onsite, a subpoena may be utilized as a means of collecting and organizing relevant material so that an inspector is not faced with this task at the facility itself.

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* Generally two types of subpoenas are used. A subpoena that requests the appearance of a witness to testify is referred to as a "Subpoena Ad Testificandum." A subpoena that requests a witness to produce documents or papers under his or her control is referred to as a "Subpoena Duces Tecum." Exhibit 3-5 is a sample of the latter subpoena. Exhibit 3-6 is a sample cover letter that usually accompanies such a subpoena.

The primary difference between subpoenas and TSCA notification letters is that compliance with a notification letter is voluntary, whereas compliance with a subpoena is mandatory (i.e., judicially enforceable).

Service of Subpoenas

Service of subpoenas should be made, where possible, by registered mail, return receipt requested, or by hand delivery to the person named therein (see Exhibit 3-7 for a model affidavit of service). The person making service should attempt to serve an appropriate corporate officer. (Note: The corporate general counsel is usually not an officer, unless this title reflects a dual role, such as "Vice President and General Counsel.") In addition, a Return of Service form should be attached to the subpoena.

Sample Subpoena Duces Tecum

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA

U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. T. K. H. Firetog, Jr.
President
Firetog Industries, Inc.
36 Sunshine Drive
Clark, MA 02856

To further the Environmental Protection Agency's investigation of your company's compliance with Section 8(e) of the Toxic Substances Control Act (TSCA), 7 U.S.C. §2607(e), you are hereby required to appear before the Assistant Administrator for Pesticides and Toxic Substances in room _____, 401 M St., S.W., Washington, D.C., on _____, at ____, and to bring with you the reports, papers, documents, answers to questions, and other information requested in the attached Specifications.

If you so desire, you may have your representative produce, at the time and place aforesaid, the items or information requested in the Specifications.

If you consider any of the documents or other information that you submit in response to this subpoena to be confidential business information, please mark each page containing such confidential business information. The mark may be the word "confidential," or the phrase "proprietary information," or other similar marking. If you wish to make a claim of confidentiality for this information, you must do so at this time. Any documents or other information not marked confidential will be available to the public. That portion of your response to the subpoena marked as confidential will be handled in accordance with EPA's public information regulations (40 C.F.R. Part 2).

Issued under the authority of 15 U.S.C. §2610(c), this _____ day of _____ 19___.

United States Environmental
Protection Agency, by

John A. Doe
Assistant Administrator for
Pesticides and Toxic Substances

Enclosure

SPECIFICATIONS

I. Instructions

1. This subpoena covers all documents described below in the possession of Firetog Industries, Inc., and subject to its control or custody.

2. For the purpose of complying with this subpoena, the word "document" means the original or a true, correct, and complete copy and all nonidentical copies of any report, paper, note, letter, correspondence, memorandum, study, data compilation, circular, work sheet, minutes, test result, laboratory note or memorandum, analysis or other transcription of information, whether written, typed, printed, recorded on tape, microfilm, or other device, regardless of whether circulated within the company or to outsiders, regardless of whether generated within or without the company, and regardless of whether in the possession of your company or any agent acting in its behalf.

3. Each document submitted shall be clearly and precisely identified as to its title, author, date of preparation, and subject matter.

4. If neither the original nor a copy of any requested document is currently in the possession or control of your company for any reason, identify the document by date, title, subject matter, the name of individuals who prepared and received it and the name and address of the person who currently has possession or control of that document. If the document no longer exists, explain why. If the document has been destroyed, identify the name of the individual who ordered it destroyed, when the order was issued, and why.

5. The authority under which this subpoena is issued, 15 U.S.C. §2610(c), authorizes the Administrator to require answers to questions as well as the submittal of documents. Answer all questions completely. Where necessary, documents may be submitted to answer all or part of any questions asked in these Specifications.

II. Information and Documents Requested

1. With respect to Exhibits A, B, C, D, and E, state:

   a) When each of the reports was received by Firetog Industries, Inc.;

   b) The individual (or individuals) within Firetog Industries, Inc., who reviewed each of the reports;

   c) The title and primary responsibilities of the individuals listed in 1(b) as of the date when they reviewed the reports;

d) The current title and primary responsibilities of the individuals listed in 1(b); and

e) The dates when those individuals listed in 1(b) reviewed each of the exhibits.

2. Submit any documents prepared or received by Firetog Industries, Inc., concerning Exhibits A, B, C, D, and E, or the subject matter of those reports.

Sample Cover Letter

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Office of Pesticides and Toxic Substances
Washington, D.C. 20460

Mr. T. K. H. Firetog, Jr.
President
Firetog Industries, Inc.
36 Sunshine Drive
Clark, MA 02856

Dear Mr. Firetog:

An FYI submission filed by Firetog Industries, Inc. (dated October 31, 1982) to EPA concerning toxicity data on your product, Heathergard LF-1, raises a number of questions regarding Firetog Industries' compliance with Section 8(e) of the Toxic Substances Control Act (TSCA). To aid in our investigation, we have enclosed a subpoena duces tecum with this letter. This subpoena requires submitting certain documents and answering a number of questions concerning whether Firetog Industries, Inc., has complied with Section 8(e) of TSCA.

The enclosed subpoena does not require your attendance at this time, provided that the documents, and other information requested, are produced at or before the date required by the subpoena.

Sincerely,

Joe A. Doe
Assistant Administrator for
Pesticides and Toxic Substances

Enclosure

Model Affidavit of Service

AFFIDAVIT OF SERVICE
UNITED STATES OF AMERICA
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I hereby certify that being a person over 18 years of age, I served a copy of the within subpoena:

(check one) ( ) in person
( ) by registered mail, return receipt requested
( ) by leaving the copy at principal place of business, which is

_____
_____
_____

( ) (write in other method, such as leaving it at dwelling, serving registered agent of corporation, etc.)

on the person named in the subpoena on (month, day, and year).

(Signature of person making service)

(Name of person making service)

(Title, if any)

Chapter Four

Documentation of Evidence

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1 Introduction

Upon completion of a TSCA inspection, enforcement inspectors are required to organize the documentary evidence that they have collected into an inspection file. An inspection file may actually consist of two separate files--a nonconfidential file and a confidential business information (CBI) file.

Information gathered during a TSCA inspection that has not been declared TSCA CBI is organized by the inspector into a package referred to as the nonconfidential inspection file. This file contains the inspector's report and all forms and nonconfidential evidence secured by the inspector that relates to the TSCA inspection. Once compiled, the file is sent to the Regional Case Development Officer (RCDO), who is responsible for reviewing the inspection results for possible enforcement action.

Information gathered during a TSCA inspection that has been declared TSCA CBI is organized by the inspector into a package referred to as the CBI inspection file. When an inspector returns from an inspection with information that has been declared confidential, the information is immediately given to the Document Control Officer (DCO), who then assigns a document control number to the confidential material. In addition, the inspector also informs the DCO of any physical samples that were declared confidential. Physical samples are also assigned a document control number by the DCO who, in turn, notifies the laboratory of this number. (The document control number is used by laboratory personnel in completing the sample chain of custody and laboratory analysis forms.) Once CBI material has been logged in by the DCO, review of the information by the RCDO must be in accordance with the procedures detailed in the TSCA Confidential Business Information Security Manual.

2 Inspection File Review

To ensure the validity and quality of documentary evidence for an administrative or judicial enforcement proceeding, the RCDO must review the inspection file (nonconfidential and CBI*) for objectivity, adequacy, and proper identification. In some instances, the RCDO will need to forward the files to Headquarters for an enforcement case review. In all cases, the RCDO must verify that all procedural safeguards were implemented so as not to prejudice a possible enforcement action.

Substantiation of Each Violation

In most cases, a violation will be substantiated through a combination of evidential sources. The RCDO's review must seek to substantiate each possible violation from the evidence supplied by the inspector. Whenever necessary, the RCDO should obtain from the inspector additional evidence or clarification of existing evidence.

Controlled Identification of Samples and Documents

An important aspect of any review by the RCDO is the determination that the samples and documents were properly collected and accurately and completely identified.

Whenever samples of chemical substances or mixtures or documents are collected, the inspector prepares a Receipt for Samples and Documents (see Exhibit 4-1). Information required on the receipt includes:

- Inspector's name and EPA office address;
- Firm's name and address;

* To review the CBI inspection file, the RCDO must have the appropriate clearance.

- Name and title of individual who is given the receipt;
- Date of collection;
- Duplicate samples (if provided);
- Description of samples with sample numbers; and
- Description of documents by title.

If the samples or documents are claimed to be confidential, a Declaration of Confidential Business Information (see Exhibit 4-2) must be completed and the materials must be handled in accordance with the TSCA Confidential Business Information Security Manual procedures. Information contained on the declaration includes:

- EPA Regional Office address;
- Date of declaration;
- Name, title, and address of firm and individual making the declaration;
- List, by title or description, of all information claimed as CBI; and
- Name and title of inspector.

Samples that are to be used as evidence must be sealed with EPA seals, which are placed on sample containers by the inspector (see Exhibit 4-3). In addition, an accurate written record must be maintained to trace the possession of each sample from the moment of collection through its introduction as evidence. Therefore, transfer of all samples from the inspector to other authorized persons must be recorded on an EPA Chain of Custody Record, which contains the following information (see Exhibit 4-4):

- Site location;
- Station location;
- Date and time of collection;
- Sample analysis required;
- Samplers' names;
- Remarks; and
- Accepting/relinquishing samples.

Once the inspection is completed, the inspector fills out the Investigation Summary (see Exhibit 4-5), which provides sample information for the FIFRA and TSCA Enforcement System (FATES) computer system and serves as a brief summary of the sample collection process.

3 Review of Adequacy of Evidence

Initial Review of the Inspection File

Once the RCDO has received the inspection file, its contents must be reviewed in the context of the following considerations:

- Adequacy of the documentation (see below);
- Significance of the violation (see Chapter Five for level of action policy); and
- Violative history of the firm (see Chapter Five for level of action policy). Violative history may be obtained from FATES.

Adequacy of the Documentation

The initial phase of the review should focus on two aspects of the documentation:

- That all necessary documents and samples have been provided; and
- That the documentation is adequate to provide the substance of the violation as indicated by the results of the inspection.

The purpose of the review is to develop a recommendation for action on the violation; either to proceed with an enforcement action or to dismiss the violation as not worthy of prosecution.

In some instances, review will indicate possible violations not documented by the inspection. In these cases, the RCDO should seek to secure the additional documentation for the new violation. This may require further consultation with the inspector or forwarding the file to Headquarters for an enforcement case review. When a violation is discovered that is unrelated to the initial suspected violation, the new violation should be pursued as a new action.

Contents of an Inspection File

An inspection file should normally contain the following items.

Investigation Request (if issued). If Headquarters had requested the inspection, it may have done so by the issuance of an Investigation Request to the Regional Office. If issued, a copy of the document should be included in the inspection file. (See Exhibit 4-6.)

Notice of Inspection. Pursuant to the requirements of Section 11(a) of TSCA, the inspection file must contain evidence that a written notice of inspection was presented. The RCDO should ensure that the inspection adherred to the terms specified in the notice. (See Exhibit 4-7.)

Verification of Credentials. Section 11(a) of TSCA also requires that an inspector present appropriate credentials to the owner, operator, or agent in charge of the inspected premises. Therefore, the inspection file should contain evidence that proper credentials were presented.

Project Plan. The plan should be reviewed to determine that it accurately reflected objectives, scope, logistics, and schedules. Inspectors should be prepared to explain inspection rationale and any deviations from the proposed plan.

Inspection Report. The report should be reviewed for factual information, professional judgments, objectivity, and comprehensiveness.

TSCA Inspection Confidentiality Notice. The RCDO should verify that facility officials were informed of their right to claim inspection data as CBI. The notice should be reviewed for proper signatures and dates, as well as completeness. (See Exhibit 4-8.)

Receipt for Samples and Documents. A receipt must be issued for all samples and documents collected during a TSCA inspection. (See Exhibit 4-1.)

Investigation Summary. The purpose of the Investigation Summary is to provide sample information for the FATES computer system and to serve as a brief summary of the sample collection process. (See Exhibit 4-5.)

Custody Records. There should exist a complete inventory of sample tags/seals (see Exhibit 4-3), chain of custody records (see Exhibit 4-4), and related material that demonstrates the traceability and proper identification of all samples taken during an inspection.

Laboratory Analyses. Test results from any laboratory analyses made in connection with the inspection should be included in the inspection file. Review for custody, methods, quality control, and proper identification.

Subpoena (if issued). The RCDO should review the subpoena to ensure that it was issued properly and that there was compliance with the requirements of the document.

Declaration of Confidential Business Information.* The declaration should be reviewed for signatures, dates, and a complete listing of all documents and samples for which CBI was claimed. (See Exhibit 4-2.)

TSCA Confidentiality Clearance References.* The RCDO should ensure that all individuals who handled or will handle TSCA CBI have had the appropriate clearance.

Other Evidential Documentation. The following items may also be included in the inspection file:

- Affidavits. Affidavits are sworn statements taken by the inspector that relate to personal first hand knowledge of a potential violation. Affidavits may be used to substantiate a violation or to set the circumstances surrounding a violation. Careful review of an affidavit should be made for evidence in support of an enforcement action. The person making the affidavit must sign it and be able to personally verify the facts contained in the statement.

  The objective of an affidavit is to obtain a clear and concise written record of factual information relating to a suspected violation. The oath taken by the person making the affidavit serves to substantiate the truth of the statement. Affidavits may be used to verify the dates obtained from a facility's records (e.g., the date of shipment). Review should emphasize the admissibility of the affidavit in court. This includes determining whether the affidavit was properly executed and whether it contributes valid evidence to any contemplated proceeding. The affidavit itself should contain the following:

  -- Identity of the affiant (i.e., the person providing the sworn statement);

  -- The reason why the affidavit was taken;

  -- The pertinent facts in a simple narrative style, arranged in chronological order; and

  -- A concluding paragraph indicating that the affiant read and understood the statement.

  In addition, any corrections made to the final copy must be initialed by the affiant.

- Statements. Statements are similar in most respects to affidavits except that statements are not taken under oath and, therefore, do not have as much evidentiary weight as do affidavits. Statements

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* The Declaration of Confidential Business Information and the TSCA Confidentiality Clearance References are contained in the inspection file when materials have been claimed as confidential.

can be used to verify data collected during an inspection. For example, a statement may be obtained from a facility representative that indicates a date of shipment. Review should verify the person's identity and the truth of the statement through a signature or some other written or verbal acknowledgment.

- Printed Matter. Brochures, literature, labels, and other printed matter may provide important information regarding a firm's conditions and operations. These materials may be collected as documentation, if in the inspector's judgment they are relevant. All printed matter should be identified with the date, the inspector's initials, and related sample numbers.

- Photographs. The documentary value of photographs ranks high as admissible evidence. Clear photographs of a relevant subject, taken in proper light and at proper lens setting, provides an objective record of conditions at the time of inspection. Review must ensure that the photographs are clear, objective, and properly identified. The photographs should be identified by location, purpose, date, time, inspector's initials, and related sample number. This information should be recorded on the photographs, or in the inspector's field notebook, or both.

- Drawings and Maps. Schematic drawings, maps, charts, and other graphic records can be useful in supporting violation documentation. They can provide graphic clarification of site location relative to height and size of objects, and other information that, in combination with samples, photographs, and other documentation, can produce an accurate, complete evidence package. Review should ensure that drawings and maps are simple and free of extraneous details. Basic measurements and compass points should be included to provide a scale for interpretation.

- Mechanical Recordings. Records produced by an electronic or mechanical apparatus can be entered as evidence. Review of charts, graphs, and other "hard copy" should ensure relevance and identity. The data collected should be identified by date of collection, inspector's initials, and related sample number.

Further Processing of the Inspection File--Enforcement Case Review

Once the investigative file has been initially reviewed, further case development may be necessary at Headquarters. If so, the file should be sent to the appropriate Headquarters Case Development Officer (HQCDO).* Aspects of the further case review may include:

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* The TSCA Confidential Business Information Security Manual should be consulted for the proper procedures on transmitting CBI materials.

- Compliance with TSCA Section 4 testing rules and submission of test data;
- Premanufacturing notice requirements for all new chemical substances or mixtures or significant new uses;
- Manufacturing or distributing chemicals or mixtures in violation of TSCA Section 6 or 7 regulations;
- Failure to comply with TSCA recordkeeping and reporting requirements;
- Compliance with import and export rules;
- Scientific review to determine the significance of any discrepancy in chemical composition, toxicity, or risk assessment;
- Relationship of suspected TSCA violation to other federal laws;
- New program elements for which policy interpretations must be established; and
- New or existing programs in which information is normally kept on file at Headquarters.

Additional Sources of Documentation

Frequently, additional information will be needed in order to complete the review of the inspection file. In some cases, this information will be provided by subsequent reports. If not, the RCDO should seek to obtain the additional information or elaboration from the most knowledgeable source. Additional sources of documentation include:

- Inspector's Narrative Report; and
- Inspector's Field Notebook.

Receipt for Samples and Documents

EPA

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

TOXIC SUBSTANCES CONTROL ACT

RECEIPT FOR SAMPLES AND DOCUMENTS

Form Approved
OMB No. 2070-0007
Approval expires 6-31-86

1. INVESTIGATION IDENTIFICATION			2. FIRM NAME
DATE	INSPECTOR NO.	DAILY SEQ. NO.	
3. INSPECTOR ADDRESS			4. FIRM ADDRESS

The documents and samples of chemical substances and/or mixtures described below were collected in connection with the administration and enforcement of the Toxic Substances Control Act.

RECEIPT OF THE DOCUMENT(S) AND/OR SAMPLE(S) DESCRIBED IS HEREBY ACKNOWLEDGED:

NO.	DESCRIPTION

OPTIONAL:

DUPLICATE OR SPLIT SAMPLES: REQUESTED AND PROVIDED ☐ NOT REQUESTED ☐

INSPECTOR SIGNATURE		RECIPIENT SIGNATURE	
NAME		NAME	
TITLE	DATE SIGNED	TITLE	DATE SIGNED

EPA Form 7740-1 (12-82)

Declaration of Confidential Business Information

EPA

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

TOXIC SUBSTANCES CONTROL ACT

Form Approved
OMB No. 2070-0007
Approval expires 8-31-85

DECLARATION OF CONFIDENTIAL BUSINESS INFORMATION

1. INVESTIGATION IDENTIFICATION			2. FIRM NAME
DATE	INSPECTOR NO.	DAILY SEQ. NO.	
3. INSPECTOR ADDRESS			4. FIRM ADDRESS

INFORMATION DESIGNATED AS CONFIDENTIAL BUSINESS INFORMATION

NO.	DESCRIPTION

ACKNOWLEDGEMENT BY CLAIMANT

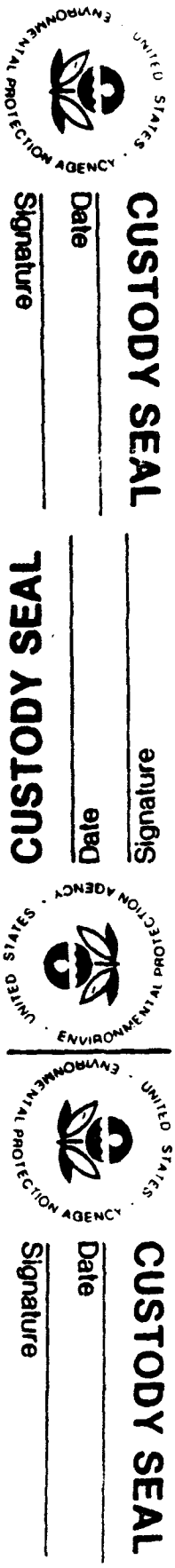
The undersigned acknowledges that the information described above is designated as Confidential Business Information under Section 14(c) of the Toxic Substances Control Act. The undersigned further acknowledges that he/she is authorized to make such claims for his/her firm.

The undersigned understands that challenges to confidentiality claims may be made, and that claims are not likely to be upheld unless the information meets the following guidelines: (1) The company has taken measures to protect the confidentiality of the information and it intends to continue to take such measures; (2) The information is not, and has not been reasonably obtainable without the company's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding); (3) The information is not publicly available elsewhere; and (4) Disclosure of the information would cause substantial harm to the company's competitive position.

INSPECTOR SIGNATURE		CLAIMANT SIGNATURE	
NAME		NAME	
TITLE	DATE SIGNED	TITLE	DATE SIGNED

EPA Form 7740-2 (12-82)

Custody Seal



Chain of Custody Record

EPA United States Environmental Protection Agency

Chain of Custody Record

Sample Number			Task Number
Inspection Number			
Inspector Name and Address	Sample Name		
	Date Sample	Time	Duplicate Requested yes no
Inspector Signature	Location of Sampling		
Analysis/Testing Required			
Laboratory			
Date Received			
Received By			
Sent Via			
Sample Condition			
Condition of Seals			
Jars Received			
Storage Location			
Assigned By			
Assigned To			
Delivered By			
Date Delivered			
Number of Jars Received			
Jars Analyzed			
Date Test Ended			
Date Released			
Released By			
Storage Location			
Date Results of Analysis Issued to EPA		Date Results of Analysis Issued to Facility	
Remarks			

Investigation Summary

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460
TOXIC SUBSTANCES CONTROL ACT
INVESTIGATION SUMMARY

1. INVESTIGATION IDENTIFICATION			2. Region/State	37. Facility Name	
Date	Inspector Number	Delta Sequence		32. Street	
3. Inspecting Org. C☐ E☐ S☐	4. Contract Number	5. Contract Work Order			
6. Facility Function	7. Insect. Type	8. Reason for Investigation	33. City	34. State	35. ZIP Code
9. Referral Agency		10. Warrant Required Yes☐ No☐	36. DUNS Number	37. SIC Codes	
SAMPLE INFORMATION					
18. Sample Sequence Number		19. State Sample Number	18. Sample Sequence Number	19. State Sample Number	
20. CAS Number		21. Project Code	20. CAS Number	21. Project Code	
22. Sample Medium		23. Date Collected	22. Sample Medium	23. Date Collected	
24. Lot or Other Codes		25. Date Shipped	24. Lot or Other Codes	25. Date Shipped	
26. Sample Identification			26. Sample Identification		
27. Amount Before Sampling			27. Amount Before Sampling		
28. Sample Description			28. Sample Description		
OTHER FACILITIES					
29. Manufacturer/Processor (Other than above)			29. Manufacturer/Processor (Other than above)		
30. City	31. State	32. ZIP Code	30. City	31. State	32. ZIP Code
33. DUNS Number			33. DUNS Number		
RECORDS					
34. Original Records			34. Original Records		
35. Sample Delivered To		36. Date	35. Sample Delivered To		36. Date
37. Remarks			37. Remarks		
INSPECTION DOCUMENTS					
38. Credentials Presented ☐	39. Notice of Inspection ☐	40. Notice of Confidentiality ☐	41. Chain of Custody ☐	42. Receipt for Samples/Documents ☐	43. Declaration of Confidentiality ☐
44. Inspector's Name			45. Inspector's Signature		

EPA Form 7740-6 (3-83) INSPECTION FILE

Investigation Request

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460
TOXIC SUBSTANCES CONTROL ACT
FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

EPA

INVESTIGATION REQUEST

1. Facility Name

2. Request Number

3. Street

4. TO:

5. FROM:
Director, Compliance Monitoring Staff
Office of Pesticides and Toxic Substances
US Environmental Protection Agency (EN-342)
Washington, DC 20460

6. City | 7. State | 8. ZIP Code

9. Pesticide/Chemical Substance

10. Basis for Investigation

11. EPA Registration Number | 12. Establishment Number

13.
☐ For Cause ☐ Neutral Scheme

14. PAN/PME/INV Number | 15. CAS Number

16. Date Requested | 17. Date Received | 18. Sample Size | 19. Laboratory

20. Description of Request

21. Requester's Name | 22. Telephone Number

23. INVESTIGATION IDENTIFICATION
Date | Inspection Number | Daily Sequence

24. Sample Set Numbers

26. Requester's Signature

28. Inspector's Signature

EPA Form 8500-1 (Rev. 6-82) Previous edition is obsolete.

HEADQUARTERS COPY

Notice of Inspection

EPA

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

TOXIC SUBSTANCES CONTROL ACT

NOTICE OF INSPECTION

Form Approved
OMB No. 2070-0007
Approval expires 8-31-85

1. INVESTIGATION IDENTIFICATION			2. TIME	3. FIRM NAME
DATE	INSPECTOR NO.	DAILY SEQ. NO.		
4. INSPECTOR ADDRESS				5. FIRM ADDRESS

REASON FOR INSPECTION

Under the authority of Section 11 of the Toxic Substances Control Act:

☐ For the purpose of inspecting (including taking samples, photographs, statements, and other inspection activities) an establishment, facility, or other premises in which chemical substances or mixtures or articles containing same are manufactured, processed or stored, or held before or after their distribution in commerce (including records, files, papers, processes, controls, and facilities) and any conveyance being used to transport chemical substances, mixtures, or articles containing same in connection with their distribution in commerce (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of the Act applicable to the chemical substances, mixtures, or articles within or associated with such premises or conveyance have been complied with.

☐ In addition, this inspection extends to *(Check appropriate blocks)*:

☐ A. Financial data
☐ B. Sales data
☐ C. Pricing data
☐ D. Personnel data
☐ E. Research data

The nature and extent of inspection of such data specified in A through E above is as follows:

INSPECTOR SIGNATURE		RECIPIENT SIGNATURE	
NAME		NAME	
TITLE	DATE SIGNED	TITLE	DATE SIGNED

EPA Form 7740-3 (12-82) INSPECTION FILE

TSCA Inspection Confidentiality Notice

EPA

US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

TOXIC SUBSTANCES CONTROL ACT

Form Approved
OMB No. 2070-0007
Approval expires 8-31-85

TSCA INSPECTION CONFIDENTIALITY NOTICE

1. INVESTIGATION IDENTIFICATION			2. FIRM NAME
DATE	INSPECTOR NO.	DAILY SEQ. NO.	
3. INSPECTOR NAME			4. FIRM ADDRESS
5. INSPECTOR ADDRESS			6. CHIEF EXECUTIVE OFFICER NAME
			7. TITLE

TO ASSERT A CONFIDENTIAL BUSINESS INFORMATION CLAIM

It is possible that EPA will receive public requests for release of the information obtained during inspection of the facility above. Such requests will be handled by EPA in accordance with provisions of the Freedom of Information Act (FOIA), 5 USC 552; EPA regulations issued thereunder, 40 CFR Part 2; and the Toxic Substances Control Act (TSCA), Section 14. EPA is required to make inspection data available in response to FOIA requests unless the Administrator of the Agency determines that the data contain information entitled to confidential treatment or may be withheld from release under other exemptions of FOIA.

Any or all the information collected by EPA during the inspection may be claimed confidential if it relates to trade secrets or commercial or financial matters that you consider to be confidential business information. If you assert a CBI claim, EPA will disclose the information only to the extent, and by means of the procedures set forth in the regulations (cited above) governing EPA's treatment of confidential business information. Among other things, the regulations require that EPA notify you in advance of publicly disclosing any information you have claimed as confidential business information.

A confidential business information (CBI) claim may be asserted at any time. You may assert a CBI claim prior to, during, or after the information is collected. The declaration form was developed by the Agency to assist you in asserting a CBI claim. If it is more convenient for you to assert a CBI claim on your own stationery or by marking the individual documents or samples "TSCA confidential business information," it is not necessary for you to use this form. The inspector will be glad to answer any questions you may have regarding the Agency's CBI procedures.

While you may claim any collected information or sample as confidential business information, such claims are unlikely to be upheld if they are challenged unless the information meets the following criteria:

1. Your company has taken measures to protect the confidentiality of the information, and it intends to continue to take such measures.
2. The information is not, and has not been, reasonably obtainable without your company's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on showing of special need in a judicial or quasi-judicial proceeding).
3. The information is not publicly available elsewhere.
4. Disclosure of the information would cause substantial harm to your company's competitive position.

At the completion of the inspection, you will be given a receipt for all documents, samples, and other materials collected. At that time, you may make claims that some or all of the information is confidential business information.

If you are not authorized by your company to assert a CBI claim, this notice will be sent by certified mail, along with the receipt for documents, samples, and other materials to the Chief Executive Officer of your firm within 2 days of this date. The Chief Executive Officer must return a statement specifying any information which should receive confidential treatment.

The statement from the Chief Executive Officer should be addressed to:

and mailed by registered, return-receipt requested mail within 7 calendar days of receipt of this Notice. Claims may be made any time after the inspection, but inspection data will not be entered into the special security system for TSCA confidential business information until an official confidentiality claim is made. The data will be handled under the agency's routine security system unless and until a claim is made.

TO BE COMPLETED BY FACILITY OFFICIAL RECEIVING THIS NOTICE:	If there is no one on the premises of the facility who is authorized to make business confidentiality claims for the firm, a copy of this Notice and other inspection materials will be sent to the company's chief executive officer. If there is another company official who should also receive this information, please designate below.
I have received and read the notice	
SIGNATURE	NAME
NAME	TITLE
TITLE / DATE SIGNED	ADDRESS

EPA Form 7740-4 (12-82)

Chapter Five

Determination of Appropriate Enforcement Response

Chapter Contents

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1 Introduction

Once the documentation of a violation is complete and EPA personnel have determined that an enforcement action is warranted, EPA must decide upon the appropriate level of action that is justified by the severity of the violation. EPA authorizes two categories of action--administrative and judicial. Generally, the Agency uses administrative actions for violations of a lesser nature or for first-time violators. The Agency reserves judicial actions for use in violations of an especially egregious nature, which result in serious harm to human health or the environment, and for willful or repeated violations.

Administrative levels of action include the following:

- Notices of noncompliance;
- Settlements with conditions;
- Notices of detention under Section 13;* and
- Civil administrative penalties.

The criteria for using each of the above actions are discussed later in this chapter. Specific procedures for preparing and issuing these actions are found in Chapter Six, "Administrative Enforcement Actions: Notices of Violation and Administrative Orders," and Chapter Seven, "Administrative Enforcement Actions: Civil Penalty Proceedings."

Judicial actions may involve either civil or criminal proceedings. The criteria for the use of judicial actions are also discussed later in this chapter. Civil proceedings include:

- Injunctions under Sections 5(e), 5(f), 7, and 17(a); and
- Seizures under Sections 7 and 17(b).

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* Notices of detention are issued by the United States Customs Service under the authority of Section 13 of TSCA.

Criminal proceedings are authorized under Section 16(b). Chapter Eight, "Judicial Enforcement: Civil Actions," and Chapter Nine, "Judicial Enforcement: Criminal Actions," discuss procedures for civil and criminal judicial proceedings.

In addition, specific level of action guidances, which relate to regulation-specific requirements, are contained in Appendix 3.

2 Level of Action Policy

Notices of Noncompliance

A notice of noncompliance (NON) is a letter issued by EPA to advise a company that a violation of TSCA has been detected. An NON can be used, for example, to notify a violator that the Agency is keeping track of the company's actions with respect to correcting the violation or as an initial step in making Agency contact with a violator if negotiations will be necessary for achieving compliance.

Although issuance of an NON is not specifically authorized by TSCA, the notice is an important enforcement tool and should be considered in the following circumstances:

- The violation involves only a minor technical deviation from the statutory or regulatory requirement;
- The violation does not pose a significant threat to human health or the environment;
- The respondent has not previously violated TSCA;
- The violation is not the result of willful conduct;
- The violation is not one that would hamper EPA's ability to detect other violations at the facility;
- An NON would be sufficient to bring about compliance; or
- Other regulation-specific policy considerations would apply (see Appendix 3).

Generally, an NON should not be issued when other enforcement responses are warranted. For example, if a situation merits both issuance of an NON and an administrative civil penalty action, only the civil penalty action should be pursued. Furthermore, if an NON is issued, but the violation continues unabated, then the Agency should consider either an administrative civil penalty action or an appropriate judicial proceeding.

Settlements With Conditions

The term "settlement with conditions" (SWC) refers to the settlement of an administrative civil penalty action under conditions that commit the respondent to perform specified acts in exchange for the remittance of all or a portion of an administratively assessed penalty. Remittance, with or without conditions, of an assessed civil penalty is permitted by Section 16(a)(2)(C) of TSCA.

An SWC should be considered if the following criteria are met:

- The violation warrants the assessment of a civil penalty;
- The violation is not the result of wanton, knowing, or willful conduct;
- The violation is of a continuing (for more than 30 days) or recurring nature,
- To come into compliance, the respondent needs to undertake a detailed design, engineering, or monitoring program that would require numerous, complex steps over time;
- The respondent has exhibited a good-faith attitude toward abating the violation and has no history of noncompliance;
- The use of an SWC would provide clear public benefits; and
- An SWC that would be acceptable to EPA can be negotiated.

An SWC, however, should be employed with some restraint. It should not be used in a manner that will encourage an industry to violate TSCA in the hope that, when the violation is discovered, the company may offer to correct its action and thereby receive a remitted penalty.

Notices of Detention

Pursuant to Section 13 of TSCA and 48 Fed. Reg. 34,734 (1983), the United States Customs Service may detain, by issuing a notice of detention, any shipment of chemical substances or mixtures that is imported into the United States and that is not in compliance with TSCA. A notice of detention may be issued at the port of arrival by a district director of the Customs Service when:

- A shipment contains any chemical substance or mixture that has been banned from the customs territory of the United States by a rule or order issued under Section 5 or 6 of TSCA;

- A shipment contains a chemical substance or mixture or article that has been ordered seized under Section 7 (imminent hazard) of TSCA;
- Whenever the Administrator of EPA has reasonable grounds to believe that the shipment is not in compliance with TSCA, and the Administrator notifies the district director to detain such shipment;
- Whenever the district director of the Customs Service has reasonable grounds to believe that the shipment is not in compliance with TSCA; or
- Whenever the importer fails to certify compliance with TSCA.

Civil Administrative Penalties

A civil penalty, as authorized by Section 16(a) of TSCA, is the remedy of choice for most violations. A civil penalty should be proposed where a violation:

- Presents a real (but not an extreme or imminent) risk to human health or the environment;
- Is likely to be an isolated occurrence; and
- Is apparently the result of ordinary negligence, inadvertence, or mistake.

Additionally, a civil penalty action should be considered where a notice of noncompliance had been issued, but the person to whom it was issued disregards the notice or fails to abate the violation.

Injunctions

Injunctive actions may be initiated under the authority of Section 5(e), 5(f), 7, or 17(a) of TSCA.

Section 5(e) Injunctions

Criteria for Use. Injunctive relief authorized by Section 5(e) of TSCA should be considered when:

- The information available to the Administrator under Section 5 of the Act is insufficient to permit a reasoned evaluation of the

human health and environmental effects of a chemical substance that is subject to the notice requirement of Section 5(a) and either:

-- In the absence of such information, the manufacture, processing, distribution in commerce, use, or disposal of such substance may present an unreasonable risk of injury to human health or the environment, or

-- The chemical substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance; and

- The Administrator has not issued a proposed order under Section 5(e) with respect to the chemical substance, or the Administrator has issued such an order, however, the order does not take effect because objections were filed pursuant to Section 5(e)(1)(C).

Use of Section 5(e) Injunctive Actions. Pursuant to Section 5(a) of TSCA, any person who manufactures a new chemical substance or who manufactures or processes a chemical substance for a significant new use must submit a premanufacture notice (PMN) to EPA. The PMN is to contain specific information regarding the effects of the new chemical or the effects concerning the significant new use for an existing chemical.

The Agency will review the submitted information to determine whether a reasoned evaluation may be made of the effects of the chemical or the significant new use. The Act provides a 90-day review period following submission of the PMN, although the period may be extended for a maximum of 90 additional days if good cause is shown.

Upon reviewing the information, the Administrator may issue a proposed order prohibiting or limiting the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance if there is insufficient information to permit a reasoned evaluation of the human health and environmental effects of the substance and either:

- In the absence of sufficient information, the manufacture, processing, distribution in commerce, use, or disposal of such substance may present an unreasonable risk of injury to human health or the environment; or

- The substance is or will be produced in substantial quantities and may:

  -- Enter, or reasonably be anticipated to enter, the environment in substantial quantities, or

  -- Result in significant or substantial human exposure to the substance.

The proposed order must be issued no later than 45 days before the expiration of the review period, and the order will become effective upon the expiration of that period.

However, an affected firm may challenge the proposed order, thus delaying the effective date of the order. Therefore, unless the Administrator immediately sustains the objection (i.e., finds that there is sufficient information to permit a reasoned evaluation of the human health and environmental effects of the substance), the Agency must seek an injunction to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of the PMN chemical substance. Additionally, the Administrator is required to seek an injunction if it is found that there is insufficient information concerning the new chemical substance or significant new use but a proposed order has not yet been issued in that particular matter. This latter circumstance might occur if the review period expires before the Administrator can issue the proposed order.

Section 5(f) Injunctions

Criteria for Use. Injunctive relief authorized by Section 5(f) of TSCA should be considered when there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance subject to premanufacture review presents or will present an unreasonable risk of injury to human health or the environment before a rule promulgated under Section 6 can protect against such risk.

Use of Section 5(f) Injunctive Actions. Pursuant to Section 5(f) of TSCA, if the Administrator determines that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance subject to premanufacture review presents or will present an unreasonable risk of injury to human health or the environment before a Section 6 rule can be promulgated, the Administrator may (before the expiration of the PMN review period):

- Prohibit the manufacture, processing, or distribution in commerce of the chemical substance by:
  - -- Proposing a rule under Section 6(a),
  - -- Issuing a proposed order under Section 5(f)(3)(A)(i) that, if challenged, must be followed by the initiation of a Section 5(f)(3)(A)(ii) injunction, or
  - -- Seeking a Section 5(f)(3)(A)(ii) injunction; or
- Limit the amount of the chemical substance that may be manufactured, processed, or distributed in commerce by proposing a Section 6(a) rule. Section 5(f)(2) states that such a proposed rule would become effective upon publication.

It is important to note that Sections 5(f)(3)(A)(i) and 5(f)(3)(A)(ii) allow the Administrator to immediately implement a prohibition on the manufacture, processing, or distribution in commerce of a chemical substance that is subject to premanufacture review and that has been specified in a proposed Section 6(a) rule. These sections of the Act are necessary because proposed Section 6(a) rules are generally not immediately effective. Section 6(d) does permit a Section 6(a) rule to become immediately effective if there is a showing of an "imminent unreasonable risk of serious or widespread injury." However, Sections 5(f)(3)(A)(i) and 5(f)(3)(A)(ii) permit the Administrator to implement immediately a prohibition on the manufacture, processing, or distribution in commerce of a PMN chemical substance by showing an "unreasonable risk of injury," not the more stringent "serious or widespread injury" requirement of Section 6(d).* If, on the other hand, the Administrator wishes only to limit the amount of a chemical substance that is subject to premanufacture review, the Administrator may do so under Section 5(f)(2). Under Section 5(f)(2), a proposed Section 6(a) rule (limiting the amount of the chemical substance that may be manufactured, processed, or distributed in commerce) becomes effective upon publication.

Section 7 Injunctions

Criteria for Use. Injunctive relief authorized by Section 7 of TSCA should be considered when a chemical substance or mixture, or article containing such a substance or mixture, poses an imminent hazard to human health or the environment.

Use of Section 7 Injunctive Actions. Section 7(a)(1)(B) of TSCA authorizes the Administrator to seek injunctive relief, through EPA or Department of Justice attorneys, against any person who manufactures, processes, distributes in commerce, uses, or disposes of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture.

Section 7(f) defines an imminently hazardous chemical substance or mixture as one that presents an imminent and unreasonable risk of serious or widespread injury to human health or the environment. An unreasonable risk is considered imminent if it can be shown that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture is likely to result in such injury before a final rule under Section 6 of the Act can protect against such risk.

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* In addition, Section 6(d) requires that in order for a Section 6 rule (which prohibits the manufacture, processing, or distribution in commerce of a chemical substance or mixture that is likely to result in an unreasonable risk of serious or widespread injury) to become immediately effective, a court must first have granted relief under Section 7 of the Act.

If an imminent hazard exists and the Administrator has not issued an immediately effective rule under Section 6(d)(2)(A)(i) against the imminently hazardous chemical substance or mixture, then according to Section 7(a)(2), the Administrator must commence an appropriate Section 7 action (i.e., a seizure or injunctive action). Agency policy, however, permits the Administrator to initiate an immediately effective rule under Section 6 in lieu of seeking a Section 7 civil action.*

A Section 7 injunctive action may seek such temporary or permanent relief as may be necessary to protect human health or the environment from the unreasonable risk associated with the chemical substance, mixture, or article involved in the action. If the injunctive action is brought against a person who manufactures, processes, or distributes in commerce an imminently hazardous chemical substance or mixture or an article containing such a substance or mixture, the action may include the issuance of a mandatory order requiring:

- In the case of purchasers of such a substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with it;
- Public notice of such risk;
- Recall;
- Replacement or repurchase of such a substance, mixture, or article; or
- Any combination of the above actions.

Concurrent with the filing of a Section 7 civil action or soon thereafter as may be appropriate and where practicable, the Administrator must initiate a Section 6(a) rulemaking proceeding.

Section 7 civil actions may be commenced notwithstanding the existence of a rule under Section 4, 5, or 6 or an order under Section 5, and notwithstanding the pendency of any TSCA administrative or judicial proceeding.

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* This policy, however, would not apply to a Section 6 rule that seeks to prohibit the manufacture, processing, or distribution in commerce of an imminently hazardous substance, since Section 6(d)(2)(A)(ii) requires that, in order for such a rule to become immediately effective, a court must first have granted relief under Section 7 of the Act. The policy does apply to the other forms of relief (i.e., other than a complete prohibition) available under Section 7.

Section 17(a) Injunctions

Criteria for Use. Injunctive relief authorized by Section 17(a) of TSCA, which is the most common form of judicial relief sought, should be considered when there is a need to:

- Restrain any violation of Section 15 of the Act. The violations specified by Section 15 include:
  - -- Failure or refusal to comply with any rule promulgated or order issued under Section 4, any requirement prescribed by Section 5 or 6 of TSCA, or any rule promulgated or order issued under Section 5 or 6,
  - -- Use, for commercial purposes, of a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6 of TSCA, a rule or order under Section 5 or 6, or an order issued in an action brought under Section 5 or 7,
  - -- Failure or refusal to establish or maintain records; to submit reports, notices, or other information; or to permit access to or copying of records, as required by TSCA or its rules, and
  - -- Failure or refusal to permit entry or inspection as required by Section 11 of TSCA;
- Restrain any person from taking any action that is prohibited by Section 5 or 6 of TSCA or by a rule or order issued under those sections;
- Compel the taking of any action required by or under the Act; or
- Direct any manufacturer or processor of a chemical substance or mixture manufactured or processed in violation of Section 5 or 6 or a rule or order under Section 5 or 6 and distributed in commerce to:
  - -- Give notice of such fact to distributors in commerce and (to the extent that they can be reasonably ascertained) other persons who possess or may be exposed to the chemical substance or mixture,
  - -- Give public notice of such risk of injury, and
  - -- Either replace a repurchase the chemical substance or mixture.

Use of Section 17(a) Injunctive Actions. Injunctive relief authorized by Section 17(a) will generally be sought in those instances where civil penalty proceedings are (or will be) ineffective because of the nature of the violation or the nature of the violator. Specifically, a permanent injunction should be considered when:

- The Agency's administrative or other judicial enforcement remedies would be inadequate either at restraining the violation or at preventing unreasonable risk to humans or the environment;

- The Agency has, in fact, already diligently exercised all appropriate administrative remedies, yet the violation continues unabated; and

- Irreparable injury, loss, or damage will result if relief is not granted. "Irreparable" means that the damage cannot be undone once it takes place.

A preliminary injunction or temporary restraining order should be considered when the following additional elements are present:

- Immediate and irreparable injury, loss, or damage will result if relief is not granted. "Immediate" is self-explanatory and is interpreted strictly; and

- There is likelihood of success at trial based on facts before the court (i.e., more than a 50-percent chance of winning at a trial based on facts before the court at the time of application).

The above considerations relating to permanent injunctions, preliminary injunctions, or temporary restraining orders may occur when:

- The violator is recalcitrant and has demonstrated a history of noncompliance with administrative orders and, therefore, should be made subject to the contempt powers of a district court;

- The nature of the violation is such that it cannot be remedied effectively by Agency proceedings. (Because injunctive proceedings are equitable in nature, they permit the court to fashion the necessary relief); or

- The violation is very serious and meets the technical criteria for a finding of "imminent hazard" under Section 7 of TSCA but the Agency does not wish to initiate a Section 6(a) rulemaking proceeding.

Seizures

Seizure actions may be initiated under the authority of Section 7 or 17(b) of TSCA.

Section 7 Seizures

Criteria for Use. Section 7(a)(1)(A) of TSCA permits the Administrator to commence a civil action in an appropriate district court for the seizure of

an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture.

Use of Section 7 Seizure Actions. A Section 7 seizure action should be used in a situation in which a chemical substance or mixture presents an imminent and unreasonable risk of serious or widespread injury to human health or the environment. Such risk is considered imminent if it is shown that the manufacture, processing, distribution in commerce, use, or disposal of the substance or mixture is likely to result in such injury before a final rule under Section 6 can protect against such risk. Whether or not a chemical substance or mixture presents an imminent hazard will have to be determined on a case-by-case basis. However, it is expected that the standard would apply to those cases where a chemical substance or mixture poses an acute risk of harm to human health or the environment or is being used by large numbers of people in many areas of the country and the substance, mixture, or article must be seized to prevent that risk. A seizure action under Section 7(a) may be used in conjunction with any other relief authorized by that section (including injunctive actions). It may also be used notwithstanding the existence of a rule under Section 4, 5, or 6 or an order under Section 5 of the Act, and notwithstanding the pendency of any administrative or judicial proceeding under any provision of TSCA.

Section 17(b) Seizures

Criteria for Use. Section 17(b) of TSCA authorizes the seizure of any chemical substance or mixture that was manufactured, processed, or distributed in commerce in violation of the Act or any rule promulgated or order issued under TSCA or any article containing such substance or mixture.

Use of Section 17(b) Seizure Actions. An *in rem* action authorized by Section 17(b) should be considered when a chemical substance or mixture presents an unreasonable risk of injury to human health or the environment but does not constitute an imminent hazard under Section 7. Note that a Section 7 seizure action may be used in instances where there is no violation of TSCA, whereas a Section 17(b) *in rem* action requires that the chemical substance or mixture has been manufactured, processed, or distributed in commerce in violation of the Act.

Criminal Proceedings

Criminal proceedings are authorized by Section 16(b) of TSCA, which states that:

> ***Any person who knowingly or willfully violates any provision of section 15 shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than

> $25,000 for each day of violation, or to imprisonment for not more than one year, or both.

Section 15 of TSCA enumerates those acts considered unlawful under TSCA (see Chapter Seven for a complete listing).

The Agency may initiate criminal proceedings in every case in which EPA can meet the stringent requirements of evidence and proof leading to a conviction. However, Agency policy, as well as pragmatic resource considerations, argues against the use of criminal sanctions in any but the most serious instances of environmental misconduct, as determined by the nature of the violation, the history of compliance on the part of the responsible person, or the seriousness of the environmental consequences.

Considerations

The Agency must carefully consider several specific factors before proceeding with a criminal prosecution. (Chapter Nine, "Judicial Enforcement: Criminal Actions," addresses these considerations in much greater detail.)

Knowledge. The Agency must determine that the violator in question knowingly or willfully violated the statute. That is, there must be evidence of intent in the commission of the violative act, rather than it merely being the result of accident or mistake.

Seriousness. Criminal actions should be considered for the most serious types of environmental misconduct. This consideration will be judged by reviewing the extent of environmental harm or human health hazard that resulted from or was threatened by the prohibited conduct. Factors such as the duration of the conduct and the toxicity of the pollutants are considered. Also of significance in assessing the seriousness of the conduct is the impact--real or potential--upon EPA's regulatory function.

Deterrence. The Agency must consider the importance of and need for deterrence of criminal conduct, either on the part of a specific person, or on the part of the larger community. In the case of a serious and willful violation, the interests of deterrence may well best be served by the imposition of criminal sanctions.

Compliance History. The compliance history of the person who is the subject of possible criminal proceedings will enter into the Agency's deliberations. While a history of noncompliance is not requisite for pursuing criminal sanctions, certainly criminal prosecution becomes more appropriate when a history of noncompliance exists.

Simultaneous Actions. The Agency may consider whether there is a need for criminal enforcement proceedings contemporaneous with a civil or administrative enforcement action, or whether one type of action alone will serve the situation in question. While simultaneous proceedings are permissible, and there may be very compelling reasons for pursuing both, the legal and practical difficulties inherent in so doing argue against such an approach except in the most extraordinary circumstances.

Use of Criminal Proceedings

The Agency has identified a number of specific situations that may be considered of such a serious nature that criminal prosecution is particularly appropriate where the violation was the result of knowing or willful conduct. To list these situations, however, should not be viewed as precluding criminal prosecution in circumstances not included below:

- Violations of Section 4 testing rules or the Section 5(b) Premanufacture Notification Program;
- Failure to report substantial risk information; and
- Violation of PCB or dioxin regulations.

Chapter Six

Administrative Enforcement Actions: Notices of Violation and Administrative Orders

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1 Introduction

This chapter outlines the specific procedures that EPA should follow in initiating and processing administrative enforcement actions, once the Agency has determined that an administrative enforcement response is appropriate for a detected violation. These actions include the following:

- Notices of noncompliance;
- Settlements with conditions; and
- Notices of detention under Section 13*.

Civil administrative penalties are not covered in this chapter; however, civil administrative penalty procedures are outlined in detail in Chapter Seven, "Administrative Enforcement Actions: Civil Penalty Proceedings." Appendix 3, "Enforcement Response Policies and Penalty Policies," also contains useful procedural information relating to administrative enforcement actions. In addition, Chapter Five, "Determination of Appropriate Enforcement Response," discusses the criteria the Agency uses in deciding when and what type of enforcement action to issue.

* Notices of detention are issued by the United States Customs Service under the authority of Section 13 of TSCA.

2 Administrative Enforcement Procedures

Notices of Noncompliance

A notice of noncompliance (NON) is a letter issued by EPA that advises a company that a violation of TSCA has been detected. Although issuance of an NON is not specifically authorized by TSCA, the notice is an important enforcement tool. It can be used, for example, to notify a violator that the Agency is keeping track of the company's actions with respect to correcting the violation, or as an initial step in making Agency contact with a violator if negotiations will be necessary for achieving compliance. As was previously discussed in Chapter Five, an NON should be considered in the following circumstances:

- The violation involves only a minor technical deviation from the statutory or regulatory requirement;
- The violation does not pose a significant threat to human health or the environment;
- The respondent has not previously violated TSCA;
- The violation is not the result of willful conduct;
- The violation is not one that would hamper EPA's ability to detect other violations at the facility;
- An NON would be sufficient to bring about compliance; or
- Other regulation-specific policy considerations would apply (see Appendix 3).

Procedure for Issuing an NON

An NON should contain the following information (see Exhibit 6-1):

- Identification, citation, and explanation of the violation;
- A paragraph indicating the expected response from the recipient (including a specific time frame for compliance), if any;

- If necessary, a statement indicating that continued noncompliance could result in further enforcement action by the Agency; and

- The name and telephone number of an EPA contact person.

The Agency should issue an NON by certified mail, return receipt requested. A copy of the NON should be placed in a case file, and the issuance of the NON should be put on the computer docket, if applicable.

Settlements With Conditions

The term "settlement with conditions" (SWC) refers to the settlement of an administrative civil penalty action under conditions that commit the respondent to perform specified acts in exchange for the remittance of all or a portion of an administratively assessed penalty. Remittance, with or without conditions, of an assessed civil penalty is permitted by Section 16(a)(2)(C) of TSCA. The procedures for entering into a SWC are set forth in Appendix 4, "Settlement With Conditions."

Notices of Detention

Pursuant to Section 13 of TSCA and 48 Fed. Reg. 34,734 (1983), the United States Customs Service may detain any shipment of chemical substances or mixtures that is imported into the United States and that is not in compliance with TSCA. Such action is accomplished through the issuance of a notice of detention at the port of arrival by a district director of the Customs Service. A notice of detention may be issued when:

- A shipment contains any chemical substance or mixture that has been banned from the customs territory of the United States by a rule or order issued under Section 5 or 6 of TSCA;

- A shipment contains a chemical substance or mixture or article that has been ordered seized under Section 7 (imminent hazard) of TSCA;

- The Administrator of EPA has reasonable grounds to believe that the shipment is not in compliance with TSCA, and the Administrator notifies the district director to detain such shipment;

- The district director of the Customs Service has reasonable grounds to believe that the shipment is not in compliance with TSCA; or

- The importer fails to certify compliance with TSCA.

For details concerning the handling and release of a detained shipment, refer to the TSCA Section 13 rule promulgated by the United States Department of the Treasury at 48 Fed. Reg. 34,734 (1983).

Sample Notice of Noncompliance*

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region I
John F. Kennedy Federal Building
Boston, MA 02203

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. T. K. H. Firetog, Jr.
President
Firetog Industries, Inc.
36 Sunshine Drive
Clark, MA 02856

RE: Notice of Noncompliance
Firetog Industries, Inc.

Dear Mr. Firetog:

You are hereby given notice that Firetog Industries, Inc., is in violation of the regulations governing polychlorinated biphenyls (PCBs), 40 C.F.R. Part 761, promulgated pursuant to the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 et seq.

On October 31, 1983, a duly designated representative of the United States Environmental Protection Agency (EPA) conducted an inspection of the Firetog Industries' facility located at 36 Sunshine Drive, Clark, Massachusetts. The inspection revealed the following violation of the requirements governing polychlorinated biphenyls (PCBs):

> Failure to mark properly PCB large high-voltage capacitors as required by 40 C.F.R. §761.40(c)(2), which was promulgated pursuant to Section 6 of TSCA, 15 U.S.C. §2614.

The above-noted violation must be corrected. Failure to do so within 30 days may result in further EPA action, including the possible imposition of civil penalties. Please keep us informed of your progress in correcting the violation.

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* Note: This is a general example of a notice of noncompliance. It does not represent the only appropriate format. Additional or different paragraphs may be included as necessary to explain or describe fully the violations and the response that the Agency expects from the recipient.

We have enclosed a copy of the current regulations governing PCBs for your information. If you have any questions, please do not hesitate to contact Mr. Don Duff at (312) 989-9876.

Sincerely,

John Doe
Director, Enforcement Division

Enclosure

Chapter Seven

Administrative Enforcement Actions: Civil Penalty Proceedings

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1 Introduction

In most instances, the Regional Office determines which violations warrant the imposition of an administrative civil penalty. Many violations fall into this category. However, if the violation is sufficiently minor, a notice of noncompliance may be appropriate (see Chapter Six, "Administrative Enforcement Actions: Notices of Violation and Administrative Orders"). Conversely, if the violation is committed knowingly or willfully, criminal prosecution may be more appropriate (see Chapter Nine, "Judicial Enforcement: Criminal Actions"). In addition, Chapter Five contains a general discussion of appropriate enforcement responses.

This chapter focuses on TSCA civil penalty actions and the procedures for litigating administratively assessed penalties.

Consolidated Rules of Practice

All adjudicatory proceedings for the assessment of administrative civil penalties under TSCA are governed by the Consolidated Rules of Practice (CROP, promulgated on April 9, 1980, 45 Fed. Reg. 24,360, codified at 40 C.F.R. §22.01 et seq.).

Regional Versus National Actions

The preappellate stage of most administrative proceedings generally occurs at the regional level. Therefore, the CROP discuss these stages only in the context of regional actions. However, if the violation is not Region-specific, the entire administrative proceeding may take place at the national level.

In order to apply to national actions, the CROP require the following substitutions of Agency officials:

Regional	National
Regional Hearing Clerk	Hearing Clerk
Regional Administrator	Administrator
Regional Judicial Officer	Judicial Officer

Substitutions between regional and national officials may also occur if an official is disqualified pursuant to the CROP. **22.04(d)*** Certain filing and service requirements specified by the CROP are also altered if the actions are conducted at the national level. For example, the Regional Hearing Clerk must forward a record of the proceeding to the Hearing Clerk when an initial decision is issued in a regional proceeding. Such a transfer is unnecessary if the proceeding was conducted at the national level. **22.27(a)**

* Note: Bold type citations in the text correspond to the sections of the CROP found at Part 22 Title 40 of the Code of Federal Regulations.

2 Elements of a Violation: Administrative

Under Section 16(a) of TSCA, the Agency may issue administrative civil complaints to persons who violate the provisions of Section 15 of the Act. In order to establish a prima facie administrative case against a respondent, the Agency must establish, by proper evidence, each element of the violation charged. The following charts list each violation that may occur under TSCA, the related elements of proof that are necessary to bring the violation to court, and the means by which the element of proof is established.

Section 15(1)(A)

It shall be unlawful for any person to fail or refuse to comply with any rule promulgated or order issued under Section 4 of the Act.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent is a person who is subject to a Section 4 rule or order (e.g., respondent is a manufacturer or processor of a chemical substance or mixture that falls within the purview of a Section 4 rule or order).	1. Review by appropriate regional or program personnel of the applicable Section 4 rule or order and the inspection file to determine whether respondent is subject to such a rule or order.
2. Respondent failed or refused to comply with that rule or order (e.g., respondent failed to submit the chemical substance or mixture for required testing or failed to submit the results of such testing).	2. Appropriate regional or program personnel review inspection documentation or respondent's submissions to determine whether respondent failed or refused to comply with the Section 4 rule or order that respondent is subject to. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

Section 15(1)(B)

It shall be unlawful for any person to fail or refuse to comply with any requirement prescribed by Section 5 or 6 of the Act.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent is a person who is subject to a requirement prescribed by Section 5 or 6 of the Act (e.g., respondent is a manufacturer of a new chemical substance as defined by TSCA).	1. Review by appropriate regional or program personnel of Sections 5 and 6 and the inspection file to determine whether respondent is responsible for compliance with any of the requirements of those sections.
2. Respondent failed or refused to comply with that requirement (e.g., respondent failed to submit a Premanufacture Notice for a new chemical substance prior to commencing its manufacture).	2. Appropriate regional or program personnel review inspection documentation or respondent's submissions to determine whether respondent failed or refused to comply with the Section 5 or 6 requirement that respondent is subject to. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

Section 15(1)(C)

It shall be unlawful for any person to fail or refuse to comply with any rule promulgated or order issued under Section 5 or 6 of the Act.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent is a person who is subject to a rule promulgated or order issued under Section 5 or 6 of the Act (e.g., respondent's facility stores PCB containers for disposal).	1. Review by appropriate regional or program personnel of Sections 5 and 6 rules and orders and the inspection file to determine whether respondent is subject to such rules or orders. This may involve the need for a laboratory analysis of the chemical substance or mixture to determine whether such substance or mixture is requested under those sections of the Act.
2. Respondent failed or refused to comply with that rule or order (e.g., respondent failed to mark properly a PCB container that is stored for disposal).	2. Appropriate regional or program personnel review inspection documentation to determine whether respondent failed or refused to comply with the rule or order that respondent is subject to. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount see Appendix 3.

Section 15(2)

It shall be unlawful for any person to use for commercial purposes a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6, a rule or order under Section 5 or 6, or an order issued in an action brought under Section 5 or 7 of the Act.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. The chemical substance or mixture was manufactured, processed, or distributed in commerce in violation of Section 5 or 6, a rule or order under Section 5 or 6, or an order issued in an action brought under Section 5 or 7 of the Act.	1. Review by appropriate regional or program personnel of applicable sections, rules, orders, and inspection file to determine whether the chemical substance or mixture was manufactured, processed, or distributed in commerce in violation of those sections, rules, or orders.
2. Respondent knew or had reason to know that such substance or mixture was manufactured, processed, or distributed in commerce in violation of those sections, rules, or orders.	2. Appropriate regional or program personnel determine from inspection documentation whether the respondent had knowledge of or had reason to know of the prohibition (e.g., knowlege from chemical manufacturer's notification letter).
3. Respondent used for commercial purposes such a substance or mixture.	3. Appropriate regional or program personnel determine from inspection documentation whether respondent used for commercial purposes such a substance or mixture (e.g., sales receipts or shipping records). For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

Section 15(3)(A)

It shall be unlawful for any person to fail or refuse to establish or maintain records as required by this Act or a rule thereunder.*

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent failed or refused to establish or maintain records required by the Act or rules thereunder (e.g., respondent failed to maintain records tracking the disposal of PCBs found on respondent's property).**	1. Review by appropriate regional or program personnel of applicable regulations and inspection documentation to determine whether records were required to be maintained by the respondent and whether such records were in fact maintained. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

* TSCA provides for an exemption from Section 8(a) recordkeeping requirements if the respondent meets the criteria of a small manufacturer or processor.

** Note an action alleging failure to establish or maintain records under TSCA or its rules may also be initiated under Section 15(1)(A).

Section 15(3)(B)

It shall be unlawful for any person to fail or refuse to submit reports, notices, or other information as required by this Act or a rule thereunder.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent failed or refused to submit reports, notices, or other information as required by the Act or a rule thereunder (e.g., respondent failed to submit a PCB annual report).	1. Review by appropriate regional or program personnel of applicable sections and regulations and inspection documentation to determine whether reports, notices, or other information was required to be submitted by the respondent and whether such reports, notices, or other information was in fact submitted. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

Section 15(3)(C)

It shall be unlawful for any person to fail or refuse to permit access to or copying of records, as required by the Act or a rule thereunder.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent failed or refused to permit access to or copying of records (e.g., respondent, an agent in charge of a TSCA-regulated establishment, did not permit the EPA inspector to copy or examine PCB records).	1. Review by appropriate regional or program personnel of inspection documentation to determine whether respondent denied access to or copying of records. Documentation should include the name and position of the person who refused to allow access to or copying of records, a summary of the conversation or events, and the date and time of the denial.
2. Access to or copying of such records is required by the Act or a rule thereunder.	2. Appropriate regional or program personnel review applicable sections of the statute and regulations to determine whether access to or copying of such records is required by the Act or a rule thereunder. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

Section 15(4)

It shall be unlawful for any person to fail or refuse to permit entry or inspection of any establishment, facility, or other such premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce.

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
1. Respondent failed or refused to permit entry to or inspection of an establishment, facility, or other such premises or conveyance (e.g., respondent, an agent in charge of a TSCA-regulated establishment, did not allow the EPA inspector entry for the purposes of conducting a PCB inspection, although the inspector followed proper entry procedures).	1. Review by appropriate regional or program personnel of inspection documentation to determine whether respondent failed or refused to permit entry or inspection of an establishment, facility, or other such premises or conveyance. Documentation should include the name and position of the person who refused entry, a summary of the conversation or events, the date and time of denial, and a description of the entry procedures used by the inspector (see Chapter Three).
2. Such establishment, facility, or other premises is one in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce; or such conveyance is one that is being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce.	2. Appropriate regional or program personnel review inspection documentation to determine: • Whether such establishment, facility, or other premises is one in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce; or

ELEMENTS OF THE VIOLATION	ESTABLISHING THE VIOLATION
	• Whether such conveyance is one that is being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce. For the significance of the violation, see "Level of Action Policy" (Chapter Five) and for the penalty amount, see Appendix 3.

3 Complaint Preparation and Filing

Civil Penalty Complaint Criteria

As was previously discussed in Chapter Five, a civil penalty action is warranted when a violation:

- Presents a real (but not an extreme or imminent) risk to human health or the environment;
- Is likely to be an isolated occurrence; and
- Is apparently the result of ordinary negligence, inadvertence, or mistake.

Issuance of a complaint initiates a TSCA Section 16(a) administrative penalty action.

Delegated Authority

Regional Administrator

The Regional Administrator is to exercise all powers and duties as prescribed or delegated under the Act and the CROP. In addition the Regional Administrator* has been delegated the authority to:

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* The Assistant Administrator for Pesticides and Toxic Substances may also exercise these authorities in multi-regional cases or cases of national significance. However, he or she must consult in advance with the Assistant Administrator for OECM or his or her designee and must notify any affected Regional Administrators or their designees when exercising any of the above authorities. These authorizations are redelegable to the Division Director level.

- Issue administrative complaints;
- Evaluate the appropriateness of civil penalties; and
- Negotiate and sign consent agreements memorializing settlements between the Agency and respondent prior to the alleged violator's filing of an answer or failure to file an answer to a complaint.

The Regional Administrator, however, must consult with the Regional Counsel's office before exercising any of the above authorities. In addition, the Regional Administrator must consult with Headquarters PTSCMS in the following instances:

- Premanufacture Notification cases (which are to be handled by Headquarters);
- Exceptional cases of first impression or of unusual national importance; and
- Settlement reductions of more than 40 percent of the penalty amounts originally proposed.

In every proceeding, the Regional Administrator will rule on all motions filed or made before an answer to the complaint is filed. **22.16(c)**

Regional Judicial Officer

A Regional Administrator may delegate all or part of his or her authority to act in a given proceeding to a Regional Judicial Officer. Any such delegation is to be performed in accordance with the CROP.

A Regional Judicial Officer may exercise any authority delegated to him or her by the Regional Administrator, or the Regional Judicial Officer may refer any case or motion to the Regional Administrator when such referral is appropriate. **22.04(b)(3)**

Presiding Officer

The Presiding Officer is to conduct a fair and impartial proceeding, ensure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer has the authority, under **22.04(c)**, to:

- Conduct administrative hearings under these rules of practice;
- Rule upon motions, requests, and offers of proof; dispose of procedural requests; and issue all necessary orders;
- Administer oaths and affirmations and take affidavits;
- Examine witnesses and receive documentary or other evidence;

- For good cause, upon motion by a party or sua sponte (i.e., upon his own motion), order a party or an officer or agent thereof to produce testimony, documents, or other nonprivileged evidence and, failing the production thereof without good cause being shown, draw adverse inferences against that party;

- Admit or exclude evidence;

- Hear and decide questions of facts, law, or discretion;

- Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

- Issue subpoenas authorized by the Act; and

- Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair, and impartial adjudication of issues arising in proceedings governed by the CROP.

TSCA Penalty Assessment Considerations

Guidelines for Determining Penalty Amount

Section 16(a)(2)(B) of TSCA requires that the Agency consider the following factors in determining the size of the penalty amount:

- The nature, circumstances, extent, and gravity of the violation(s); and

- The violator's ability to pay, ability to continue to do business, history of prior such violations, degree of culpability, and other matters as justice may require.

Pursuant to the statutory requirements, EPA has established a general penalty assessment system, "Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA" [45 Fed. Reg. 59,770 (1980)]. In some instances, section-specific penalty policy guidances have been developed. (See Appendix 3 for the general penalty policy and those specific guidances that have been developed.)

Independently Assessible Charges

A separate civil penalty should be assessed for each violation of the Act that results from an independent act (or failure to act) by the respondent and that is substantially distinguishable from any other charge in the complaint for which a civil penalty is to be assessed. A given charge is independent of, and substantially distinguishable from, any other charge when it requires an element of proof not needed by the others. (See Section 2, "Elements of a Violation: Administrative," of this chapter.)

Not every charge that appears in a complaint can be separately assessed. Where a charge derives primarily from or merely restates another charge, a separate assessment is not warranted. Charges that do not support a separate assessment are to be indicated in the complaint as "lesser included charges."

Complaint Preparation

Since the complaint initiates an administrative civil penalty action and is the focal point for all subsequent proceedings, it must be as complete as possible. Failure to file a complaint that meets the standards and procedures outlined in this chapter may:

- Cause a delay in the proceedings;
- Prevent the complainant from being granted a motion for default under Section 22.17 of the CROP; and
- Make the complainant subject to adverse motions by other parties to the proceedings.

Checklist of Complaint Requirements 22.14(a)*

The following elements are considered necessary to establish the legal sufficiency of a civil penalty complaint:

1. Statement reciting the section(s) of the Act authorizing the issuance of the complaint;
2. Concise statement of the factual basis for alleging the violation;
3. Specific reference to each provision of the Act and to the regulations that the respondent is alleged to have violated;
4. Statement explaining the proposed penalty;
5. Copy of the Agency's "Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA," 45 Fed. Reg. 59,770 (1980), and a copy of the appropriate section-specific penalty policy guidance;
6. Proposed amount of civil penalty to be assessed;

---

* The numbers to the left of each of the following items correspond to numbers in Exhibit 7-1, which shows a sample complaint. The numbers in the exhibit identify examples of each kind of information.

7. Notice of respondent's right to request a hearing on any material fact contained in the complaint or on the appropriateness of the amount of the proposed penalty;

8. Copy of the Consolidated Rules of Practice (CROP);

9. Notice of opportunity for an informal settlement conference; and

10. Date and signature with notation of title of a duly authorized official of the Agency.

Elements of the Complaint

The discussion under each element of the complaint gives the purpose of the element and in some cases the reason for its particular place in the complaint.

Caption

- Identification of Respondents (A).* Respondents (i.e., those against whom the complaint is filed) are to be accurately and individually identified on the left side of the caption.

- Docket Number and Subjects of the Complaint (B). The docket number and matters addressed in the complaint are to be properly identified on the right side of the caption. Docket numbers are assigned by the Regional Hearing Clerk. The docket number designates the statute, the Region involved (in Roman numerals), the year, and the case number (e.g., Docket Number: TSCA-VI-83-9). The docket number must be accurately reflected in the caption, because it is the identifying number for all subsequent documents filed in the proceedings.

Jurisdictional Authority (C)

The complaint must contain a statement of jurisdictional authority that informs the Presiding Officer and the respondent of the statutory authority under which the complaint is issued. This statement should be in the beginning of the complaint and should be as specific and precise as possible.
22.14(a)(1)

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* The letters in parentheses to the right of each element correspond to the letters in Exhibit 7-1.

Factual Allegations (D)

In this section of the complaint, the specific facts of a particular violation are tied to the statute, rule, regulation, and/or order that allegedly has been violated.

The goal of this section is to adequately inform the Presiding Officer of the alleged violations and to inform the respondent of the charges so that an adequate response can be prepared.

In the event that a complaint contains multiple violations, the discussion of each separate count should contain an enumeration of the facts and circumstances related to that violation. The proposed penalty assessment should include an enumeration of the dollar amount proposed for each count charged or an indication that a particular charge is "lesser included" and bears no penalty assessment. The factual allegations of the complaint, including multiple counts, should be separated into paragraphs.

In making factual allegations, the key word is "concise." "Conciseness" means that all material facts necessary to establish the factual basis for each violation are specified, while extraneous or irrelevant information is omitted. Although the purpose of this section is only to inform the respondent and Presiding Officer of the facts that the alleged violation is based on, all relevant facts should be included rather than risk failure to meet the requirements set forth in the CROP. For instance, even though the respondent may have been present when certain facts were ascertained, those facts must still be included to inform the respondent and the Presiding Officer of their legal significance.
22.14(a)(3)

Citation of Legal Requirements Violated (E)

The citation of the particular provision of the statute, regulation, rule, or order that allegedly has been violated must be as specific as possible. For example, if the complaint alleges that a violation of Section 15 of TSCA has occurred, the specific subsection under Section 15 that is the basis of the violation and the requirement of the statute, regulation, or order that was violated must be cited [e.g., PMN violation of Sections 15(1)(B), 15(3)(B), and 5(2)(1)].

Amount of Civil Penalty and Rationale (F, G)

This section of the complaint is intended to:

- Explain the reason for the proposed penalty (F) in a manner that reflects the fact that the Agency has considered the penalty assessment factors specified by Section 16(a)(2)(B) of TSCA. Every detail of the Agency's reasoning process need not be reflected; however, the section should state that the TSCA criteria were considered in assessing the penalty. In order to help meet the

statutory requirement without unnecessary elaboration, a copy of the Agency's policy in assessing TSCA civil penalties should be attached to the complaint; and
22.14(a)(5)

- Specifically identify the proposed penalty amount (G).
22.14(a)(4)

Right To Request a Hearing (H)

The respondent must be informed of the right to request a hearing concerning any material fact contained in the complaint or concerning the appropriateness of the amount of the proposed penalty. The respondent should be referred to a copy of the CROP, which is attached to the complaint, for information concerning the request for a hearing and the consequences of failing to request a hearing.
22.14(a)(6)

Notice of Opportunity for an Informal Settlement Conference (I)

The Agency encourages all parties against whom a civil penalty proceeding has been initiated to pursue the possibility of settlement through informal conferences with the Agency. Therefore, the respondent should be informed that, regardless of whether a hearing is requested, a request for informal settlement conference may be made. The respondent should be cautioned, however, that a request for an informal conference does not stay the running of the 20-day time period for requesting a hearing and filing an answer.

Signature Block (J)

The complaint must be dated and signed (with notation of title) by a duly authorized official of the Agency.

Service of the Complaint

The respondent is served with a copy of the complaint in either of the following manners:
22.05(b)

- Personal Service. The complaint and accompanying documents are left with the respondent or an authorized representative; or

- Service by Certified Mail, Return Receipt Requested. The complaint and accompanying documents are mailed to the respondent or an authorized representative.

Personal Service

For personal service on an individual at a business address, the complaint should be left with the respondent or a person who is in charge of the office, such as an office manager, or a person who is responsible for the respondent's administrative affairs, such as a personal secretary.

For personal service on a corporation, company, or association, the complaint should be left with an officer, partner, managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

For personal service on a named individual at a residential address, the complaint should be left with any person of suitable age and discretion who resides there.

Service by Mail

If the complaint is addressed to an individual person, it should be mailed to the last known business address by certified mail, return receipt requested.

If the complaint is addressed to a corporation, company, or association, it should be mailed, return receipt requested, to the last known address of an officer, partner, managing or general agent, or any other person authorized by appointment or by federal or state law to receive service of process.

The return receipt establishes that the complaint was received on a particular date.

The receipt should be attached to the original complaint, which is retained by the Agency. If no return receipt is obtained, another letter should be sent. If no receipt is again obtained, personal service may be necessary.

Service Upon U.S. Government Officials or Agencies

Service upon an officer or agency of the United States must be made by delivering a copy of the complaint to the officer or agency, or in the manner prescribed by applicable regulations. If the agency is a corporation, service may be either personal or by certified mail directed to an officer, partner, managing or general agent, or any other person authorized by appointment or law to receive service of process. **22.05(b)(1)(iii)**

Service on State or Local Government Entities or Officials

Service upon a state or local unit of government, or a state or local officer, agency, department, corporation, or other instrumentality must

either be made in the manner prescribed by state law or upon the chief executive officer of the governmental unit or the state or local officer.
22.05(b)(1)(iv)

Certificates of Service

Proof of service must be made either by a properly executed affidavit of service (Exhibit 7-3) for personal service, or by a properly executed return receipt, for service by mail. A certificate of service must be filed with the original complaint.
22.05(b)(1)(v)

Filing the Complaint

The original and one copy of the complaint (with proof of service) must be filed with the Regional Hearing Clerk.
22.05(a)(1)

Sample Complaint

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re: (A)	)	Docket No. TSCA-I-83-18 (B)
	)	
	)	
Firetog Industries, Inc.	)	COMPLAINT
36 Sunshine Drive	)	AND
Clark, MA 02856	)	NOTICE OF OPPORTUNITY
	)	FOR HEARING
Respondent	)	
	)	
	)	

COMPLAINT

1. (C)

This civil penalty action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency by Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (hereinafter referred to as "the Act" or "TSCA"). The complainant in this action is John Doe, Division Director, Enforcement Division, Region I, United States Environmental Protection Agency, who has been duly authorized to institute this action. The respondent in this action is Firetog Industries, Inc.

2. Allegations or Counts (D)

This is to notify you that there is reason to believe respondent has violated Section 15 of TSCA by respondent's failure to comply with the regulations promulgated under Section 6(e) of the Act. The complainant alleges that the violations occurred in the following manner:

Count 1

1. On May 4, 1981, respondent's facility, located at 36 Sunshine Drive, Clark, Massachusetts, was inspected by duly designated representatives of the U.S. Environmental Protection Agency.

2. Four hundred and six (406) high-voltage DC capacitors containing PCBs, which were stored for disposal, were found at respondent's facility.

3. Neither the individual capacitors nor the storage room was properly marked with PCB M_L labels as required by 40 C.F.R. §§761.40(a)(1) and 761.40(a)(10), which were issued pursuant to Section 6(e) of TSCA.

4. Failure or refusal to comply with any rule promulgated, or order issued, under Section 6 of the Act constitutes an unlawful act under Section 15(1)(C) of TSCA.

3. **(E)**

5. The conduct described in Paragraphs 2 and 3 above constitutes a violation of Section 15(1)(C) of TSCA in that respondent failed to mark PCB containers and PCB storage areas as required by a rule [40 C.F.R. §§761.40(a)(1) and 761.40(a)(10)] promulgated pursuant to Section 6(e) of the Act.

Count 2

1. On May 4, 1981, respondent's facility, located at 36 Sunshine Drive, Clark, Massachusetts, was inspected by duly designated representatives of the U.S. Environmental Protection Agency.

2. Four hundred and six (406) high-voltage DC capacitors containing PCBs, which were stored for disposal, were found at respondent's facility.

3. The inspectors requested from respondent the records relating to the storage of PCBs. Such records are required by 40 C.F.R. §761.80(b), which was issued pursuant to Section 6(e) of TSCA.

4. Respondent admitted to the inspectors that the required records had not been maintained.

5. Failure or refusal to comply with any rule promulgated or order issued under Section 6 of the Act constitutes an unlawful act under Section 15(1)(C) of TSCA. Failure or refusal to establish or maintain records required by the Act or a rule thereunder constitutes an unlawful act under Section 15(3)(A).

3. **(E)**

6. The conduct described in Paragraphs 2 and 4 above constitutes a violation of Sections 15(1)(C) and 15(3)(A) of TSCA, in that respondent failed to maintain PCB storage records as required by a rule [40 C.F.R. §761.80(b)] promulgated pursuant to Section 6(e) of the Act.

4. Proposed Civil Penalty **(F)**

In arriving at the assessment of the penalty specified below, the U.S. Environmental Protection Agency, as required by Section 16(a)(2)(B) of

TSCA [15 U.S.C. §2615(a)(2)(b)], has taken into consideration the following factors:

- The nature, circumstances, extent, and gravity of the violations; and
- The respondent's ability to pay, ability to continue to do business, history of prior such violations, degree of culpability, and other matters as justice may require.

5. Agency policy with respect to assessment is governed by the U.S. Environmental Protection Agency's "Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy" [45 Fed. Reg. 59,770 (1980)], a copy of which is attached to this complaint.

6. (G)

Based on the above considerations, the U.S. Environmental Protection Agency proposes to assess against Firetog Industries, Inc., the following amount:

Count 1

Failure To Mark PCB Containers and Storage Areas	$1,500

Count 2

Failure To Maintain PCB Storage Records	1,000
Total Penalty Assessment	$2,500

7. NOTICE OF OPPORTUNITY FOR HEARING (H)

8. This administrative civil penalty proceeding will be conducted pursuant to the Consolidated Rules of Practice (CROP) [40 C.F.R. §22.01 et seq.], a copy of which accompanies this complaint. Pursuant to the CROP, you have the right to request a hearing to contest any factual allegation set forth in the complaint or the appropriateness of the proposed penalty. In the event that you wish to request a hearing and to avoid having the above penalty assessed without further proceedings, you must file a written answer to this complaint with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 1, John F. Kennedy Federal Building, Boston, Massachusetts 02203.

If you do not request a hearing or file a written answer within twenty (20) days of receipt of this complaint, the above penalty will be assessed without further proceedings, and you will be so notified.

9. Settlement Conference (I)

The Environmental Protection Agency encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning (1) whether the alleged violation in fact occurred as set forth above, or (2) the appropriateness of the proposed penalty in relation to the size of your business, the gravity of the violation, and the effect of the proposed penalty on your ability to continue in business. The request for an informal conference does not stay the running of the twenty (20) day time period for requesting a hearing and filing an answer. To explore the possibility of settlement in this matter, contact Ms. Kate Smith, Enforcement Division, United States Environmental Protection Agency, Region 1, John F. Kennedy Federal Building, Boston Massachusetts 02203, telephone (312) 989-9876.

10. (J)

John Doe
Director, Enforcement Division

Date: _____ At: _____

Enclosures: TSCA
Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy
Consolidated Rules of Practice (CROP)

Sample Cover Letter

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Region I
John F. Kennedy Federal Building
Boston, MA 02203

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

G.B. Stubbs, Registered Agent
Firetog Industries, Inc.
36 Sunshine Drive
Clark, MA 02856

Dear Mr. Stubbs.

As the enclosed complaint and notice of opportunity for hearing indicates, the United States Environmental Protection Agency has initiated an administrative civil penalty proceeding against Firetog Industries, Inc., for violations of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 et seq.

It is suggested that you carefully read and analyze the complaint and the enclosed Consolidated Rules of Practice (40 C.F.R. §22.01 et seq.) so that you are fully apprised of the alternatives offered to you in considering the alleged violation, proposed penalty, and opportunity for a hearing. You will note that you have only twenty (20) days from your receipt of this notice within which to file an answer to the enclosed complaint with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 1, John F. Kennedy Federal Building, Boston, Massachusetts 02203. Failure to file a timely answer, in writing, will result in a default order being entered against you for the full amount of the assessed penalty.

The Agency encourages all parties against whom a civil penalty proceeding has been initiated to pursue the possibility of settlement through informal conferences with the Agency. Therefore, regardless of whether you request a hearing, you are extended the opportunity to request an informal settlement conference. To request a conference, please write to Ms. Kate Smith, United States Environmental Protection Agency, Region 1, John F. Kennedy Federal Building, Boston, Massachusetts 02203, or telephone Ms. Smith at (312) 989-9876. Any discussion you may have with Ms. Smith will not affect the time period in which you are permitted to request a hearing or file an answer to the complaint.

Sincerely,

John Doe
Director, Enforcement Division

Enclosure

Model Affidavit of Service

AFFIDAVIT OF SERVICE
UNITED STATES OF AMERICA
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I hereby certify that being a person over 18 years of age, I served a copy of the within complaint

(check one) ( ) in person
( ) by registered mail, return receipt requested
( ) by leaving the copy at principal place of business, which is

_____
_____
_____

( ) (write in other method, such as leaving it at dwelling, serving registered agent of corporation, etc.)

on the person named in the complaint on (month, day, and year).

(Signature of person making service)

(Name of person making service)

(Title, if any)

4 Prehearing Stage

Intervenors and Amicus Curiae

An individual may make a motion to become an intervenor in any proceeding conducted under the CROP. To intervene, the individual's motion must reflect that:

- The individual has a certain interest in the proceeding that is not adequately represented by the original parties;
- The individual's presence will not unduly prolong or otherwise prejudice the adjudication of original parties' rights; and
- The individual will be affected adversely by a final order.

A motion to become an intervenor is ordinarily made before the first prehearing conference. However, the motion may be made after that time if good cause is shown for the failure to file in a timely manner. A party objecting to the intervention may make an answer to the motion to intervene within 10 days following service of the motion. Once an individual is permitted to intervene, that individual becomes a full party to the proceeding.
22.11(a), 22.11(b), 22.11(c), 22.03(a)

An individual may make a motion to file an amicus curiae brief. The motion must identify the interest of the applicant and the desirability of the proposed amicus brief. If the motion is granted, the Agency official granting the motion specifies the time for filing the brief. Once the motion is granted, the individual, while not considered a full party, is permitted to file amicus briefs in all subsequent briefings during the proceeding and is served with copies of all documents relating to such briefings.
22.11(d)

Agency Files*

The Agency must maintain at least two files--one that is initiated by the Regional Hearing Clerk and one that is initiated by the Presiding Officer upon assignment to a case. In addition, the enforcement official bringing the action should maintain a separate file, which contains duplicates of all documents relating to the enforcement proceeding.
22.05(a)(1), 22.05(a)(2)

Any file that contains TSCA confidential business information must be maintained in accordance with the procedures set forth in the TSCA Confidential Business Information Security Manual. (See discussion in Chapter 11.)

Files of Regional Hearing Clerk and Presiding Officer

All documents served in the proceeding must be filed with the Regional Hearing Clerk. The Regional Hearing Clerk initiates this file after receiving the original and one copy of the complaint and the accompanying certificate of service. All original copies of filings and communications from Agency officials, including those from the Presiding Officer, are to be maintained in the Regional Hearing Clerk's file.

The documents that are filed with the Regional Hearing Clerk include:
22.05(a)

- Original and one copy of the complaint;
- Originals and copies of certificates of service;
- Original filings of any intervenors;
- Original answer received from the respondent;
- Original and one copy of rulings, orders, decisions, and other documents that are issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer;
  22.06
- Originals of direct correspondence from the Presiding Officer to the parties; and
- Copies of direct correspondence from the parties to the Presiding Officer.

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* Note: If the action is initiated at the national instead of the regional level, certain terms should be substituted for the terms set forth below. (See "Regional Versus National Actions" in Section 1 of this chapter.)

Copies of the above documents must be maintained in the Presiding Officer's file, except correspondence from the parties to the Presiding Officer. The originals of such correspondence are kept by the Presiding Officer.

Regional Enforcement Case File

The Agency enforcement official initiating a complaint should maintain a separate file containing duplicates of all documents filed in the proceeding, as well as other enforcement documents relating to the case. Documents in this file include:

- Copies of all documents filed with the Regional Hearing Clerk or Presiding Officer;
- Any internal EPA documents used in generating the enforcement action (e.g., concurrence documents, checklists, etc.);
- EPA investigative records such as laboratory reports and copies of business records;
- Original Penalty Assessment Worksheet(s);
- All correspondence between the respondent and other EPA parties; and
- All correspondence between EPA and other federal or state agencies (e.g., the Department of Justice).

This file should be retained for a minimum of five years in the Region after termination of the case, after which time it should be transferred to Records Control Center.

Filing Requirements

A document is considered sufficient for filing if:

- It contains, on the first page of the document, a caption that identifies the respondent and the docket number assigned for the proceeding:
  22.05(c)(2)
- It bears the signature of the filing party, counsel, or other representative (except for exhibits); and
  22.05(c)(3)
- It bears the name, address, and telephone number of the person filing the document if it is the initial document filed by that person. Any changes in this information must be sent to the Hearing Clerk, Presiding Officer, and all other parties to the

proceeding. If a party fails to provide or, when appropriate, amend this information, the right to notice and service is waived.
22.05(c)(4)

The Agency official with jurisdiction over the proceeding may prescribe additional requirements for the form of documents.
22.05(c)(1)

If the applicable requirements are not met, the Agency official receiving the filing may refuse to accept it until it is properly amended. Permission to amend is granted only upon motion to the Administrator, Regional Administrator, or Presiding Officer who refused to file the defective document.
22.05(c)(5)

Also, any party filing a document after the complaint has been issued must certify that copies of the document have been sent to other parties, appropriate Agency officials and any *amicus curiae*. While the CROP do not give explicit sanctions for failure to provide an appropriate certificate of service, failure to serve copies of documents on individuals who have a right to notice may delay the proceeding and, in some cases, may even result in an otherwise entirely correct proceeding being dismissed by the Presiding Officer or being overturned on appeal.
22.05(a)(2)

Public Access to Documents Filed

Subject to any confidentiality requirements specified by law, the documents filed in the proceeding must be made available by the Regional Hearing Clerk for public inspection during business hours.
22.09(a)

Prohibition of Ex Parte Discussion

After a complaint has been issued, certain Agency officials are prohibited from discussing *ex parte* (*i.e.*, without notice to all parties) the merits of the proceeding with individuals or their representatives who have an interest in the proceeding.
22.08

Although *ex parte* discussion about the merits of a proceeding is prohibited, if such communication occurs, it is regarded as argument, and a copy of the *ex parte* communication is served on all other parties in the proceeding. Those other parties are then afforded an opportunity to reply. Failure to comply with these provisions of the CROP can taint an otherwise entirely correct proceeding and may result in its dismissal by the Presiding Officer or in the action being overturned on appeal.

The Agency officials subject to ex parte prohibitions are:

- Administrator;
- Regional Administrator;
- Judicial Officer;
- Regional Judicial Officer;
- Presiding Officer; and
- Any other person who is likely to advise these officials (e.g., the Assistant Administrator for OECM and the Assistant Administrator for Pesticides and Toxic Substances).

The Agency officials listed above are prohibited from participating in ex parte discussions with the following individuals:

- An Agency official who performs a prosecutorial or investigative function in the proceeding or a factually related proceeding;
- Any person outside the Agency who has an interest in the proceeding; and
- Any representative of the persons identified above.

Answer to the Complaint

The respondent must respond to the allegations in the complaint within 20 days after service of the complaint.* The response is in the form of an answer. In the answer, the respondent must admit, deny, or explain each of the factual allegations contained in the complaint. Where the respondent has no knowledge of the allegations and makes a statement to that effect, the allegations are considered denied. **22.15(b)** Failure to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of that allegation.
22.15(d)

* Service of the complaint is complete when the return receipt is signed (if the complaint was mailed) or when personal service is effectuated.

Procedural Considerations

Before the answer is filed, all motions are made to the Administrator or Regional Administrator, or the Judicial Officer or Regional Judicial Officer, as appropriate. After the answer is filed, a Presiding Officer is designated, and all motions are made to that official.
22.16(c)

Filing a timely answer precludes the complainant from seeking a motion for default based on the failure to file a timely answer.
22.17(a)(1)

Filing a timely answer lessens complainant's opportunity to amend because, as a matter of right, the complainant may amend the complaint once before the answer is filed. Otherwise, a motion must be made to and approved by the Presiding Officer.
22.14(d)

The complainant may withdraw the complaint, all or in part, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer or after the filing of an answer, the complaint may be withdrawn only upon motion granted by the Presiding Officer or Regional Administrator.
22.14(e)

Sufficiency of Answer

The answer must meet the following requirements:

- Filing the original of the answer with the Regional Hearing Clerk; and
- Complying with the general filing, service, and content requirements specified by the CROP.
  22.05

The contents of the answer must include:

- Clear and direct admissions, denials, or explanations of each factual allegation contained in the complaint of which the respondent has any knowledge. If the respondent has no knowledge of a particular factual allegation and makes a statement to that effect, the allegations are considered denied. All allegations should be addressed in some manner;
- Grounds for defense;
- Facts that the respondent will put in issue; and
- Any request for a hearing.
  22.15(b)

Evaluation of Answer

Upon receiving a copy of the answer, the complainant should immediately review it for any deficiencies and also check with the Regional Hearing Clerk to ensure that the requirements concerning timely filing and the general filing requirements have been met. Review of the answer might also indicate that a motion to amend the complaint is warranted (i.e., if proposed penalties should be reduced or increased).

Consequences of an Unsufficient Answer

If the form requirements specified by Section 22.05(c) of the CROP are not complied with, the Regional Hearing Clerk can refuse to file the answer.
22.05(c)(5)

If the requirements specified by Section 22.15(b) of the CROP are not complied with, the insufficient answer may be regarded as an admission of the matter(s) not sufficiently discussed.
22.15(d)

If the answer is not filed within the time requirement (20 days), the complainant can seek a default order.
22.17(a)(1)

Assignment of a Presiding Officer

When an answer is filed, the Regional Hearing Clerk forwards the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who assigns either himself (or herself) or another Administrative Law Judge as Presiding Officer. The Presiding Officer then obtains the case file from the Chief Administrative Law Judge and notifies the parties of the assignment.
22.21(a)

Prehearing Motions

Motions may be made by the parties before a hearing is convened. Some motions must be made during the prehearing stage, but most may be made at other stages of the proceeding as well. Before the filing of an answer, motions are filed with the Regional Administrator. After the filing of an answer, motions are filed with the Presiding Officer.
22.16(c)

Written Motions

All motions made during the proceeding, except those made orally on the record during a hearing, must:
22.05(a)(2), 22.05(b)(2), 22.16(a)

- Be in writing;
- Specifically state the grounds or basis for the motion;
- Specifically identify the action(s) that the motion seeks;
- Be accompanied by any evidence that is being relied upon by the movent (e.g., affidavits and legal memoranda); and
- Be served upon the parties.

A written motion must also comply with the general filing and service provisions of Section 22.05 of the CROP (i.e., it must be properly signed, accompanied by appropriate certificates of service, and bear an appropriate docket number).

Because a transcript is required only in a hearing (although a transcript may be used in prehearing conferences at the discretion of the Presiding Officer), most motions made before the hearing will probably have to be in writing and conform with the requirements specified by Section 22.16(a) of the CROP.
22.19(c)

Reply to Motion

A party's response to any written motion must be filed with the Regional Hearing Clerk within 10 days after service of such motion, except in the case of a motion for a default order, which specifies a 20-day period for replies. Like all documents filed in the proceeding, replies to motions must bear the docket number and comply with the filing and service requirements specified by Section 22.05 of the CROP.
22.16(b), 22.1[illegible](a)

If a response is not filed within the time specified by Section 22.07 of the CROP, any objection to the motion is considered waived, and the motion may be granted without further argument.
22.16(b)

The Administrator, Regional Administrator, and Presiding Officer, as appropriate, may set a shorter time than 10 days for the response, and may also permit oral argument concerning motions.
22.16(b)

Examples of Prehearing Motions

The following types of motions may be made during the prehearing stage of the proceeding:

- Motion for default for failure to file a timely answer;
  22.17(a)(1)
- Motion to intervene;
  22.11(a)
- Motion to file amicus curiae brief;
  22.11(d)
- Motion for default for failure to comply with a prehearing order of the Presiding Officer;
  22.17(a)(2)
- Motion for default for failure to appear at a conference or hearing convened by the Presiding Officer pursuant to Section 22.19 of the CROP;
  22.17(a)(3)
- Motion for consolidation or severance; and
  22.12(a), 22.12(b)
- Motion for postponement of hearing.
  22.21(c)

Default Orders

Default orders may be issued under three circumstances:

- Against the respondent for failure to file a timely answer to the complaint;
  22.17(a)(1)
- Against a complainant or respondent for failure to obey a prehearing or hearing order that has been issued by the Presiding Officer; and
  22.17(a)(2)
- Against a complainant or respondent for failure to attend a conference or hearing without good cause being shown.
  22.17(a)(3)

Motions for default are made either to the Regional Administrator or Regional Judicial Officer in the first circumstance, or to the Presiding Officer in the second and third circumstances.

A motion for default may be made by any person who is a party to the proceeding [as defined by Section 22.03(a) of the CROP] at the time the motion is made. ("Any person" apparently includes intervenors.) In addition, the Presiding Officer is permitted to issue a default order sua sponte in the latter two default circumstances.
22.17(a)

Procedures

The party making a motion for default must include with the motion a proposed default order (see Exhibit 7-4). The motion for default must be served on all parties and otherwise conform with the filing and service requirements specified by Section 22.05 of the CROP.

The alleged defaulting party has 20 days from service of the motion for default to reply to the motion.

This time period is 10 days longer than that generally specified for replies to motions (Section 22.16(b) of the CROP).

Default Order as Initial Decision

A default order constitutes an initial decision of the proceeding at the time that the order is issued by the Presiding Officer (Regional Administrator or the Regional Judicial Officer, if a timely answer is not filed). As such, it must:
22.17(b)

- Contain findings of fact, conclusions regarding material issues of law or discretion, and the recommended penalty; and
  22.17(c)

- Be filed with the Regional Hearing Clerk.
  22.17(b)

The Regional Hearing Clerk must serve copies of the initial decision on all parties to the proceeding and otherwise comply with Section 22.27 of the CROP, which addresses transfer of the proceeding's record to the Hearing Clerk. The default order becomes the final order of the Administrator within 45 days after its service upon the parties unless (1) the default order is appealed or (2) the Administrator elects, sua sponte, to review the default order.

Appeal

A default order may first be appealed by a motion to set aside the default order. Such a motion is made to the Agency official who issued the order. Any further appeal of the default order must be made directly to the Administrator pursuant to Section 22.30 of the CROP.
22.17(d), 22.29(a)

Consequences of Final Default Order

When the Administrator issues a final order upon default against the respondent, respondent is subject to the following consequences:

- The respondent has essentially "admitted" to all facts alleged in the complaint and the right to a hearing is waived; and
- The penalty proposed in the complaint will become due and payable within 60 days after the final order is issued.
  22.17(a)

The admission of factual allegations and waiver of hearing applies only to the immediate civil penalty proceeding and does not affect any other proceedings. In addition, the 60-day period for payment of the penalty begins only after the Administrator has issued a final order upon default, not after the Presiding Officer issues the initial default order.

When the Administrator issues a final order upon default against the complainant, the complaint is dismissed with prejudice. This means that the complainant cannot reinstitute a civil penalty proceeding that is based on the allegations contained in the dismissed complaint.

Settlement

EPA encourages settlement of a civil penalty proceeding, if the settlement is consistent with the provisions and objectives of TSCA and its applicable regulations.
22.18(a)

Procedures

A settlement conference can be requested at any time. The parties may confer on settlement whether or not the respondent has requested a hearing. Before an answer is filed and a Presiding Officer is appointed, settlement conferences can be convened by consent of the parties. After a Presiding Officer has been appointed, settlement conferences are subject to the jurisdiction of the Presiding Officer who may order a prehearing conference settlement. As an alternative, the parties may be directed to correspond with the Presiding Officer concerning settlement.
22.18, 22.19

Consent Agreement and Proposed Consent Order

If a settlement is reached by the parties, they must forward a written consent agreement (see Exhibit 7-5) and a proposed consent order to the Regional Administrator. In addition, they must serve copies of these documents on the Presiding Officer if one has been appointed. The consent

agreement must contain the following information before the Regional Administrator can approve it:
22.18(b)

- The signature of all parties or their representatives in the proceeding (e.g., complainant, respondent, and any intervenors);
- A statement in which the respondent admits that the Agency has jurisdictional authority to bring the complaint;
- A statement in which the respondent admits facts stipulated in the consent agreement or neither admits nor denies facts alleged in the complaint; and
- A statement in which the respondent consents to the assessment of the stated civil penalty that is reflected in the consent agreement and proposed consent order.

Also, the consent agreement must include any and all terms of the agreement among the parties. Consequently, any terms to which the parties have agreed in reaching a settlement must be reflected in the consent agreement (e.g., agreement not to pursue criminal penalties, agreement by intervenor not to pursue private damage remedies, agreement by the respondent to take actions that minimize the effect of the violation, etc.).

Partial settlement of the proceedings is permitted and, in many cases, is likely. Settlement agreements and proposed consent orders must be very carefully drawn and completely understood before signatures are obtained so that the parties understand precisely what elements of the matter are not disposed of by the consent agreement and consent order.

The consent agreement becomes final and binding on the parties only after the Regional Administrator has signed the consent order. The consent order disposes of only those elements of the proceeding that are specifically addressed by that order and the consent agreement.

The proposed consent order must be prepared for the Regional Administrator's signature. It need not restate all the terms of the consent agreement, but it must at least explicitly incorporate (by reference) the consent agreement as being the basis for the consent order.
22.18(c)

The Regional Administrator, in deciding whether to issue a final consent order, may require parties to the settlement to appear in person to answer questions relating to the proposed consent agreement or order.

Filing of Consent Agreement and Order

The consent agreemeent and the final consent order constitute important documents that affect the substantive and procedural rights of the parties. Consequently, the originals of these documents must be placed in

the Regional Hearing Clerk's file, and copies must be served as required by Section 22.06 of the CROP.

Settlement With Conditions

In certain circumstances, a settlement in an administrative civil penalty action may be reached that assesses a civil penalty but provides for the respondent to undertake remedial performance as a means of remitting all or part of the assessed penalty. Such a settlement is referred to as a "settlement with conditions." The criteria and procedures for using a settlement with conditions are set forth in Appendix 4.

Prehearing Conference

When a hearing is ordered, the Presiding Officer also convenes a prehearing conference, unless it appears unnecessary. Prehearing conferences are intended to facilitate and expedite a hearing proceeding. These conferences encourage informal, frank discussions among the parties on any matter that could expedite the hearing. Any anticipated problems should be discussed at this time. The prehearing conference may involve:
22.19(a)

- Settling the case;
- Attempting to simplify the proceeding through consolidation of issues and stipulation by the parties;
- Amending the pleadings;
- Exchanging information concerning evidence to be presented (e.g., identities of expert witnesses and summaries of their testimony and exchange of exhibits, documents, and prepared testimony);
- Limiting the number of witnesses;
- Setting a time and place for the hearing; and
- Attending to any matter that may expedite the disposition of the proceeding.

Exchange of Information

The CROP generally require that the parties exchange witness lists, brief descriptions of witness testimony, and copies of all documents and physical materials that will be introduced into evidence. This requirement supports the accepted manner of hearings--one that is forthright and avoids surprise.
22.19(b)

Failure To Exchange Information

A party must request the permission of the Presiding Officer to introduce a witness or a document during a hearing if that party did not exchange, prior to the hearing, the witness lists and documents referred to in Section 22.19(b) of the CROP. Additionally, if such permission is granted, the Presiding Officer must first allow other parties a reasonable time to review the newly introduced evidence.

Protection of Evidence Sources

Certain unusual circumstances may justify not following the policy of early information exchange. One such example is a reasonable belief that witnesses might be subject to physical or economic intimidation. Another circumstance is a reasonable belief that the nature of the documentary or physical evidence would permit the respondent to intimidate witnesses, destroy evidence, or otherwise improperly interfere with the enforcement efforts of the Agency. In such situations, the Presiding Officer should be fully informed of the reasons for withholding evidence or the identity of a particular witness.

Role of Discovery

The CROP state that evidence that is not subject to the mandatory exchange of witness lists and documents in the prehearing conference, shall be subject to discovery only upon determination by the Presiding Officer. This provision is primarily intended to address discovery by deposition. To obtain such discovery, a party must make a motion for discovery to the Presiding Officer, which demonstrates that the:
22.19(f)

- Proceeding will not be unreasonably delayed by discovery;
- Information sought cannot be obtained through alternative means; and
- Information sought is of significant probative value.
  22.19(f)(1)

If the discovery involves oral depositions, then a party must also show that the evidence will not be preserved for presentation by a witness.
22.19(f)(2)

The difference between evidence that is subject to mandatory exchange requirements and evidence that may be discovered must be carefully understood. If the evidence being sought should normally be exchanged under Section 22.19(b) and for some reason is being withheld, then a motion to the Presiding Officer to enforce the requirements of the CROP must be made, not a motion for discovery.

If an order for discovery issued by the Presiding Officer is not obeyed, the inference may be drawn that revealing the withheld information would adversely affect the party withholding it. Also, an order for default may be issued based on a failure to comply with a prehearing or hearing order.
22.19(f)(4), 22.17(a)

An order for discovery is an important document that affects the procedural rights of the parties. It must, therefore, be included in the Regional Hearing Clerk's file, and copies must be served in accordance with requirements of Section 22.06 of the CROP.

Record of Prehearing Conference

The record of a prehearing conference generally consists of a summary prepared by the Presiding Officer that incorporates all rulings or orders containing directions to parties and any written stipulations or agreements of the parties. Except for those portions of a prehearing conference that relate to settlements, a transcript of the prehearing conference may be made. The transcript is ordered by the Presiding Officer upon motion of a party or sua sponte.
22.19(c)

Settlement conferences, however, are not recorded in order to ensure that the parties are able to negotiate freely and compromise without fear that such agreements will be subsequently revealed.

The transcript or written summary of the prehearing conference must be filed with the Regional Hearing Clerk for inclusion in the Regional Hearing Clerk's file.
22.06

If a transcript is taken, motions made during the hearing may be oral. However, if no transcript is taken, any motions made must be in writing and must otherwise conform with the requirements of Section 22.16 of the CROP and the filing, service, and content requirements specified by Section 22.05.

Motion for Accelerated Decision and Dismissal

Motion for Accelerated Decision

The Presiding Officer may issue an accelerated decision either sua sponte or upon motion by the respondent or complainant. The accelerated decision may involve a particular issue or the entire case and may be issued at any time during the proceeding if the Presiding Officer finds that:
22.20

- No genuine issue of material fact exists between respondent and complainant; and

- The complainant or respondent is entitled to a judgment as a matter of law.

"Entitled to a judgment as a matter of law" means that the movant has established by undisputed or undisputable (not reasonably challenged) evidence that all technical and legal elements in a violation did occur and that, consequently, the Presiding Officer must decide a particular issue or the entire case in the movant's favor at that time. Because there is nothing to adjudicate, there is no need for a hearing.

A discussion of all of the relevant precedents and considerations that apply to a motion for an accelerated decision is not feasible in the space allowed. However, some general principles can be discussed.

Nature of Motion. A motion for an accelerated decision challenges the essential position of the other party's case. The motion asserts that, under the facts and law of the case, the adverse party's position is entirely without merit. In this sense, it is not merely a technical motion--that is, one which seeks to establish that the manner or form of the other party's pleadings is technically insufficient to establish a defense or a claim. It would not, for example, seek to establish that the respondent's defense pleadings lack discussion of an essential element of the defense. Instead, the motion seeks to undermine the adverse party's pleadings by demonstrating that, irrespective of those pleadings, the facts and law of the case require a judgment in favor of the moving party.

Facts. By requiring that no genuine material issue of fact exists between the parties, the standard for an accelerated decision does not mean that the parties must agree on all material facts. Instead, the material facts may be either undisputed, or undisputable, that is, not reasonably challenged.

Affirmative Defenses. The complainant must demonstrate entitlement to a judgment as a matter of law. The complainant is required not only to prove the elements of the violation by undisputed or undisputable evidence, but also to address any affirmative defenses raised by the respondent with undisputed or undisputable evidence (e.g., an argument that the respondent relied on Agency advice in violating applicable regulations).

Evidence and Burden. The Presiding Officer will probably rely on affidavits and counteraffidavits in reaching a decision on the motion for an accelerated decision. However, the Presiding Officer may consider any admissible evidence, including stipulations, admissions, expert witness testimony, deposition testimony, and officially noticed evidence. **22.20(a)**

In deciding whether to grant the motion for an accelerated decision, the Presiding Officer generally gives the party against whom the motion is made every benefit of the doubt.

Motion To Dismiss

In addition to a motion for an accelerated decision, the respondent can make a motion to dismiss for:

- Failure of the complainant to establish a prima facie case; and
- Other grounds that show that the complainant has no right to relief. **22.20(a)**

To find useful precedent and argument for these standards, the following sources may be helpful:

- For the first standard, Rule 41(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), Involuntary Dismissals, and any Federal decisions on this rule; and
- For the second standard:
  - -- Agency decisions--in which TSCA standards for an accelerated decision were applied--that relate to failure to state adequate claim or in which the result was required by justice, and
  - -- Federal decisions [involving Fed. R. Civ. P. 12(b), which relates to motions to dismiss] that were based on lack of jurisdiction, insufficient process, or failure to state a claim upon which relief can be granted.

Partial Decision

A decision that grants a motion for an accelerated decision or a motion to dismiss need not dispose of all issues in the proceeding. If such a partial order is issued, the Presiding Officer must also determine which issues remain in controversy between the parties. To do so, the Presiding Officer must issue an interlocutory order that specifies the issues disposed of by the accelerated decision or dismissal order and those issues that remain in controversy.
22.20(b)(2)

Initial Decision

If an accelerated decision or dismissal order is issued that disposes of all issues in the proceeding, such a decision or order is treated as an initial decision and, therefore, may be appealed to the Administrator under Section 22.30 of the CROP.
22.20(b)(1)

If a partial decision is rendered, the objecting party, before appealing, must await the issuance of a final initial decision or obtain certification to appeal an interlocutory decision.
22.20(b)(2), 22.29

An initial decision must comply with the requirements of Section 22.27(a) on content, filing, service, and transfer requirements.

5 Hearing Stage

The Presiding Officer convenes a hearing on request by the respondent or, if appropriate, sua sponte--if the matter has not yet been disposed of by a default order, accelerated decision, dismissal order, or consent order. The Chief Administrative Law Judge appoints a Presiding Officer as soon as the respondent files an answer.
22.21

Notice of Hearing and Venue

If the respondent requests a hearing or if a hearing is ordered by the Presiding Officer, the Presiding Officer must issue to all parties a notice of hearing, which identifies the time, date, and place for the hearing. Such notice must be issued at least 20 days before the date set for the hearing. **22.21(b)** The hearing may be held:

- In the county where the respondent resides or conducts the business for which the hearing concerns;
- In the city in which the relevant EPA Regional Office is located; or
- In Washington, D.C.

However, the Presiding Officer may determine that there is good cause to hold the hearing either at another location in a Region or by telephone.
22.21(d), 22.19(d)

Any party may make a motion for postponement of the hearing but the movent must demonstrate good cause for the request.
22.21(c)

Presentation of Evidence

As is true for all Agency administrative proceedings, the complainant is the first to present evidence. The complainant must establish a prima facie case; that is, the complainant must submit evidence that the events alleged in the complaint did occur, that the events constitute a violation of the Act, and that the proposed civil penalty is appropriate. After the complainant has established a prima facie case, the respondent must then present any defense to the allegations that are contained in the complaint and any affirmative defenses that are raised by the answer. **22.24**

"Burden of Presentation" and "Burden of Persuasion" are used in the CROP to describe the burden of proof that is placed on the parties in the hearing. **22.24** The definitions are as follows:

- Burden of Presentation (Burden of Going Forward With the Evidence)--A party must introduce evidence on the claims or defenses raised in the complaint or answer.

- Burden of Persuasion--Each party must convince the Presiding Officer of the affirmative allegations in his or her pleading.

The complainant is alleging that a violation has in fact occurred and, therefore, has the burden of presentation. The complainant also has the burden of persuasion. Once the complainant has established a prima facie case, the burden of presentation shifts to the respondent, who must then introduce sufficient evidence to rebut or outweigh the evidence presented by the complainant. The burden of persuasion never shifts, but remains with the complainant throughout the proceeding; that is, the complainant always has the obligation of convincing the Presiding Officer, by a preponderance of the evidence, of the allegations contained in the complaint.

The respondent has the burden of persuasion with respect to any affirmative defenses raised in the answer--for example, a reliance argument based on Agency advice. The Burden of Presentation initially rests with the respondent but shifts, once the respondent has introduced sufficient evidence to support a favorable finding.

Preponderance of Evidence

Each matter that is contested in the hearing and which must be adjudicated to decide the case is determined by the Presiding Officer on the basis of a preponderance of the evidence. To prevail, a party must convince the Presiding Officer that, on balance, his or her allegations appear more

likely or probable than the other party's allegations. This standard, is different from a criminal standard, which requires a decision based on "evidence beyond a reasonable doubt" or "evidence excluding a reasonable doubt."
22.24

Default Orders and Accelerated Decisions

During the hearing, the complainant should keep in mind that a motion for default order (except one based on failure to file a timely answer) or a motion for an accelerated decision may be appropriate despite the advanced stage of the proceeding.

Hearing Rules of Evidence

Under the CROP, the Presiding Officer must admit evidence unless it falls in one of the following categories:

- Irrelevant;
- Immaterial;
- Unduly repetitious;
- Unreliable; and
- Of little probative value.
  22.2(a)

When in doubt, the Presiding Officer will most likely admit, not exclude, evidence.

Confidential Information

The CROP state that, from the outset, confidential information can be introduced as evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence in camera, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion arising out of that portion of the evidence that is confidential or includes trade secrets.
22.22(a)

Unless otherwise permitted by the Presiding Officer, such a supplemental decision, if issued before the final initial decision, is to be treated like a partial decision and is not appealable until the final initial

decision is issued or certification to appeal an interlocutory decision is obtained.
22.29(a)

For confidential commercial information, the complainant should be aware that 5 U.S.C. §1901 prohibits the disclosure of such information by a government official. (See also, Chapter Eleven.)

Materiality and Relevancy

Two standards described in the CROP concern materiality and relevancy. Materiality and relevancy are legal terms of art, and previous cases should be consulted to determine how these terms have been treated by the Agency. Federal case law should also be consulted.
22.22(a)

- Materiality. Material evidence is evidence that is pertinent to or has a legitimate and effective bearing on the case. For example, the evidence relating to the status of an officer within a corporation may be material to proving that he or she knowingly violated TSCA by manufacturing a certain chemical substance. The officer's status within the local church, however, is not likely to be material.

- Relevancy. Evidence that is material may or may not be relevant. Relevant evidence is evidence that has a tendency to make a fact in issue more probable or less probable. The emphasis here is on the probative value of the evidence. The probative value of offered evidence must be assessed in light of the facts in issue. For example, to prove that a reporting violation has occurred, evidence demonstrating that a particular EPA report was prepared but not sent would surely be relevant. In contrast, evidence that the firm generally failed to maintain good business records might still be considered material but is less likely to be considered relevant or probative.

Although materiality and relevancy have technical distinctions, in general, both standards can be viewed in terms of probative value of evidence. If an item of evidence has probative value to the issue for which it is introduced (i.e., tends to prove or disprove a particular proposition), then both criteria are satisfied.

Evidence Relating to Settlement

Any evidence relating to settlement that would be excluded under Rule 408 of the Federal Rules of Evidence (Fed. R. Evid.) is also excluded under the CROP. Rule 408 of the Fed. R. Evid. generally excludes evidence of settlement or attempted settlement when it is offered as proof of an admission of liability. This evidence, however, may be admitted for another purpose, such as proving bias of a witness or disproving a

contention of undue delay. When such evidence is offered for these purposes, it may still be excluded if the Presiding Officer determines that its probative value is outweighed by confusion of issues, undue delay, etc.

Testimony of Witnesses

Witnesses are generally examined orally upon oath or affirmation. The Presiding Officer, however, may allow certain exceptions to this rule (e.g., an affidavit from a dying witness). Any witness appearing at the hearing may be cross-examined if the cross-examination is not unduly repetitious.
22.22(b), 22.22(d)

Verified Statements in Lieu of Direct Testimony

In lieu of direct testimony, a party may desire that a witness admit into the record previously prepared statements of fact or opinion. Such a request may be appropriate when the testimony is technical or academic and does not lend itself to a clear, cohesive presentation through direct questions. This type of evidence can be admitted only upon the approval of the Presiding Officer.

A copy of the written statement must be submitted to the Presiding Officer, reporter, and opposing counsel before it is delivered. The evidence contained in the statement is subject to the same rules of testimonial evidence that apply to oral testimony (e.g., the witness must swear to or affirm the statement and is subject to oral cross-examination concerning the statement).
22.22(c)

Affidavits in Lieu of Direct Testimony

When a witness is "unavailable," as defined by Rule 804(a) of the Fed. R. Evid., an affidavit may be admitted into evidence in lieu of oral testimony. Under Rule 804(a), witnesses are deemed unavailable if they are exempt by a court order, refuse to testify in spite of a court order, claim lack of memory, are dying or physically impaired, or are absent despite efforts to secure their attendance.
22.22(d)

Exhibits and Physical Evidence

If exhibits are introduced, the original and one copy must be filed with the Presiding Officer where practicable. A true copy of any exhibit may be substituted for the original if submitting the original is not possible. Copies must also be furnished to each party.
22.22(e)

Official Notice

The Presiding Officer may take official notice of any matter judicially noticed in the federal courts, of matters permitted under Rule 201 of the Fed. R. Evid., and of other facts that are within the specialized knowledge and experience of the Agency. Official notice may be sua sponte or upon motion by one of the parties.
22.22(f)

Official notice under Rule 201 of the Fed. R. Evid. is limited to adjudicative facts that are not subject to reasonable dispute and that are:

- Generally known within the territorial jurisdiction of the proceeding; or
- Capable of accurate and ready determination.

"Adjudicative facts" directly concern the immediate parties in the proceeding--who did what, when, where, how, and with what motive or intent. These facts relate to the occurrence(s) alleged by the pleadings, which must be adjudicated to decide the case.

The official notice that the Presiding Officer may employ as a result of the special expertise of the Agency is broader than that permitted by Rule 201 of the Fed. R. Evid. Consequently, official notice extends to all matters about which the Agency is presumed expert. For example, the experience and knowledge of the Agency in an environmental area might justify official notice that, statistically, a physical event always occurs under a certain set of environmental circumstances.

Subpoenas and Summoning Witnesses

Issuance of Subpoenas

The Presiding Officer may issue a subpoena to require the attendance of witnesses or the production of documentary evidence. The Presiding Officer may also grant a request for a subpoena upon a showing by the movent of:

- The grounds and necessity of the evidence or witness; and
- The materiality and relevancy of the evidence or witness sought.
  22.33(b)(1)

In addition, a request for the production of documents must describe the evidence sought as specifically as practicable.
22.33(b)(1)

Subpoenas are served in accordance with Section 22.05(b)(1) of the CROP.
22.33(b)(2)

Witness Fees

Witnesses summoned by subpoena before the Presiding Officer are to be paid the same fees and mileage that are paid witnesses in the courts of the United States. The fees are to paid by the party who requested the witness's appearance. If, however, the witness appears pursuant to a request initiated by the Presiding Officer, then the fees are to be paid by the Agency.
22.33(b)(3)

Objections and Rulings

Objections about the conduct of the hearing, such as evidentiary and procedural objections, may be stated orally or in writing. The form of the objection depends on the circumstances. In general, however, if the objection involves a relatively complicated argument and if time permits, it should be written. If it is written, it must comply with the service, filing, and content requirements specified by Section 22.05 of the CROP.
22.23(a)

Rulings and Exceptions to Rulings

The Presiding Officer must rule on all objections and provide reasons for the rulings, which will become part of the record. Copies of the ruling must be served on the parties by the Presiding Officer and the original entered into the Regional Hearing Clerk's file in accordance with Section 22.06 of the CROP. The CROP also state that to take specific exception to each overruled objection is not necessary. The exception to an overruled objection is automatic and is not waived by further participation in the hearing.
22.23(a)

Appeal of Ruling

A ruling on an objection is not subject to an automatic interlocutory appeal to the Administrator. A party wishing to appeal the ruling immediately, must make a motion in writing within six days of notice of the ruling to the Presiding Officer to certify such a ruling to the Administrator. (See also, "Appeals of Interlocutory Orders or Rulings" in this section.)

Unlike other motions made during a hearing, a request for certification may not be made orally, but must be in writing.
22.29(a)

Offers of Proof

If evidence is found to be immaterial, irrelevant, etc. and cannot be introduced, the party seeking to introduce it may not only object to its exclusion, but may also make an offer of proof. An offer of proof places the evidence into the official record, and the Administrator on appeal can use such evidence to reopen the hearing. This offer consists of:

- One copy of the documentary or physical evidence; or
- A brief written summary, if the evidence is testamentary.

Such offers of proof are not mandatory, and the right to appeal the exclusion of evidence is preserved under Section 22.23(a). Nonetheless, offers of proof should generally be made whenever evidence is excluded. **22.23(b)**

Transcript of Hearing

A hearing must be transcribed verbatim, and the reporter must send the original and copies of the transcript to the Regional Hearing Clerk for filing. A copy must also be sent to the Presiding Officer. The Regional Hearing Clerk must notify all parties of the availability of the transcript and permit them to obtain a copy upon payment of a reproduction fee. Payment may be waived if a party can show that the cost is unduly burdensome. A certificate of service should accompany each copy of the transcript. Persons not a party to the proceeding may receive a copy of the transcript (except for confidential portions of the transcript) upon payment of a reproduction fee.
22.25

The transcript of the hearing is an important document because:

- Many objections and motions made during the hearing are oral and are thus reflected only in the transcript; and
- The transcript is used by the parties to draft the proposed findings of fact, conclusions of law, and orders, which are then submitted to the Presiding Officer for consideration in issuing the initial decision.

Proposed Findings, Conclusions, and Orders

At the conclusion of the hearing, parties may submit proposed findings of fact, conclusions of law, and orders to the Presiding Officer for consideration in issuing the initial decision.

The purpose of the proposals and supporting briefs is to advocate positions of the submitting party and to persuade the Presiding Officer to adopt that party's proposals.

Procedures

The proposed findings of fact, conclusions of law, and orders, together with supporting briefs, may be submitted to the Presiding Officer for consideration within 20 days of notice of the transcript's availability. The proposals and briefs must be served on the other parties. Although the Presiding Officer must permit reply briefs, the timing of such briefs can be specified. The proposals and all briefs must be in writing and must contain adequate references to the record and authorities relied on. **22.26**

Preparation

In preparing the proposals, the focus should be on issues that the Presiding Officer must address in the initial decision.

The importance of the proposals and briefs cannot be overemphasized. Through these materials, the position of the submitting party can be detailed, and the Presiding Officer can view in depth the merits of the party's position.

Initial Decision

The Presiding Officer must issue an initial decision as soon as is "practicable" after the period specified for filing reply briefs to the proposed findings, conclusions of law, and orders.

The initial decision should contain the Presiding Officer's:

- Findings of fact and conclusions for all material issues of law or discretion;
- Reasons for those findings and conclusions;
- Recommended civil penalty; and
- Proposed final order.

In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer must consider, in addition to the criteria listed in Section 16(a)(2)(B) of TSCA, any evidence of good faith or lack thereof.

The Presiding Officer must also consider the guidelines for the assessment of civil penalties under TSCA [45 Fed. Reg. 59,770 (1980)].
22.35(c)

Specific reasons must be set forth in the initial decision if the Presiding Officer increases or decreases the amount of penalty from that originally assessed in the complaint. The Presiding Officer, however, cannot increase the amount of penalty from that which was recommended in the complaint if the respondent has defaulted.

Challenge to Initial Decision

The initial decision becomes a final order within 45 days after it is served unless:

- A party files a motion to reopen the hearing, which stops the 45-day period until the motion is denied or the reopened hearing is concluded; or
  22.28

- A party makes an appeal to the Administrator, or the Administrator determines sua sponte that a review of the initial decision is appropriate.
  22.27

Motion To Reopen a Hearing

If a party believes that additional evidence should be introduced into the record, that party may make a motion to reopen the hearing. Such a motion must be made no later than 20 days after service of the initial decision on the parties. The motion to reopen the hearing must state the specific grounds upon which relief is sought, state the nature and purpose of the evidence to be adduced, and show that the evidence is not merely cumulative. The party must also demonstrate why the evidence was not introduced at the hearing. The motion must be written and must comply with the requirements specified for such motions and the filing, service, and content requirements for submitting documents.
22.28(a)

Replies from other parties must be made within 10 days after the motion is served. The Presiding Officer must render a decision on the motion as soon as is practicable after the filing of replies.
22.28(b)

Filing a motion to reopen a hearing shall automatically stay the running of all time periods (e.g., appeals) until such time as the motion is denied or the reopened hearing is concluded.
22.28(b)

Appeals of Interlocutory Orders or Rulings

Immediately Appealable Orders

The only orders or rulings that may be appealed to the Administrator as a matter of right are:

- Accelerated decisions that decide the entire case;
  22.20, 22.29
- Dismissal orders;
  22.20, 22.29
- Default orders; and
  22.17, 22.29
- Initial decisions rendered after an evidentiary hearing.
  22.27, 22.29

All other orders or rulings issued by an Agency official during the prehearing and hearing proceedings are considered interlocutory. As such, they must await the issuance of an initial decision before they can be appealed, unless the Agency official issuing such orders or rulings certifies them to the Administrator on appeal.
22.29

Procedures and Standards for Interlocutory Orders

A motion for interlocutory appeal of an order or ruling must be filed in writing within six days of notice of such ruling or order.
22.29

Besides stating the grounds for appeal, the moving party must demonstrate, to the appropriate Agency official, that:

- The order or ruling involves important legal or policy issues concerning which there is substantial grounds for difference of opinion; and

- Immediate appeal will materially advance the proceeding or that waiting for normal review will be ineffective or inadequate. **22.29(b)**

The motion must also comply with requirements for filing, service, and content requirements specified in the CROP.

If the Presiding Officer does not certify the interlocutory appeal, a party may make a motion to the Administrator within six days of service to reverse that decision on the grounds that it is contrary to the public interest. This motion must also comply with the requirements of Section 22.16 and 22.05 of the CROP, except that the appropriate Agency officials receiving the motion are the Regional Hearing Clerk and the Administrator. **22.29(c)**

Actions by the Administrator

If the Presiding Officer certifies the interlocutory appeal, the Administrator may:
22.29(c)

- Deny the certification as improvidently granted;
- Take no action within 30 days and thereby dismiss the certification; or
- Grant the certification, review the interlocutory appeal, and grant or deny the appeal on its merits.

Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made by the Presiding Officer. The Administrator may, however, allow further briefs and oral argument.
22.29(c)

Request for Stay

The motion for interlocutory appeal may include a request for stay of the proceeding pending the Administrator's decision on the certification and interlocutory appeal. The request must demonstrate that extraordinary circumstances exist to justify granting the stay. If the Presiding Officer grants a request for stay of over 30 days, it must be separately approved by the Administrator.
22.29(d)

Sample Default Order

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
6TH AND WALNUT STREETS
PHILADELPHIA, PENNSYLVANIA 19106

In re:	)	Docket No. TSCA-III-83-4
	)	
W. G. Neudecker and Sons	)	
1215 Madison Avenue, N.E.	)	
Washington, D.C. 20019	)	DEFAULT ORDER
	)	
Respondent		

Preliminary Statement

This civil proceeding for the assessment of a penalty was initiated pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (hereinafter referred to as TSCA). Respondent is charged with violating Sections 15(1)(C) and 15(3)(A) of TSCA by respondent's failure to maintain PCB storage records as required by a rule [40 C.F.R. §761.80(b)] promulgated pursuant to Section 6(e) of TSCA. It is hereby determined that an appropriate default order shall be issued based on the findings of fact and conclusions of law that are set forth below.

Findings of Fact

1. Respondent's facility, located at 1215 Madison Avenue, N.E., Washington, D.C., contained 22 barrels of waste oil that were marked with PCB M_L labels and which were stored for disposal.

2. Respondent failed to maintain records relating to the storage of those PCBs.

3. On July 16, 1983, the Enforcement Division, United States Environmental Protection Agency, Region III (the complainant), issued a complaint and notice of opportunity for hearing to respondent, pursuant to Section 16(a) of TSCA. The complaint alleged that respondent had violated Sections 15(1)(C) and 15(3)(A) of TSCA by respondent's failure to maintain PCB storage records as required by 40 C.F.R. §761.80(b). (A copy of the complaint is enclosed as Attachment A.)

4. In the complaint, a civil penalty of $1,000 was proposed against respondent. The penalty was assessed based upon the factors contained in Section 16(a)(2)(B) of TSCA and the "Guidelines for the

Assessment of Civil Penalties Under Section 16 of TSCA; PCB Penalty Policy" [45 Fed. Reg. 59,770 (1980)], a copy of which was attached to the complaint.

5. The complaint in the instant case set forth respondent's right to request a hearing within twenty (20) days of receipt of the complaint, the requirement of a written answer to the complaint, and the consequences of failure to answer the complaint. Furthermore, a copy of the Consolidated Rules of Practice (CROP), 40 C.F.R. §22.01 et seq., was enclosed with the complaint.

6. Said complaint was mailed to respondent on July 16, 1983, via certified mail. Receipt No. 202684 was returned to complainant, stamped July 17, 1983, and bearing the signature "Betty Wilson" as signer for the addressee. (Copy enclosed as Attachment B.)

7. As of this date, respondent has failed either to respond to the complaint, request a formal hearing, or file an answer to the complaint pursuant to the CROP.

Conclusions of Law

1. By reason of the facts as set out in the findings of fact, respondent violated Sections 15(1)(C) and 15(3)(A) of TSCA by respondent's failure to maintain PCB storage records as required by 40 C.F.R. §761.80(b), which was promulgated pursuant to Section 6(e) of TSCA.

2. By failing to file a timely answer to the complaint and to request a formal hearing, respondent has admitted the facts alleged in the complaint and has waived its right to a hearing. Accordingly, respondent is in default and the proposed civil penalty is therefore due and payable. [CROP, 40 C.F.R. §22.17]

3. It is further concluded that the amount of the proposed penalty is appropriate pursuant to Section 16(a)(2)(B) of TSCA.

Order

Respondent shall within sixty (60) days of receipt of this default order pay by cashier's or certified check a civil penalty in the amount of one thousand dollars ($1,000) to the Treasurer, United States of America. Such remittance may be sent by messenger or certified mail to the Hearing Clerk, U.S. Environmental Protection Agency, Region III, Curtis Building, 6th & Walnut Streets, Philadelphia, Pa. 19106. In the event of failure of respondent to make said payment within sixty (60) days of receipt of this default order, the matter shall be referred to the United States Attorney for the District of Columbia pursuant to Section 16(a)(4) of TSCA [15 U.S.C. §2615(a)(4)] for recovery by appropriate action in United States District Court.

AND NOW, THIS DAY OF October 4, 1983 the foregoing order is hereby issued under the authority of the Toxic Substances Control Act and the Consolidated Rules of Practice adopted pursuant thereto.

Regional Administrator

Model Consent Agreement and Final Order

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203

In re:	)	
	)	Docket No. TSCA-I-83-5
Firetog Industries, Inc.	)	
36 Sunshine Drive	)	CONSENT AGREEMENT
Clark, MA 02856	)	AND
	)	FINAL ORDER
Respondent	)	

Preliminary Statement

1. This civil proceeding for the assessment of a penalty was initiated pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2615 et seq. (hereinafter TSCA). The action was instituted by a complaint and notice of opportunity for hearing, filed upon respondent pursuant to TSCA, charging violations of (cite specific sections of the Act).

2. Respondent filed an answer admitting the jurisdictional allegations of the complaint, admits (facts admitted), and explains (neither admits nor denies) (facts explained).

3. Respondent hereby explicitly waives the right to request a hearing on any issue consented to herein.

4. Respondent consents to the issuance of the order hereinafter recited, with the stipulations and admission of facts and conclusions of law for the purposes of this proceeding only. Respondent consents to the payment of a civil penalty of the amount set out in the order.

Findings of Fact

[The "Findings of Fact" section shall state with particularity all findings of fact with respect to each material allegation noted in the complaint.]

Conclusions of Law

By reason of the facts set forth in the "Findings of Fact," it is concluded that respondent has violated Section(s) ____ of TSCA.

Respondent hereby consents to the issuance of the following order. The (title of the Regional Office) EPA Region _____ hereby recommends that the Regional Administrator issue the following order:

Order

Respondent shall, within sixty (60) days of receipt of this consent agreement and final order, pay by cashier's or certified check a civil penalty in the amount of ($ _____) dollars, payable to the Treasurer, United States of America. Such payment shall be remitted to the Hearing Clerk, EPA Region _____, (address) . Failure to remit such payment will result in the referral of this matter to the United States Attorneys Office for collection pursuant to Section 16(a)(4) of TSCA.

[Alternative Order]

Based on a finding that the payment of any or all of the penalty hereinbefore addressed would materially affect respondent's ability to continue in business, respondent, having duly stipulated to the violations as charged, is excused from payment in accordance with the terms of Section 16(a)(2)(B) of TSCA.

(Signature of respondent) _____

(Signature of complainant) _____

Date: _____ At: _____

It is so ordered. This order shall become effective immediately.

(Signature of Regional Administrator)
Regional Administrator, EPA Region ___

(Title) _____
EPA Region ____

Date: _____ At: _____

6 Post-Hearing Stage

Appeal of Initial Decision

Jurisdiction of Administrator

The Administrator assumes full jurisdiction of the case immediately after the Presiding Officer issues an initial decision. The Administrator assumes jurisdiction regardless of whether or not a party appeals the initial decision. If, however, a party files a motion to reopen a hearing, the Presiding Officer may rule on that motion.
22.27(c)

Once the initial decision is issued, the Regional Hearing Clerk's file, which now includes the original initial decision, is forwarded to the Hearing Clerk. Consequently, the appellant must send any notice of appeal and accompanying appellate brief to the Hearing Clerk. A motion to reopen a hearing, however, is to be filed with the Regional Hearing Clerk.
22.27(a), 22.30(a)

Notice of Appeal and Appellate Brief

The notice of appeal and appellate brief must comply with the general filing, service, and form requirements of the CROP where appropriate. The notice of appeal and the appellate brief must be filed with the Hearing Clerk within 20 days after the initial decision is served on the parties.
22.30(a)(1)

The notice of appeal must address the disputed findings of fact and conclusions of law contained in the initial decision. Specifically, it must contain:

- Alternative findings of fact;
- Alternative conclusions regarding issues of law or discretion;
- A proposed order that reflects the conclusions and findings desired by the appellant; and

- Relevant references to the record and the initial decision. **22.30(a)(1)**

The appellate brief is intended to present the appellant's arguments as to why the appeal should be granted. As such, it must include:

- A statement of issues presented for review;
- A statement of the nature of the case;
- Identification of the facts that are relevant to the issues presented for review;
- Specific arguments on the issues presented;
- A short conclusion that includes the precise relief being sought; and
- Appropriate references to the record and the initial decision.

Party's Reply

Any other party or amicus curiae may file a reply brief with the Hearing Clerk within 15 days of service of a notice of appeal and appellate brief. The reply brief is specifically intended to address only the appellate brief and should be so limited. Therefore, it should respond to the argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or appellate brief. The reply brief must also comply with service, filing, and content requirements specified by the CROP.
22.30(a)(2)

Administrator's Actions

Even if the initial decision is not formally appealed, the Administrator may determine sua sponte that a review of the initial decision is necessary. The Administrator, however, has only 45 days after service of the initial decision to review the initial decision sua sponte. Otherwise, the initial decision of the Presiding Officer becomes the final order of the Administrator. **22.27(c), 22.30(b)** If the Administrator determines to review the initial decision sua sponte, the Hearing Clerk shall serve notice of such intention upon the parties. The notice will include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.
22.30(b)

Scope of Review

The appeal of the initial decision must concern only those issues raised by the parties in the previous proceeding.
22.30(c)

Oral Argument on Appeal

Oral argument on appeal is not automatic and may be granted only if a party makes a request to the Administrator or the Administrator orders it sua sponte. In assigning a time and place for oral argument, the Administrator must consider the convenience of the parties. There are no standards specified in the CROP for deciding whether oral argument should be heard.
22.30(d)

Final Order

Timing and Content

The Administrator is required to issue a final order as soon as is practicable after the final action of the appeal process--either after filing of appellate briefs, filing of subsequent briefs if ordered by the Administrator, or oral argument, whichever occurs last.
22.31

The Administrator may, in the final order:

- Adopt, modify, or set aside all or some of the findings and conclusions contained in the initial decision or order; and
- Increase or decrease the recommended penalty unless the initial decision is a default order (in which case the Administrator may not increase the recommended penalty).

The CROP requires the final order to contain the reasons for any decision that the Administrator makes.

Motion To Reconsider and Stay Request

A party may file a motion to reconsider a final order within 10 days after service of the final order. A motion to reconsider must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. The motion may also include a request that the final order be stayed pending a resolution of the motion to reconsider. Unless such a request for stay is granted, however, the effective date of the final order is the date on which it was issued, unless otherwise ordered by the Administrator.
22.32

Appeal From Final Order

A party may appeal the findings of the final order to a United States court of appeals pursuant to the provisions of Section 16(a)(3) of TSCA. The obligation to pay the civil penalty does not become due until the party has exhausted all appeals.

Payment of Penalty

The payment of the civil penalty specified in a final order of the Administrator is due and payable in full within 60 days after the respondent receives the final order, unless otherwise agreed by the parties. **22.31(b)**

Chapter Eight

Judicial Enforcement: Civil Actions

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1 Introduction

Under TSCA, regulatory remedies are initially and primarily handled through the use of administrative actions. However, in those instances where EPA is unable to obtain compliance through the use of administrative actions or in those cases involving imminently hazardous chemical substances or mixtures, the Act authorizes EPA to seek relief through civil court injunctive and in rem (seizure) proceedings.

An injunction is a writ issued by a court forbidding or commanding a person to perform a particular act. Injunctions involve the equity power of the federal courts and are generally viewed as an extraordinary form of relief. Consequently, they are not readily granted and a party seeking injunctive relief has a heavy burden in demonstrating the need for such action.

In rem (seizure) proceedings signify acts against things rather than individuals. Therefore, a proceeding "in rem" is one taken against property and has for its object the disposition of the property.

Statutory Authority

The use of TSCA judicial civil actions is authorized by the following sections of the Act.

Section 5(e) authorizes the use of injunctive actions to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance that is subject to the notification requirement of Section 5 and for which there is insufficient information to permit a reasoned evaluation of the human health and environmental effects of the substance, if the Administrator determines that:

- In the absence of such information, the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance may present an unreasonable risk of injury to human health or the environment; or

- The chemical substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance.

Section 5(f) provides for injunctive relief to prohibit the manufacture, processing, or distribution in commerce of a chemical substance that is subject to premanufacture notification if the Administrator finds that the substance presents or will present an unreasonable risk of injury to human health or the environment before a rule promulgated under Section 6 can protect against such risk.

Section 7 gives the Agency authority to commence civil actions in district courts for the following purposes:

- Seizure of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture; and

- Relief (e.g., injunctions or other judicial orders) against a person who manufactures, processes, distributes in commerce, uses, or disposes of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture. Such relief may be temporary or permanent as may be necessary to protect human health or the environment from the unreasonable risk associated with the chemical substance, mixture, or article involved in the action. In the case of an action brought against a person who manufactures, processes, or distributes in commerce an imminently hazardous chemical substance or mixture or an article containing such a substance or mixture, such relief may include the issuance of a mandatory order requiring:

  -- In the case of purchasers of such a substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with the substance, mixture, or article,

  -- Public notice of such risk,

  -- Recall,

  -- Replacement or repurchase of the substance, mixture, or article, or

  -- Any combination of the above actions.

Section 17(a) accords district courts jurisdiction over civil actions to:

- Restrain any violation of Section 15 of the Act;

- Restrain any person from taking any action prohibited by Section 5 or 6 of TSCA or by a rule or order issued under those sections;

- Compel the taking of any action required by or under the Act; and

- Direct any manufacturer or processor of a chemical substance or mixture manufactured or processed in violation of Section 5 or 6 or a rule or order under Section 5 or 6 and distributed in commerce to:

  — Give notice of such fact to distributors in commerce and (to the extent that they can be reasonably ascertained) other persons who possess or may be exposed to the chemical substance or mixture,

  -- Give public notice of such risk of injury, and

  -- Either replace or repurchase the chemical substance or mixture.

Section 17(b) authorizes the seizure, through an in rem condemnation proceeding in district court, of:

- Any chemical substance or mixture that was manufactured, processed, or distributed in commerce in violation of TSCA or any rule promulgated or order issued under the Act; or

- Any article containing such a substance or mixture.

2 Elements of a Violation: Civil

Evidence in Support of Civil Actions

Civil actions require supportive evidence that goes beyond the prima facie evidence necessary to establish administrative violations of TSCA. In some instances, this may require the use of expert witnesses to establish certain elements of proof (e.g., immediate and irreparable injury or unreasonable risk of injury). Below follows a list of additional evidentiary showings that should be met before undertaking an injunctive or in rem action.

Injunctive Actions*

Traditionally, courts have required the petitioner or plaintiff to make the following showings before a permanent injunction would be issued:

- There is an inadequate remedy at law;
- The applicable administrative remedies have been exhausted; and
- Irreparable injury, loss, or damage will result if the relief is not granted.

Issuance of a preliminary injunction or temporary restraining order would require the following additional showings:

- Immediate and irreparable injury, loss, or damage will result if the relief is not granted; and
- There is a likelihood of success at trial, based on facts before the court.

---

* These actions may consist of permanent injunctions, preliminary injunctions, or temporary restraining orders. These types of injunctions are discussed in more detail in Section 4 of this chapter.

The above criteria have not, however, been uniformly applied by the various judicial districts. While some jurisdictions have emphasized different aspects of the criteria, other courts have developed alternative tests that use some, but not all, of the elements listed above. For example, recent court decisions have indicated a relaxation in the requirement of irreparable injury. In particular, where a statute prohibits certain conduct, many courts will presume the conduct to be injurious, thus warranting an injunction without the need to show irreparable injury [see Bradford v. SEC, 278 F.2d (9th Cir. 1960)]. For this reason, an attorney should research recent trends in the jurisdiction in which the injunctive action is being sought to determine the appropriate criteria.

The general requirements mentioned above for obtaining injunctive relief apply primarily to injunctions sought under the authority of Section 17(a) of TSCA. Notwithstanding the above criteria, injunctions based on Sections 5(e), 5(f), and 7 of TSCA require the following evidentiary showings:

Section 5(e):

- The information available to the Administrator, submitted in accordance with Section 5, is insufficient to permit a reasoned evaluation of the human health and environmental effects of a chemical substance subject to premanufacture notification and either:

  -- The manufacture, processing, distribution in commerce, use, or disposal of such substance may present an unreasonable risk of injury to human health or the environment, or

  -- The chemical substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance; and

- The Administrator has not issued a proposed order under Section 5(e) with respect to the chemical substance, or the Administrator issued such an order, however, the order does not take effect because objections were filed pursuant to Section 5(e)(1)(C).

Section 5(f):

- There is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance subject to the notice requirement of Section 5(a) presents or will present an unreasonable risk of injury to human health or the environment before a rule promulgated under Section 6 of the Act can protect against such risk.

Section 7:

- The manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture is likely to result in imminent and unreasonable risk of serious or widespread injury to human health or the environment; and

- Such injury is likely to occur before a final rule under Section 6 of TSCA can protect against such risk.

In Rem (Seizure Actions)

The following evidentiary showings should be met before undertaking an in rem (seizure) action under Section 7(a) or 17(b) of TSCA:

Section 7(a):

- The chemical substance or mixture is imminently hazardous; and

- The imminently hazardous chemical substance or mixture, or article containing such substance or mixture, is found within the jurisdiction of the district court that will hear the action.

Section 17(b):

- The chemical substance or mixture was manufactured, processed, or distributed in commerce in violation of TSCA or any rule promulgated or order issued under the Act; and

- The chemical substance or mixture, or article containing such substance or mixture, is found within the jurisdiction of the district court that will hear the action.

Use of Expert Witnesses

As in the case of administrative actions, civil judicial enforcement proceedings generally require the presentation of expert testimony by EPA personnel appearing as witnesses. Such testimony is used to establish certain elements of proof that justify the relief sought (e.g., the showing of immediate and irreparable injury for obtaining an injunction). Witnesses should be selected for their direct knowledge of the circumstances surrounding the suspected violation, because the witnesses will be required to relate any such knowledge to the court. (See Appendix 2, "Expert Witnesses.")

3 Procedures for Filing Actions

Except where otherwise authorized by law, the Department of Justice represents EPA in judicial court actions.*

Requests for TSCA civil court actions are referred to the Department of Justice or the appropriate United States Attorneys Office by the Assistant Administrator for OECM (or the Assistant Administrator's delegatee).** In most instances, the Regional Office will initiate the request for an injunction or an in rem action and will designate the lead Agency attorney.*** The lead attorney is responsible for preparing the "referral package," which, upon completion, is sent from the Regional Office to OECM. A copy of the package should also be forwarded to Headquarters PTSCMS.

A referral package contains:

- Referral Memorandum. A referral memorandum identifies the primary elements of the proposed litigation. Specifically, the memorandum, at a minimum, should include:

  -- Identification of the potential defendants;

---

* Sections 5(e)(2)(A)(i), 5(f)(3)(A)(ii), and 7(e) of TSCA permit EPA attorneys to appear and represent the Administrator in such actions authorized by these sections. However, under the current EPA delegations of authority, only Section 7 actions may be initiated without first referring the case to the Department of Justice.

** The Regional Office has independent authority to refer requests for emergency temporary restraining orders under TSCA to the Department of Justice and the appropriate United States Attorneys Office. When exercising this authority, however, the Regional Administrator must notify the Assistant Administrator for OECM and the Assistant Administrator for Pesticides and Toxic Substances (or their designees).

*** Headquarters program and Enforcement Counsel staff may participate more actively in the case development process if precedential or nationally significant issues are involved.

-- Brief factual summary of the case;

-- Identification of the major issues (including potential problems that may exist with the case);

-- Status of past Agency enforcement efforts; and

-- Names of Agency and Department of Justice attorneys who are involved in the case, including the lead attorney.

- Civil Litigation Report. In addition to the referral memorandum, the referral package must contain a litigation report, prepared by the designated lead EPA attorney. (See Exhibit 8-1 for a complete outline and guide to preparing the report.) The report must include a synopsis of the facts and history of the violation, including past violations by the potential defendant. The report must cite the specific sections of TSCA and its regulations that have been violated.

  The report must show that all elements of the violation have been satisfied. For each element, the report should indicate the available supporting evidence. A copy of the necessary documentary evidence and a summary of the expected expert testimony should be attached to the litigation report.

  The lead attorney should include a statement regarding the specific relief to be sought (e.g., injunctive or in rem action). The report should also include a list of any equities that may weigh against granting the relief sought by EPA; any expected defenses by the violator (and how they will be countered); and any past, anticipated, or pending state or federal actions (administrative or judicial) against the violator. Where an injunction is requested, the report should discuss the likelihood that the violator would comply without the imposition of an injunction.

Once the referral package is received by Headquarters, Enforcement Counsel attorneys will conduct a limited final legal review to ensure completeness and consistency in application of enforcement policy. The case will then be transmitted to the Department of Justice or the appropriate United States Attorneys Office. OECM will notify the Regional Administrator and the Assistant Administrator for Pesticides and Toxic Substances (or their designees) upon the transmittal of the civil referral.

Following the referral of a case, the lead EPA attorney will be responsible for coordinating responses to all requests for supplemental information by the Department of Justice or the United States Attorneys Office. The lead Agency attorney also will be responsible for keeping program officials and other previously involved Agency attorneys apprised of case developments after referral.

Agency employees who are involved in the investigation and referral to the Department of Justice of civil TSCA actions should familiarize themselves with the Agency documents listed below. These documents are contained in EPA's General Enforcement Policy Compendium.

- Memorandum of Understanding Between the Department of Justice and the Environmental Protection Agency (6/15/77);
- Quantico Guidelines for Enforcement Litigation (4/8/82);
- General Operating Procedures for EPA's Civil Enforcement Program (7/6/82); and
- Case Referrals for Civil Litigation (9/7/82).

Model Civil Litigation Report Outline and Guide*

Title Page

A. Identify the facility by name and location and indicate the parent company if different from the facility name.

B. Identify who prepared the report (both legal and technical personnel) indicating addresses and telephone numbers.

C. Show the date of completion/submission of the report.

Table of Contents (Standardized Example)

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II. Synopsis of the Case Page ___

III. Statutory Authority Page ___

IV. Description of Defendant's Business and Technical Description of the Pollution Source Page ___

A. Facility Description Page ___

B. Source of Pollution Page ___

C. Pollutants Involved; Environmental Harm (Where Appropriate) Page ___

D. Available Control Technology and/or Remedial Action Page ___

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* The Model Civil Litigation Report Outline and Guide is to be used for all Agency civil referrals to the Department of Justice. Civil litigation reports, however, are most frequently used in referring civil court actions under statutes other than TSCA. Therefore, certain sections of the report would not need to be as detailed as those prepared for referrals involving non-TSCA violations. For example, since TSCA referrals involve only requests for injunctive or in rem relief, civil penalties would not need to be discussed in Section VII of the report (Relief Requested).

V. Administrative and Enforcement History Page ___

VI. Required Elements of Proof and Evidence Page ___

A. Elements of Proof Page ___

B. Evidence of Violation Page ___

C. Evidence of Environmental Harm (Where Appropriate) Page ___

D. Discovery Page ___

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VII. Relief Requested Page ___

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- Copies of correspondence
- Copies of relevant regulated submissions
- Copies of relevant policy memos, regulations, interpretations

Body of the Report

I. Information Identifying the Defendant(s)

A. Legal name of company

B. Address: Corporate headquarters

C. Name of facility (if different from "A")

D. Address of facility (if different from "B")

E. SIC code

F. State of incorporation

G. Registered agent for service

H. Legal counsel (name, address, telephone number)

I. Judicial district in which violator is located

II. Synopsis of the Case

This section should be a one- or two-page articulation of the heart of the case. It should describe both the violation and the proposed relief. It should not describe statutory authority or intricate legal issues in detail.

This succinct statement of the case will provide the reader a framework in which to fit the details developed and presented in the body of the litigation report.

The factual basis of the case should be touched upon. Purely conclusory characterization of the case is not as useful as showing the facts of a violation and requested relief. For example, it is better to say a violator discharged or emitted X quantity of Y pollutant for Z days, than to simply say that the violator did not comply with the terms of a permit, State Implementation Plan (SIP), or statute.

The environmental seriousness of the violation, its ongoing nature, and a violator's recalcitrance may be touched upon in this section (but will also be developed later in paragraph IV(C)).

III. Statutory Authority

A. Present the substantive requirements of the law and applicable regulations. Reference all federal statutes by U.S.C. citation as well as by the section of the pertinent Act. Summarize the enforcement authority, jurisdiction, and venue. Specific elements of proof are to be addressed in paragraph VI.

B. Lengthy dissertation on the law is unnecessary. However, in the instance of State Implementation Plans under the Clean Air Act, or Water Quality Standards under the Clean Water Act, or involvement of any other state law or regulation, a more extensive explanation of the law or regulation may be necessary. Pertinent excerpts from any applicable state laws or regulations should be identified and attached to the litigation report.

C. Any prior interpretation of pertinent state laws or regulations that are germane to the case should be referenced when identifying the law violated. If a state's interpretation of the law has been different from ours, the issue should be discussed with the state and fully explained in this section of the litigation report. (This section may then be referenced when discussing potential defenses, etc., in paragraph VIII.)

D. List any other possible theories of violation under federal, state, or common law.

IV. Description of the Defendant's Business and Technical Description of the Pollution Source

A. Describe the violating corporation and the particular division or facility in question. Any interesting corporate interrelationships or subsidiaries should be noted.

B. Discuss the business of the corporation and/or division, providing details about the facility in question, what is produced, and what causes the pollution. Emphasis should be on the particular process that is causing the problem. Plant and process should be thoroughly explained, including those outfalls or emission points not subject to this enforcement action. Diagrams should be referenced and attached to, or included in, the litigation report. Photographs of the source may be helpful.

C. Discuss the types of pollutants being discharged, and potential health and environmental effects. Although the seriousness of the violation is not technically a requirement of proof in enforcement of certain statutes, it is sometimes relevant to the assessment of penalties and equitable relief. For this reason, it should be discussed in the report although it will not be the sole determinant of whether a case has prosecutorial merit. The Department of Justice has suggested the following considerations in assessing the seriousness of the violation:

- The discharge of toxics or mutagens or carcinogens is more serious than the discharge of conventional pollutants;
- The discharge of large quantities of pollutants is more important than the discharge of small quantities;
- Bioaccumulative wastes posing long-term threats are more serious than biodegradable wastes;
- The discharge of pollutants in an area not attaining primary ambient air quality standards is more important than discharges in an area not meeting secondary standards;
- The discharge of pollutants that directly and demonstrably affect health or the environment is more than those that have no direct or obvious effect;
- Ongoing present violations that the government seeks to stop are more important than episodic violations which have ceased; and
- A defendant with a history of violations is more worthy of attention than a first offender.

If a case does not present obvious "serious" health effects or environmental harm, but is compelling for some other reason (e.g., deterrence of continued, blatant violations of the law), this should be indicated.

D. Discuss available methods of controlling the problem. Specify technology(ies) that will achieve the imposed limits, and indicate the time requirements for a schedule of compliance that considers time necessary for design, contracting, construction, and startup. (This is not inconsistent with EPA policy of not prescribing specific compliance technologies. This information may be necessary in court to illustrate technical feasibility if requested by the judge.)

Cost estimates should be included, to the extent known. Indicate the reliability of the estimates. (Reference paragraph VII(E) as appropriate.)

V. Chronological Administrative History and/or Earlier Enforcement Actions (State and Federal)

A. Show all attempts to exact compliance or impose sanctions administratively or judicially that have been considered or taken. A full historical chronology should be presented.

B. Indicate whether necessary notice pursuant to the statutory requirements has been given to the violator prior to initiation of court action.

VI. Required Elements of Proof and Evidence

A. List the necessary elements of proof to establish the violation under each statute involved.

B. Present a detailed, objective, factual analysis of all real, documentary, and testimonial evidence corresponding to each necessary element of proof in paragraph VI(A) above.

Indicate the location of all real evidence.

Reference each item of documentary evidence as an attachment, except where it is too voluminous (in which case indicate its present location).

Identify all witnesses by name (indicating whether lay or expert), when indicating the import and substance of their testimony. Complete addresses and phone numbers of witnesses will be listed in paragraph VII(E) below.

C. Discovery. Where evidence may be made available by discovery, indicate:

1. The type of evidence anticipated;

2. The person or organization currently having the evidence; and

3. The type of discovery to be used.

Assess the quality of the evidence. Be objective. Any facts or circumstances that affect the strength of the Agency's proof should be explicitly set forth. The newness or oldness of evidence is relevant; the dependability of testing techniques is important. Any assumptions, and the reasons for them, should be spelled out.

D. If establishing environmental harm is important to the case, set forth the evidence of harm (as done in paragraph VI(B) for elements of substantive violation).

E. List all evidence favorable to the violator, including test results that differ from EPA's. Any relevant fact that may bear adversely on the government's contentions should be highlighted. Defense witnesses, to the extent they can be anticipated, should be listed in paragraph VI(G).

F. List all government witnesses alphabetically with business address, and telephone number and home telephone number. Qualifications of experts should be given.

All witnesses listed should have been consulted and thoroughly interviewed. Paragraph VI(B) should set out in succinct fashion the actual facts and opinions to be included in the testimony.

G. List all defense witnesses anticipated, identifying their employment, expertise, etc. The likely content of their testimony should be set out in paragraph VI(E).

H. Indicate projected resource needs (e.g., experts, money, etc.).

VII. Relief Requested

This paragraph should include a comprehensive "bottom-line" settlement position on all items of relief necessary, including those set forth below. If there are policy questions or conflicts associated with any requested relief, discuss them. This section should be carefully detailed. It will be relied upon in determining the acceptability of any settlement offers/proposed consent decrees.

A. Preliminary injunction.

B. Standards to be met (interim and final).

C. Compliance schedule for available technology with phasing, duration, etc. (Reference paragraph IV(D), as appropriate.)

D. Stipulated contempt fines in conjunction with compliance schedule.

E. Civil Penalties.

1. Economic savings realized by the violator should be analyzed. The EPA Civil Penalty Evaluation form should be completed, discussed, and attached. Calculations should be included as attachments. This section should include discussion of all elements developed under EPA's civil penalty policy, including ability of the company to pay and recalcitrance.

2. Comment on types of credits possible (or proposed by the violator), as well as credits considered and/or allowed for other similar violators (including municipal POTWs).

3. If economic savings is not a relevant measure of penalty assessment, explain what basis should be used.

F. Necessary bonds.

Witnesses necessary to establish the relief requested should be identified by name, address and telephone number, with a brief summary of the subject of their testimony.

VIII. Anticipated Issues

A. Possible defenses.

(Analyze only defenses that are likely to be presented; fanciful theories can be ignored.)

1. Outline legal issues. Attach legal memoranda on threshold legal issues (e.g., Chapter 11 Reorganization) or collateral legal action asserted as a bar to enforcement litigation.

2. Outline factual issues.

B. Equitable arguments by the violator (e.g., EPA delay in promulgating guidelines; installation of equipment that did not work; in compliance at its other facilities; emission standard to be revised; inability to finance; economic constraints, etc.). Any past action, or inaction, or inaction, (not necessarily judicial or administrative) by a state or any EPA office that the company may use as an excuse, or cite for reliance. (e.g., promises of less stringent limits; agreement not to sue, etc.).

C. Pendency of any action involving the violator or EPA on related issues in any court or administrative forum. (Reference paragraph V(A), as necessary.)

D. Other possible issues that might arise at trial.

E. Discuss any potential practical problems with the case.

IX. Litigation Strategy

A. Need for preliminary injunction.

B. Potential for summary judgment.

C. Settlement potential.

1. Past contacts by EPA, the Department of Justice or the United States Attorneys Office.

2. Present negotiating posture and assessment of potential for settlement. Include comparison of posture with "bottom-line" settlement position from paragraph VII.

D. Other potential defendants.

E. Other pending actions against violator.

X. Index of Attachments

XI. Attachments

4 Injunctive Actions

Injunctive actions may be initiated under the authority of Section 5(e), 5(f), 7, or 17(a) of TSCA.

Section 5(e) Injunctions

Criteria for Use

Injunctive relief authorized by Section 5(e) of TSCA should be considered when:

- The information available to the Administrator under Section 5 of the Act is insufficient to permit a reasoned evaluation of the human health and environmental effects of a chemical substance that is subject to the notice requirement of Section 5(a) and either:
  - -- In the absence of such information, the manufacture, processing, distribution in commerce, use, or disposal of such substance may present an unreasonable risk of injury to human health or the environment, or
  - -- The chemical substance is or will be produced in substantial quantities, and such substance either enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to the substance; and
- The Administrator has not issued a proposed order under Section 5(e) with respect to the chemical substance, or the Administrator has issued such an order, however, the order does not take effect because objections were filed pursuant to Section 5(e)(1)(C).

Use of Section 5(e) Injunctive Actions

Pursuant to Section 5(a) of TSCA, any person who manufactures a new chemical substance or who manufactures or processes a chemical substance for a significant new use must submit a premanufacture notice (PMN) to

EPA. The PMN is to contain specific information regarding the effects of the new chemical or the effects concerning the significant new use for an existing chemical.

The Agency will review the submitted information to determine whether a reasoned evaluation may be made of the effects of the chemical or the significant new use. The Act provides a 90-day review period following submission of the PMN, although the period may be extended for a maximum of 90 additional days if good cause is shown.

Upon reviewing the information, the Administrator may issue a proposed order prohibiting or limiting the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance if there is insufficient information to permit a reasoned evaluation of the human health and environmental effects of the substance and either:

- In the absence of sufficient information, the manufacture, processing, distribution in commerce, use, or disposal of such substance may present an unreasonable risk of injury to human health or the environment; or

- The substance is or will be produced in substantial quantities and may:

  -- Enter, or reasonably be anticipated to enter, the environment in substantial quantities, or

  -- Result in significant or substantial human exposure to the substance.

The proposed order must be issued no later than 45 days before the expiration of the review period, and the order will become effective upon the expiration of that period.

However, an affected firm may challenge the proposed order, thus delaying the effective date of the order. Therefore, unless the Administrator immediately sustains the objection (i.e., finds that there is sufficient information to permit a reasoned evaluation of the human health and environmental effects of the substance), the Agency must seek an injunction to prohibit or limit the manufacture, processing, distribution in commerce, use, or disposal of the PMN chemical substance. Additionally, the Administrator is required to seek an injunction if it is found that there is insufficient information concerning the new chemical substance or significant new use but a proposed order has not yet been issued in that particular matter. This latter circumstance might occur if the review period expires before the Administrator can issue the proposed order.

Section 5(f) Injunctions

Criteria for Use

Injunctive relief authorized by Section 5(f) of TSCA should be considered when there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance subject to premanufacture review presents or will present an unreasonable risk of injury to human health or the environment before a rule promulgated under Section 6 can protect against such risk.

Use of Section 5(f) Injunctive Actions

Pursuant to Section 5(f) of TSCA, if the Administrator determines that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance subject to premanufacture review presents or will present an unreasonable risk of injury to human health or the environment before a Section 6 rule can be promulgated, the Administrator may (before the expiration of the PMN review period):

- Prohibit the manufacture, processing, or distribution in commerce of the chemical substance by:
  - -- Proposing a rule under Section 6(a),
  - -- Issuing a proposed order under Section 5(f)(3)(A)(i) that, if challenged, must be followed by the initiation of a Section 5(f)(3)(A)(ii) injunction, or
  - -- Seeking a Section 5(f)(3)(A)(ii) injunction; or
- Limit the amount of the chemical substance that may be manufactured, processed, or distributed in commerce by proposing a Section 6(a) rule. Section 5(f)(2) states that such a proposed rule would become effective upon publication.

It is important to note that Sections 5(f)(3)(A)(i) and 5(f)(3)(A)(ii) allow the Administrator to immediately implement a prohibition on the manufacture, processing, or distribution in commerce of a chemical substance that is subject to premanufacture review and that has been specified in a proposed Section 6(a) rule. These sections of the Act are necessary because proposed Section 6(a) rules are generally not immediately effective. Section 6(d) does permit a Section 6(a) rule to become immediately effective if there is a showing of an "imminent unreasonable risk of serious or widespread injury." However, Sections 5(f)(3)(A)(i) and 5(f)(3)(A)(ii) permit the Administrator to implement immediately a prohibition on the manufacture, processing, or distribution in commerce of a PMN chemical substance by showing an "unreasonable risk of injury," not the more stringent "serious or widespread injury" requirement of

Section 6(d)*. If, on the other hand, the Administrator wishes only to limit the amount of a chemical substance that is subject to premanufacture review, the Administrator may do so under Section 5(f)(2). Under Section 5(f)(2), a proposed Section 6(a) rule (limiting the amount of the chemical substance that may be manufactured, processed, or distributed in commerce) becomes effective upon publication.

Section 7 Injunctions

Criteria for Use

Injunctive relief authorized by Section 7 of TSCA should be considered when a chemical substance or mixture, or article containing such a substance or mixture, poses an imminent hazard to human health or the environment.

Use of Section 7 Injunctive Actions

Section 7(a)(1)(B) of TSCA authorizes the Administrator to seek injunctive relief, through EPA or Department of Justice attorneys, against any person who manufactures, processes, distributes in commerce, uses, or disposes of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture.

Section 7(f) defines an imminently hazardous chemical substance or mixture as one that presents an imminent and unreasonable risk of serious or widespread injury to human health or the environment. An unreasonable risk is considered imminent if it can be shown that the manufacture, processing, distribution in commerce, use, or disposal of the chemical substance or mixture is likely to result in such injury before a final rule under Section 6 of the Act can protect against such risk.

If an imminent hazard exists and the Administrator has not issued an immediately effective rule under Section 6(d)(2)(A)(i) against the imminently hazardous chemical substance or mixture, then according to Section 7(a)(2), the Administrator must commence an appropriate Section 7 action (e.g., a seizure or injunctive action). Agency policy, however,

* In addition, Section 6(d) requires that in order for a Section 6 rule (which prohibits the manufacture, processing, or distribution in commerce of a chemical substance or mixture that is likely to result in an unreasonable risk of serious or widespread injury) to become immediately effective, a court must first have granted relief under Section 7 of the Act.

permits the Administrator to initiate an immediately effective rule under Section 6 in lieu of seeking a Section 7 civil action.*

A Section 7 injunctive action may seek such temporary or permanent relief as may be necessary to protect human health or the environment from the unreasonable risk associated with the chemical substance, mixture, or article involved in the action. If the injunctive action is brought against a person who manufactures, processes, or distributes in commerce an imminently hazardous chemical substance or mixture or an article containing such a substance or mixture, the action may include the issuance of a mandatory order requiring:

- In the case of purchasers of such a substance, mixture, or article known to the defendant, notification to such purchasers of the risk associated with it;
- Public notice of such risk;
- Recall;
- Replacement or repurchase of such a substance, mixture, or article; or
- Any combination of the above actions.

Concurrent with the filing of a Section 7 civil action or soon thereafter as may be appropriate and where practicable, the Administrator must initiate a Section 6(a) rulemaking proceeding.

Section 7 civil actions may be commenced notwithstanding the existence of a rule under Section 4, 5, or 6 or an order under Section 5, and notwithstanding the pendency of any TSCA administrative or judicial proceeding.

Section 17(a) Injunctions

Criteria for Use

Injunctive relief authorized by Section 17(a) of TSCA, which is the most common form of judicial relief sought, should be considered when there is a need to:

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* This policy, however, would not apply to a Section 6 rule that seeks to prohibit the manufacture, processing, or distribution in commerce of an imminently hazardous substance, since Section 6(d)(2)(A)(ii) requires that, in order for such a rule to become immediately effective, a court must first have granted relief under Section 7 of the Act. The policy does apply to the other forms of relief (i.e., other than a complete prohibition) available under Section 7.

- Restrain any violation of Section 15 of the Act. The violations specified by Section 15 include:

  -- Failure or refusal to comply with any rule promulgated or order issued under Section 4, any requirement prescribed by Section 5 or 6 of TSCA, or any rule promulgated or order issued under Section 5 or 6,

  -- Use, for commercial purposes, of a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6 of TSCA, a rule or order under Section 5 or 6, or an order issued in an action brought under Section 5 or 7,

  -- Failure or refusal to establish or maintain records; to submit reports, notices, or other information; or to permit access to or copying of records, as required by TSCA or its rules, and

  -- Failure or refusal to permit entry or inspection as required by Section 11 of TSCA;

- Restrain any person from taking any action that is prohibited by Section 5 or 6 of TSCA or by a rule or order issued under those sections;

- Compel the taking of any action required by or under the Act; or

- Direct any manufacturer or processor of a chemical substance or mixture manufactured or processed in violation of Section 5 or 6 or a rule or order under Section 5 or 6 and distributed in commerce to:

  -- Give notice of such fact to distributors in commerce and (to the extent that they can be reasonably ascertained) other persons who possess or may be exposed to the chemical substance or mixture,

  -- Give public notice of such risk of injury, and

  -- Either replace a repurchase the chemical substance or mixture.

Use of Section 17(a) Injunctive Actions

As discussed in Chapter Five, administrative penalty proceedings are the preferred enforcement tools of the Agency in enforcing TSCA requirements. Injunctive relief authorized by Section 17(a) will generally be sought in those instances where civil penalty proceedings are (or will be) ineffective because of the nature of the violation, or the nature of the violator. Specifically, a permanent injunction should be considered when:

- The Agency's administrative or other judicial enforcement remedies would be inadequate either at restraining the violation or at preventing unreasonable risk to humans or the environment;

- The Agency has, in fact, already diligently exercised all appropriate administrative remedies, yet the violation continues unabated; and

- Irreparable injury, loss, or damage will result if relief is not granted. "Irreparable" means that the damage cannot be undone once it takes place. (See the discussion on irreparable injury in Section 2 of this chapter.)

A preliminary injunction or temporary restraining order should be considered when the following additional elements are present:

- Immediate and irreparable injury, loss, or damage will result if relief is not granted. "Immediate" is self-explanatory and is interpreted strictly; and

- There is likelihood of success at trial based on facts before the court (i.e., more than a 50-percent chance of winning at a trial based on facts before the court at the time of application).

The above considerations relating to permanent injunctions, preliminary injunctions, or temporary restraining orders may occur when:

- The violator is recalcitrant and has demonstrated a history of noncompliance with administrative orders and, therefore, should be made subject to the contempt powers of a district court;

- The nature of the violation is such that it cannot be remedied effectively by Agency proceedings. (Because injunctive proceedings are equitable in nature, they permit the court to fashion the necessary relief); or

- The violation is very serious and meets the technical criteria for a finding of "imminent hazard" under Section 7 of TSCA but the Agency does not wish to initiate a Section 6(a) rulemaking proceeding.

Procedures for Seeking Injunctive Relief

1. Determine the Necessity for Injunctive Relief

- Regional Initiation. The Regions generally make the initial determination that an injunction is necessary to restrain violations of TSCA or to prevent harm to humans or the environment. The regional

determination must be based on a careful weighing of the facts of the violation, of the evidence available to document the severity of the violation, and of the criteria discussed above.

- Headquarters Initiation. In some instances, Headquarters may be the initiating party when noncompliance with the terms of the statute exists on a national level, or the hazard to human health or the environment is of national significance (e.g., Section 7 injunctions).

2. Determine Type of Injunction To Be Sought

- Temporary Restraining Order (Exhibit 8-2). A temporary restraining order (TRO), sometimes known as a provisional injunction, is used for immediate temporary relief prior to issuance of a preliminary injunction, or unless otherwise permitted by statute. For example, issuance of a TRO may be warranted when:

  -- A situation exists that justifies the use of a Section 7 civil action to prevent the unreasonable risk of an imminent hazard before a final Section 6 rule can protect against such risk, or

  -- Under a Section 5(e) or 5(f) injunctive proceeding, where the notification period under Section 5(a), (b), or (c) may expire before the judicial proceeding is completed.

  The purpose of the TRO is to preserve the status quo until a motion for a preliminary injunction can be heard. Its advantage is that it is the most expediently obtained form of injunctive relief. However, a TRO is limited in duration to only 10 days (although it can be extended an additional 10 days by the court).

  Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) controls the procedural steps for obtaining a TRO. Generally the attorney for the adverse party, if known (or if not known, the adverse party itself), must be given oral or written notice of the request for a TRO. This requirement, however, is suspended if (1) it is shown by specific facts that immediate and irreparable harm will occur before the adverse party can be heard and (2) if the government attorney certifies in writing the efforts, if any, taken to provide notice to the adverse party and the reasons supporting the claim that notice should not be required. The facts demonstrating immediate and irreparable injury, loss, or damage, may appear either in a verified complaint or in a separate affidavit signed by an EPA employee other than the attorney for the case. Along with the motion for a TRO, a copy of the suggested TRO should be filed.

  When a TRO is granted without notice (i.e., ex parte), the motion for a preliminary injunction must be set for hearing at the earliest possible time. The party who obtained the TRO must then proceed with the application for a preliminary injunction and if

the party does not do so, the TRO will be dissolved by the court. If a defendant moves to modify or dissolve a TRO, there must be a hearing and the Agency must be informed at least two days before the hearing.

- Preliminary Injunction (Exhibit 8-3). A preliminary injunction by its very nature is interlocutory, provisional, or temporary. It is intended to preserve the status quo pending final determination of the action after a full hearing on the merits. It is different from a TRO in that a preliminary injunction requires advance notice to the adverse party, and it can last longer than 10 days.

  Notice presumes a hearing and an opportunity to contest the motion for an injunction. The applicant has the burden of establishing the right to injunctive relief. To do so, it is advisable to rely on more than affidavits (Exhibit 8-4) whenever possible. Oral testimony should be available when and if necessary to substantiate the Agency's contentions.

  The court may order the advancement and consolidation of the trial on the merits with the hearing on the application for preliminary injunction. Consequently, the government attorney should be prepared to go forward with the prosecution of the case when seeking a preliminary injunction.

- Permanent Injunction (Exhibit 8-5). A permanent injunction, also called a final or perpetual injunction, is generally unlimited in duration. It is usually granted only after a full trial on the merits. Consequently, the judgment granting a permanent injunction constitutes final disposition of the suit, although the judgment may be appealed to a circuit court.

  Mere passage of time will not dissolve a permanent injunction, unless the judgment itself so provides. However, the prospective features of a final injunctive decree are subject to termination or modification by the court when warranted by changed conditions. For example, under Section 5(e)(2)(D) of TSCA, a district court, upon petition, will dissolve a Section 5(e) injunction if test data is submitted that is sufficient to evaluate the human health and environmental effects of the chemical substance subject to the injunction unless the Administrator has initiated a proceeding for the issuance of a rule under Section 6(a) respecting the substance. If such a proceeding has been initiated, the court will continue the injunction until the effective date of the rule or, if the proceeding is terminated without the promulgation of a rule, upon termination of the proceeding.

3. Determine the Appropriate District Court Having Jurisdiction

The Regional Office must determine which is the appropriate district court having jurisdiction over the violator. An injunction operates in personam (meaning "against the particular person"), so that the

district court in which the motion is filed must have in personam jurisdiction over the party against whom the injunction is sought. Usually this means that the person or corporation who is the defendant must live or have a place of business within the state. Furthermore, service of process, or the delivery of written notice, is subject to the territorial limits of the state in which the district court is located unless otherwise provided for in a statute.

In some instances, an injunction may have an in rem ("against the world at large") effect on property or items that are the subject of the suit or that are within the court's in rem jurisdiction. In rem jurisdiction may have a broader reach for serving process than does in personam--it is easier to get "the thing" than it is "the person." These possibilities should be explored informally with the appropriate U.S. Attorney before formal referral of the case file.

The following specific jurisdictional requirements apply to injunctions sought under Sections 5(e), 5(f), 7 and 17(a) of TSCA:

- Section 5(e) and 5(f) Injunctions. Injunctive actions that are based on Sections 5(e) and 5(f) of TSCA may be filed in:

  -- The United States District Court for the District of Columbia, or

  -- The United States district court for the judicial district in which the manufacturer or processor of the chemical substance subject to the action is found, resides, or transacts business.

- Section 7 Injunctions. Injunctive actions that are based on Section 7 of TSCA may be filed in:

  -- The United States district court for the District of Columbia.

  -- The United States district court for the judicial district in which the person who manufactures, processes, or distributes a chemical substance or mixture that is the subject of the action is found, resides, or transacts business.

  According to Section 7(c)(1)(A), process in a Section 7 injunctive action may be served on a defendant in any other district in which such defendant resides or may be found. However, Section 7(c)(1)(B) states that in instances in which the action may be brought in more than one judicial district, the Administrator is to take into account the convenience of the parties. Subpoenas requiring the attendance of witnesses may be served, pursuant to TSCA Section 7(c)(1)(C), in any judicial district.

  According to Section 7(c)(2), whenever proceedings involving identical chemical substances, mixtures, or articles are pending in two or more district courts, they are to be consolidated for trial upon application reasonably made by any party in interest and upon notice to all parties in interest.

- Section 17(a) Injunctions. Injunctive actions that are based on Section 17(a) of TSCA differ on their filing location depending upon the nature of the activity that is the subject of the action:

  -- If the injunctive action involves a violation of Section 15 of the Act, the action must be filed in the United States district court for the judicial district in which the violation occurred or where the defendant is found or transacts business, or

  -- If the injunctive action involves any other activity specified by Section 17(a), the action must be brought in the United States district court for the judicial district in which the defendant is found or transacts business.

  Process may be served on a defendant in any judicial district in which the defendant resides or may be found, and subpoenas requiring the attendance of witnesses at trial may be served in any judicial district.

4. Prepare the Referral Package

See discussion in "Procedures for Filing Actions" (Section 3) in this chapter.

Court Actions on Motions for Injunctive Relief

If an injunction is granted, the following actions should ensue:

- Preparation for the Next Stage of the Proceeding. If the court grants a motion for a preliminary injunction or TRO, the regional attorney in conjunction with the U.S. Attorney must begin preparation for the next stage in the proceeding, whether that be a full trial on the merits or a more extensive and permanent type of injunction.

- Monitoring the Injunction. Although it is the court's responsibility to monitor any equitable decree, including an injunction, the courts have limited resources and often encounter practical difficulties in monitoring compliance. If the court does not ask the Agency to monitor the injunction, the Region should offer to assist the court in monitoring the injunction and to report any violations of the injunction. A violation of an injunction will subject the party to a charge of contempt of court.

If an injunction is denied, the Agency may either:

- Appeal the denial; or
- Accept the denial and pursue other legal remedies.

In both instances, the Headquarters Case Development Officer (HQCDO) should be consulted by the Regional Office to determine which course of action to take.

Model Motion for Temporary Restraining Order

United States District Court

_____District of_____

(Title of Action) Civil Action No._____

Motion for Temporary Restraining Order [With or Without Notice]

Plaintiff, the United States of America, herewith moves this court to grant [*(1) forthwith and without notice to defendant or his or her attorney] a temporary restraining order restraining defendant, his or her agents, and employees from (set forth acts sought to be enjoined) pending a hearing and disposition of plaintiff's motion for a preliminary injunction on the grounds that immediate and irreparable injury, loss, or damage will result to [*(2) plaintiff, the public, the environment] as set forth in the attached affidavit of (name of affiant) [*(3) before notice can be given and before defendant or his or her attorney can be heard in opposition, as certified to by the undersigned].

(Signature of U.S. Attorney)
United States Attorney for the

_____District of _____

Date _____

---

* (1),(3) -- These statements are optional depending upon whether or not the defendant or his or her attorney receives advance notice of the request for a TRO.

* (2) -- The victim of the alleged injury can be best determined from the actual facts of the case at hand.

Model Motion for Preliminary Injunction

United States District Court

_____District of_____

(Title of Action) Civil Action No._____

Motion for Preliminary Injunction

Plaintiff, the United States of America, herewith moves this court for a preliminary injunction enjoining the defendant (name of defendant), his or her agents, servants, employees, and attorneys and all persons in active concert and participation with the defendant pending the final hearing and determination of this action, from (set forth act or acts sought to be enjoined) on the grounds that:

(1) Unless restrained by this court, defendant will perform the acts referred to;

(2) Such action by the defendant will result in immediate and irreparable injury, loss, or damage to (the plaintiff, the public interest, or the environment), as appears in the verified complaint and the affidavit of (name of affiant), attached hereto; and

(3) The issuance of a preliminary injunction herein will not cause undue inconvenience or loss to defendant, but will prevent immediate and irreparable injury to the plaintiff.

(Signature of U.S. Attorney)
United States Attorney for the

_____District of _____

Date_____

Model Affidavit in Support of Motion for Preliminary Injunction

United States District Court

_____ District of _____

(Title of Action) Civil Action No. _____

Affidavit in Support of Motion for Preliminary Injunction

(Name of Affiant), being duly sworn, deposes and says:

(1) The United States of America, plaintiff in the above-entitled action, makes this affidavit in support of plaintiff's motion for a preliminary injunction.

(2) This is an action [to enjoin defendant from engaging in any violation of the Toxic Substances Control Act, 15 U.S.C §2601 et seq., or an action otherwise authorized by the Act].

(3) [Statement of facts to support the motion].

(Signature of Affiant other than EPA attorney)

Subscribed and sworn to and before me at (City and State) _____ this _____ day of _____, 19___.

(Signature of Attesting Official other than EPA attorney)

Model Motion for Permanent Injunction

United States District Court

_____District of_____

(Title of Action) Civil Action No._____

Motion for Permanent Injunction

Plaintiff, the United States of America, herewith moves this court to make permanent the preliminary injunction issued herein on (date). In support, plaintiff submits (the opinion of the court of _____), which is conclusive to the effect that the (behavior or activity of the defendant) is unlawful and no additional evidence could alter that result.

[Optional: (1) Counsel may also want to include a paragraph moving the court to enter the mandate of a higher court, if the grant of injunction has been unsuccessfully appealed.]

[Optional: (2) Counsel may also find it necessary to include a motion either for the dismissal of defendant's counterclaim or for the grant of summary judgment as to the counterclaim.]

(Signature of U.S. Attorney)
United States Attorney for the

_____District of _____

Date_____

5 In Rem (Seizure) Actions

In rem (seizure) actions may be initiated under authority of Section 7 or 17(b) of TSCA. The seizure of a chemical substance or mixture or article containing such a substance or mixture, as authorized by those sections, is effectuated through an in rem condemnation proceeding conducted according to Rule 9(h) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and the Supplementary Rules for Certain Admiralty and Maritime Claims [Title 28 U.S.C.].

Section 7 In Rem Actions

Authority

Section 7(a)(1)(A) of TSCA permits the Administrator to commence a civil action in an appropriate district court for the seizure of an imminently hazardous chemical substance or mixture or any article containing such a substance or mixture.

Criteria for Use

A Section 7 seizure action should be used in a situation in which a chemical substance or mixture presents an imminent and unreasonable risk of serious or widespread injury to health or the environment. Such risk is considered imminent if it is shown that the manufacture, processing, distribution in commerce, use, or disposal of the substance or mixture is likely to result in such injury before a final rule under Section 6 can protect against such risk. Whether or not a chemical substance or mixture presents an imminent hazard will have to be determined on a case-by-case basis. However, it is expected that the standard would apply to those cases where a chemical substance or mixture poses an acute risk of harm to human health or the environment or is being used by large numbers of people in many areas of the country and the substance, mixture, or article must be seized to prevent that risk. A seizure action under Section 7(a) may be used in conjunction with any other relief authorized by that Section (including injunctive actions). It may also be used notwithstanding the

existence of a rule under Section 4, 5 or 6 or an order under Section 5 of the Act, and notwithstanding the pendency of any administrative or judicial proceeding under any provision of TSCA. A Section 7 action (either seizure or other relief) is mandatory if the Administrator has not made a rule under Section 6(a) immediately effective with respect to the imminently hazardous chemical substance or mixture.

Jurisdictional Considerations

A seizure action authorized by Section 7(a)(1)(A) against a chemical substance or mixture, or article containing such substance or mixture, may be brought in any United States district court within the jurisdiction in which the substance, mixture, or article is found.

Section 17(b) In Rem Actions

Authority

Section 17(b) of TSCA authorizes the seizure of any chemical substance or mixture that was manufactured, processed, or distributed in commerce in violation of the Act or any rule promulgated or order issued under TSCA or any article containing such substance or mixture.

Criteria for Use

An *in rem* action authorized by Section 17(b) should be considered when a chemical substance or mixture presents an unreasonable risk of injury to human health or the environment but does not constitute an imminent hazard under Section 7. Note that a Section 7 seizure action may be used in instances where there is no violation of TSCA, whereas a Section 17(b) *in rem* action requires that the chemical substance or mixture has been manufactured, processed, or distributed in commerce in violation of the Act.

Jurisdictional Considerations

A seizure action authorized by Section 17(b) of TSCA against a chemical substance or mixture, or article containing such substance or mixture, may be brought in any United States district court within the jurisdiction in which such substance, mixture, or article is found.

Procedures for Initiating an In Rem Action

1. Prepare the Referral Package

Upon determining that an in rem seizure action is appropriate, the Regional Office should prepare a civil litigation referral package (see Section 3 of this chapter). The package may include a proposed complaint in rem (Exhibit 8-6), which is prepared in accordance with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims that accompany the Fed. R. Civ. P. The necessary elements of the complaint in rem are that:

- It be verified by oath or affirmation;
- It describe with reasonable particularity the property that is the subject of the action;
- It state that the property to be seized is (or will be during the pendency of the action) within the jurisdiction of the district court that will hear the action;
- It state the place of seizure; and
- It state the allegations of the violations, as required by the statute, with sufficient particularity that the defendant/respondent can frame responsive pleadings and investigate the facts without moving for a more definite statement.

2. Execute the Warrant

Once the complaint in rem is filed with the court, an "arrest" warrant (i.e., a warrant for the arrest of the property that is the subject of the action) will be issued. According to Rule C(3) of the Supplemental Rules, the warrant is delivered to a U.S. Marshal for execution.

3. Notify Other Regions

The Region should notify other Regions of its actions if there is reason to believe that the violative product is also in those Regions.

Compliance With a Seizure Order

The violation of a court-ordered seizure or decree of condemnation constitutes contempt of court. When any such violation is found, it should be reported promptly to the U.S. Attorney who filed the seizure action.

Model Complaint In Rem

IN THE UNITED STATES DISTRICT COURT FOR THE
_____ DISTRICT OF _____

United States of America

v.

_____

_____

_____ Complaint In Rem

_____

_____

_____

_____

TO THE HONORABLE JUDGE OF SAID COURT:

This is a complaint in rem filed in behalf of the United States of America by the United States Attorney for this District, who represents as follows:

I

This is an action in rem instituted pursuant to Section 17(b) [or Section 7(b)(3)] of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2616(b), for the seizure and condemnation of a chemical substance or mixture that has been manufactured, processed, or distributed in commerce in violation of TSCA or any implementing rule or order or any article containing such substance or mixture. Authority to bring this action is vested in the United States Attorney by 28 U.S.C. §547(2).

II

This Court has jurisdiction of the subject matter of this action pursuant to 15 U.S.C. §2616(b).

III

The property to be seized is located at (exact location), which is within this judicial district [or, the property will be located at (exact location), within this jurisdiction, during the pendency of the action].

IV

(Name of chemical substance or mixture) is a chemical substance or mixture that has been manufactured, processed, or distributed in commerce in violation of TSCA as follows:

(State allegation with specific reference to the sections of the Act, regulations, or orders that allegedly have been violated.)

WHEREFORE, the complainant, United States of America, prays:

(a) That the chemical substance or mixture (name of chemical substance or mixture) or article containing such substance or mixture be seized and condemned, and that it be disposed of as the Court may direct in conformity with the practice of this Court.

(b) That the (name of company that manufactures, processes, or distributes in commerce) and any or all persons having, or pretending to have any right, title, or interest in or to the substance, mixture, or article, be notified to appear in order that they may answer the allegations herein set forth.

(c) That this Honorable Court may enter all such orders, decrees, and judgments as may be necessary and grant the complainant the costs of this proceeding.

(d) That the complainant may have such other and further relief as the nature of the case may require.

(Signature of U.S. Attorney)
United States Attorney for the

_____ District of _____

VERIFICATION

I have read the foregoing pleading and know its contents, which is true and correct of my own knowledge, except as to matters therein stated upon my information and belief, and as to such matters I believe it to be true.

Executed on this _____ day of (date) _____

(location) _____

_____
United States Attorney

6 Settlement Agreements

By their very nature, TSCA judicial civil actions do not involve settlement agreements. Nonetheless, an injunction or in rem (seizure) action that is granted to EPA by a district court is usually monitored for compliance by the Agency. The violation of either type of civil action will subject the responsible party to a charge of contempt of court.

Chapter Nine

Judicial Enforcement: Criminal Actions

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Chapter Nine

Judicial Enforcement: Criminal Actions

Statutory Authority

The imposition of criminal penalties is authorized by Section 16(b) of TSCA, which states that:

> ***Any person who knowingly or willfully violates any provision of section 15 shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) of this section for such violation, be subject, upon conviction, to a fine of not more than $25,000 for each day of violation, or to imprisonment for not more than one year, or both.

Section 15 of TSCA enumerates those acts considered unlawful under TSCA (see Chapter Seven for a complete listing).

Basic Enforcement Policy

The objective of the toxic substances enforcement program is to ensure compliance with the terms and provisions of TSCA. The Act provides the Agency with a variety of administrative, civil, and criminal enforcement options to accomplish this goal. Potential overlap exists among these various options, but the Agency is free to pursue criminal sanctions whenever sufficient evidence is available to support the requisite elements of proof.

As a matter of enforcement policy and resource allocation, such an unrestrained use of criminal sanctions is neither warranted nor practical. The commitment of investigative and technical resources necessary for the successful prosecution of a criminal case is high. More importantly, a criminal referral for investigation or prosecution can entail profound

consequences for the subject of the referral. Accordingly, criminal referrals should be confined to situations that--when measured by the nature of conduct, the compliance history of the subject(s), or the gravity of the environmental consequences--reflect the most serious cases of environmental misconduct.

Criteria for Identification of a Potential Criminal Action

This section discusses the considerations that should be examined in determining whether to proceed with a criminal vis-a-vis administrative/civil action.

The Scienter Requirement

An individual who engages in conduct prohibited by statute or regulation can be prosecuted civilly or administratively without regard to the mental state that accompanied the conduct. Criminal sanctions, on the other hand, will be limited ordinarily to cases in which the prohibited conduct is accompanied by evidence of a "guilty knowledge" or intent on the part of the prospective defendant. Referred to as the scienter requirement, this element of proof exists under virtually every environmental statute enforced by the Agency.*

TSCA imposes criminal penalties only for "knowing or willful violations" of the Act. Although there is, as yet, no case law on the meaning of this phrase under TSCA, the phrase is used in a number of other criminal provisions. As such, it has been interpreted to mean that the violative

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* One exception to this general rule is the Refuse Act, 33 U.S.C. §407, which has generally been interpreted as a "strict liability" statute. [See, e.g., United States v. White Fuel Corporation, 498 F.2d 619 (1st Cir. 1974).] In addition, a prosecution for illegal discharges under the Clean Water Act can be based on negligent or willful conduct, 33 U.S.C. §1319(c)(1). "Negligence" is not, strictly speaking, a form of scienter.

act must have been done intentionally and not as a result of accident or mistake.*

The requirement to prove a culpable mental state, as well as a prohibited act, is certainly the clearest distinction between criminal and administrative/civil enforcement actions.

The Nature and Seriousness of the Offense

As a matter of enforcement policy and resource allocation, EPA will investigate and refer only the most serious forms of environmental misconduct for criminal prosecution.

Of primary importance to this assessment is the extent of environmental contamination or human health hazard that has resulted from, or was threatened by, the prohibited conduct. In general, this determination will depend upon considerations such as the duration of the conduct; the toxicity of the pollutants involved; the proximity of population centers; the quality of the receiving land, air, or water; the amount of federal, state, or local cleanup expenditures; and the public sentiment supporting strong enforcement action in response to a specific situation.

Also of significance in assessing the seriousness of the illegal conduct is the impact--real or potential--on EPA's regulatory functions. This factor is of particular importance in cases involving the falsification or concealment of records, reports, or other information. For example, even if a technical falsification case can be made, criminal sanctions may not be appropriate if the distortion of information could not reasonably have been expected to have a significant impact on EPA's regulatory or decisionmaking process. Where the materiality of the falsification is clear, however, the need for criminal sanctions should be considered.

---

* Courts do make a distinction between the terms "knowingly" and "willfully." "Knowingly" is generally defined to mean an act done intentionally and not as a result of accident. "Willfully" is often defined as requiring proof that the person performed the violative act with intent to violate the statute. However, courts that have interpreted the term "willfully" in the context of the Clean Water Act have declined to impose this more stringent burden of proof. These courts have indicated that evidence demonstrating that the act was intentionally done was sufficient to demonstrate willfulness. [United States v. Hamel, 551 F.2d 107 (6th Cir. 1977); United States v. Frezzo Brothers, Inc., 461 F. Supp. 266 (E.D. Pa. 1978), aff'd, 602 F.2d 1123 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Ouelette, 11 ERC 1350 (E.D. Ark. 1977).] Courts can reasonably be expected to attach the same meaning to the term in TSCA cases.

The Need for Deterrence

Deterrence of criminal conduct by a specific individual (individual deterrence) or by the community at large (general deterrence) has always been one of the primary goals of the criminal law. Where the offense is deliberate and results in serious environmental contamination or human health hazard, the need to achieve deterrence through the application of strong punitive sanctions will almost always exist.

The goal of deterrence may, on occasion, justify a criminal referral for an offense that appears relatively minor. This would be true, for example, for offenses that--while of limited importance by themselves--would have a substantial cumulative impact if commonly committed. This might also be true when addressing violations by an individual with an extended history of recalcitrance and noncompliance.

The Compliance History of the Subject(s)

The compliance history of the subject(s) of a potential criminal referral should also be considered in determining the appropriateness of criminal sanctions. As a general rule, criminal sanctions become more appropriate as the incidents of noncompliance increase. The occurrence of past enforcement actions against a company or the failure of administrative/civil enforcement, is certainly not a prerequisite to a criminal referral. However, a history of environmental noncompliance will often indicate the need for criminal sanctions to achieve effective individual deterrence.

The Need for Simultaneous Administrative/Civil Enforcement Action

Simultaneous administrative/civil and criminal enforcement proceedings are legally permissible [United States v. Kordel, 397 U.S. 1, 11 (1970)] and on occasion clearly warranted. However, separate litigation staffs must be appointed on initiation of a grand jury investigation, if not before. Furthermore, the pursuit of simultaneous proceedings would provide fertile grounds for legal challenges to one or both proceedings that, even if unsuccessful, would consume additional time and resources. Thus, parallel proceedings should be avoided except where clearly justified.

In this regard, it should be noted that some of the goals of a criminal prosecution, including deterrence, can be achieved through an administrative or civil action that secures substantial civil penalties in addition to injunctive relief. Moreover, recent experience indicates that while some cases may result in periods of incarceration, criminal sentences will often be limited to monetary fines and a probationary period. In light of this reality, the use of the additional time and resources necessary to pursue a criminal investigation is often not justified.

Criminal Enforcement Priorities

The Office of Criminal Investigations, in conjunction with the Agency program offices, has developed investigative priorities in each of the Agency's program areas. The purpose of this effort is to focus the limited investigative resources of the Agency on the most serious cases of environmental misconduct. These priorities are fluid and will be modified to reflect additional regulatory programs in the Agency as they develop. In addition, the creation of these priorities does not preclude the possibility of criminal referral for conduct not falling within these investigative priorities.

The order of the listing is random. It is not intended to create ranking within the priorities for TSCA; nor is any section of the Act given higher priority than another. The priorities for TSCA are listed below.

Violations of Section 4 Testing Rules or the Section 5(b) Premanufacture Notification Program. Sections 15(1) and 16(b) of TSCA, 15 U.S.C. §§2614(1) and 2615(b), establish misdemeanor penalties of one year of imprisonment and a $25,000 fine for knowing or willful violations of any rule promulgated under Section 4 or any requirement prescribed by Section 5 of TSCA. A high investigative priority will be placed on violations that have a significant impact on the Agency's ability to act under Section 4(f)(1), 15 U.S.C. §2603(f)(1), and on situations of falsified test data submitted pursuant to Section 5(b), 15 U.S.C. §2604(b), and the premanufacture notification program.

Failure To Report Substantial Risk Information. Sections 8(e), 15(3)(B), and 16(b) of TSCA, 15 U.S.C. §§2607(e), 2614(3)(B), and 2615(b), establish misdemeanor penalties of one year of imprisonment and a $25,000 fine for knowing or willful failure to submit to EPA information that reasonably supports the conclusion that a chemical substance or mixture manufactured, processed, or distributed in commerce presents a substantial risk of injury to health or the environment. A high investigative priority will be placed on all violations of this reporting requirement.

Violation of PCB or Dioxin Regulations. Sections 15(1)(C) and 16(b) of TSCA, 15 U.S.C. §§2614(1)(C) and 2615(b), establish misdemeanor penalties of one year of imprisonment and a $25,000 fine for knowing or willful violations of rules issued under Section 6 of TSCA. The Agency has issued regulations governing polychlorinated biphenyls (PCBs) and the disposal of dioxin-contaminated pesticide wastes. A high investigative priority will be placed on knowing or willful violations of these regulations that result in, or threaten, significant environmental contamination or human health hazard.

Procedures for the Investigation and Referral of a Criminal Case

Investigation

The Office of Criminal Investigations maintains the primary role of investigating and referring all allegations of criminal misconduct to the Department of Justice. The office is staffed by experienced criminal investigators located in each of five field offices and in EPA Headquarters. (Exhibit 9-1 contains a list of the field offices and their scope of responsibility.)

An initial "lead" or allegation of potential criminal activity may come to the Agency from any of several sources, including state agencies, routine compliance inspections, disgruntled plant employees, or citizen groups. Regardless of its source, the lead should be transmitted immediately to the Special-Agent-In-Charge of the responsible field office, who will open a case file* and assign a criminal investigator (known as a Special Agent) to the lead for follow-up.

If the reliability of the lead is unclear, the Special Agent will conduct a preliminary inquiry solely to determine the credibility of the allegation and to make an initial assessment of the need for a more thorough investigation. This initial inquiry will be brief and will not involve extensive commitment of resources or time. Its sole purpose is to reach an initial determination on the need for a complete investigation.

Once a determination has been made by the Office of Criminal Investigations that a thorough investigation is warranted, the Special Agent will immediately contact the Regional Counsel in the Region where the investigation is to be conducted. The Regional Counsel will ensure that no civil enforcement action is pending or contemplated against the investigative target and will assign an attorney to work with the investigator during the case development process. The regional attorney and Special Agent will also contact the appropriate regional program office to ensure that no administrative enforcement action is pending or contemplated. In addition, where the need for technical support during the investigation is contemplated, the regional program office will be asked to assess the availability of technical support and when appropriate, to designate a specific individual to work with the Special Agent during the course of the investigation.

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* The opening of a case file does not commit the Agency to proceed with a criminal referral at the culmination of the investigation; nor does it reflect an Agency decision that criminal conduct occurred. All enforcement options remain open and should be considered until referral to the Department of Justice.

Management of the investigation will be the primary responsibility of the Special Agent, acting under the supervision of the field office's Special-Agent-In-Charge. The Special Agent will be responsible for determining the basic investigative approach and will take the lead in conducting interviews; assembling and reviewing records; planning and executing surveillance; coordinating with state, federal, and local law enforcement agencies; planning and executing searches; developing informants; and performing other investigative matters. A technical person will work with the Special Agent during those portions of an investigation requiring technical expertise.

Referral

A referral recommendation will be developed when the independent field investigation has been exhausted or when it can or should proceed no further without the initiation of a grand jury investigation by the Department of Justice.* At this point, the results of the investigation will be assembled in a referral package. The preparation of the overall referral package will be the responsibility of the regional attorney assigned to the investigation, working in conjunction with the Special Agent.**

Once the package is prepared, it will be reviewed by the Special-Agent-In-Charge and the Regional Counsel, who will act as joint signatories. Technical portions of the package will also be reviewed by the regional or Headquarters program office, or NEIC--depending on the source of technical support. During this technical review, the availability of technical resources to support litigation should also be reviewed and specifically confirmed by the appropriate technical office.

Following completion of the referral package and concurrence in the referral recommendation by the Special-Agent-In-Charge and the Regional Counsel, three copies of the referral package and all exhibits should be directed to the Associate Enforcement Counsel for Criminal Enforcement, Criminal Enforcement Division (LE-134E); U.S. Environmental Protection Agency; 401 M Street, S.W.; Washington, D.C. 20460. No copies of the referral package will be sent to the local United States Attorney or the Department of Justice until Headquarters has reviewed and approved the referral.

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* Where a referral is made for further investigation by a grand jury, the task of creating a complete referral package is difficult since the case has not yet been completely developed. Therefore, a streamlined referral process has been instituted for these cases to eliminate inefficiency and to provide for the more natural development of criminal cases. (See Exhibit 9-2 for a copy of these procedures.)

** Where a referral is made for further investigation by a grand jury, the package will be prepared by the Special Agent in coordination with the regional legal and technical staffs assigned to the case.

If either the Special-Agent-In-Charge or the Regional Counsel believes the referral should not be made, that official will include a statement of the reasons underlying this position and make an alternative recommendation (e.g., close out investigation, etc.). The package nevertheless will be directed to the Criminal Enforcement Division for review; a final referral decision will be made by the Assistant Administrator for OECM (or the Assistant Administrator's delegatee).

The Headquarters review will focus on the adequacy of case development, adherence to the criminal enforcement priorities of the Agency, legal issues of first impression, consistency with related program office policy, and general prosecutorial merit. In cases involving particularly complex issues of law, the Criminal Enforcement Division will also consult with General Counsel attorneys. If, following this review process, the referral recommendation is accepted, referral packages will be directed simultaneously to the Department of Justice and the appropriate United States Attorneys Office. Appropriate cover letters will be drafted by the Criminal Enforcement Division.

Referral Package Format

Referral packages should be prepared in accordance with the Uniform Criminal Referral Package Format effective on January 1, 1982. A copy is included in this Manual as Exhibit 9-3. However, referral packages prepared for those cases referred for further investigation by a grand jury should be prepared in accordance with the May 9, 1983, guidelines (see Exhibit 9-2).

References

Agency employees who are involved in the investigation and referral to the Department of Justice of allegations of criminal violations of TSCA should familiarize themselves with the Agency documents listed below. Although a digested form of some of this material is contained in this section, most of the items are not covered in detail. The documents are contained in the General Enforcement Policy Compendium, or copies of the documents may be obtained by contacting the Criminal Enforcement Division, EPA Headquarters.

- General Operating Procedures for the Criminal Enforcement Program;
- Criminal Enforcement Priorities;
- Agency Guidelines for Participation in Grand Jury Investigations;
- Agency Guidelines for the Use of Administrative Discovery Devices in the Development of Potential Criminal Cases;

- Guidelines on Press Relations on Matters Pertaining to EPA's Criminal Enforcement Program;
- Policy and Procedures on Parallel Proceedings at the EPA; and
- Guidance Concerning Compliance with the Jencks Act.

Office of Criminal Investigations: Field Offices

Philadelphia Field Office
(Regions I, II and III)

Special-Agent-In-Charge
Office of Criminal
Investigations
EPA - Region III
Curtis Building
6th & Walnut Streets
Philadelphia, PA 19106
FTS 597-1949

Atlanta Field Office
(Regions IV and VI)

Special-Agent-In-Charge
Office of Criminal
Investigations
EPA - Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365
FTS 257-4885

Chicago Field Office
(Regions V and VII)

Special-Agent-In-Charge
Office of Criminal
Investigations
EPA - Region V
230 South Dearborn Street
Chicago, IL 60604
FTS 886-[illegible]

Seattle Field Office
(Regions IX and X)

Special-Agent-In-Charge
Office of Criminal Investigations
EPA - Region X
1200 6th Avenue
Seattle, WA 98101
FTS 399-9874

Denver Field Office
(Region VIII)*

Special-Agent-In-Charge
Office of Criminal Investigations
National Enforcement Investigations
Center
Box 25227
Denver Federal Center
Denver, CO 80225
FTS 234-2158

* In addition to Region VIII cases, the Denver Field Office's responsibilities include cases that overlap the jurisdiction of of field offices.

Referral Procedures for Criminal Cases

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC 20460

MAY 9 1983

OFFICE OF
LEGAL AND ENFORCEMENT COUNSEL

MEMORANDUM

SUBJECT: Referral Procedure for Criminal Cases

FROM: Courtney M. Price
Acting Associate Administrator
and General Counsel

TO: Regional Counsels, Regions I-X
All SAICs, Criminal Enforcement Division

Under the current General Operating Procedures, a criminal referral to the Justice Department may be made for one of two reasons: for prosecution (where the investigative effort is complete and we believe the crime is capable of being proved); and for further investigation in conjunction with the Justice Department.

In the latter situation--"referrals for further investigation"--the scope of the ultimate prosecution, and even the identity of defendants, may well not be known. The purpose of the referral is to facilitate further development of the case rather than to incorporate final Agency decisions on the viability or advisability of a prosecution. As such, it can and often does occur at an early stage in the case development process.

In these situations, the task of creating a complete referral package is difficult--in light of the fact that the case has not yet been completely developed. It is also time consuming, and thus can prejudice the investigation. The time spent in attempting to prepare a complete referral package, and in processing the package through the Regional and the Headquarters review system, can cause delays in the development of the case while not providing the countervailing benefits normally realized in the referral process, i.e. close scrutiny of the evidence prior to filing or a final assessment of the merits of criminal prosecution.

To eliminate this inefficiency, and provide for the more natural development of criminal cases, a shortened referral package will be used where the purpose of the referral is for further investigation in conjunction with the Justice Department, rather than to incorporate a complete investigative package. (The format appears as Attachment A.)

This package will provide a basis on which to make the best possible assessment both at the Regional level and at EPA Headquarters on the merits of the potential case. At the same time, it will provide a vehicle for the more rapid transmission of our investigative work product to prosecutors with the Justice Department, who will then become part of the criminal case development team.

The modified referral package will normally be prepared by the Special Agent assigned to the investigation, who will be most familiar with investigative activity to date. The package must be prepared in close coordination with Regional legal and technical personnel assigned to the investigation. As under existing procedures, the referral will be approved by both the Special-Agent-in-Charge and the Regional Counsel before transmission to EPA Headquarters for approval. Cover letters to the appropriate United States Attorney and to the Land and Natural Resources Division will be drafted at EPA Headquarters for the signature of the Associate Administrator.

Questions on this procedure should be directed to Peter Beeson (382-4543). It is our hope that these modified procedures will ensure the most efficient possible development of our criminal cases.

Attachments

ATTACHMENT A

MEMORANDUM

SUBJECT: Criminal Referral

FROM: Special-Agent-in-Charge_____
_____ Field Office
Criminal Enforcement Division

_____
Regional Counsel
Region_____

THRU: _____
Associate Enforcement Counsel
Criminal Enforcement Division

_____
Enforcement Counsel

TO: _____
Associate Administrator and General Counsel

Attached for your consideration are materials assembled by this Agency in a criminal investigation against_____ _____. It is the opinion of our offices that further development of this case should proceed in close coordination with the Justice Department. An overview of the nature of this investigation is provided below for your information. We recommend immediate referral to the (U.S. Attorney/Federal District) and to the Land and Natural Resources Division for further development.

REFERRAL PACKAGE
(Name of Case)
(Name of District)

I. Identity of Subject(s) of Investigation:

Individual(s):

1. Name
2. Title
3. Age
4. Home/work address
5. Current employment
6. Criminal record, if any
7. Prior EPA enforcement action
8. Other pertinent information

Corporation(s):

1. Name and nature of business
2. Parent company
3. Susidiaries
4. Address of facility(ies) associated with offenses
5. State of incorporation
6. Size of company
7. Prior EPA enforcement action
8. Other pertinent information

II Nature of Activity under Investigation

1. Location and duration
2. Venue
3. Significance of Activity (A brief statement of reasons underlying the need to address the misconduct with criminal sanctions.)

-2-

III. Statutory Offenses

1. Applicable Statutes: (A summary of Federal environmental and related laws potentially violated by the activity, accompanied by pertinent citations to the United States Code and the Code of Federal Regulations)

2. Evidence Gathered to Date: (A brief summary of available evidence, accompanied by copies of selected investigative reports prepared within the Criminal Enforcement Division that reflect this evidence (for example, surveillance reports or interview summaries.)

IV. Personnel Assigned

1. Special Agent
2. Regional Attorney
3. Technical Staff

Uniform Criminal Referral Package Format

Effective January 1, 1982, the following format should be used by all EPA offices in preparing criminal cases for referral to the Department of Justice. Obviously, organizational changes should be made where considered necessary to achieve an effective presentation of the facts or issues of an individual case. However, this format and the accompanying instructions reflect the subject matter that should be included in the package. If changes are made in the format, please be sure that required subject matter is not omitted in the process.

INTRODUCTORY SECTIONS

Title Page

Each referral package should carry a title page or cover sheet that includes:

- Identity of the company and/or primary individual subject(s) of the investigation;
- Federal district of the proposed referral;
- Identity, occupation, and telephone number of the Agency personnel who assisted in preparing the referral package; and
- Date of submittal of the report from the regional office.

Table of Contents

Each referral package should have a table of contents that includes the following sections:

		Page
I.	Introduction	.....
II.	Statutory Authority	.....
III.	Subject(s) of the Investigation	.....
IV.	Enforcement and Regulatory History	.....
V.	Description of the Evidence	.....

Page

VI. Legal Issues .....
VII. Environmental Impact .....
VIII. Recommendation .....
Appendix A. List of Witnesses.....
Appendix B. List of Exhibits .....
Appendix C. Exhibits .....

A discussion of each individual section follows.

Body of the Report

Section I--Introduction. The introduction will provide a synopsis of the investigation to orient the reader. It should be brief. A detailed discussion of the evidence will be provided in a subsequent section of the report.

Within the introduction, the following areas should be addressed:

- The identity of the corporate and individual subject(s) of the investigation;
- A brief description of the nature and duration of the criminal activity under investigation;
- Venue (i.e., the federal district(s) in which the offense occurred). If venue lies in more than one district, an explanation should be included for the Region's choice of one federal district over another for referral; and
- The regional recommendation underlying the referral.

Section II--Statutory Authority. This section should include the statutory provisions that provide the basis for the referral. Pertinent portions of each statute should be quoted in full, followed by a listing of the elements of each offense that must be provided in a subsequent prosecution.

Section III--Subjects of the Investigation. This section will be used to provide pertinent background data on the subjects of the referral. For each individual subject, the following minimum information should be included:

- Name and title;
- Approximate age;
- Home and work addresses;
- Nature of current employment; and
- Criminal record, if known.

For each corporate subject, include:

- Name of company and parent corporation, if appropriate;
- Complete address of company;
- Complete address of facility associated with offenses;
- State of incorporation of corporate subjects;
- Registered agent for service; and
- A brief statement of the business, profits, and size of the company.

Section IV--Enforcement and Regulatory History. This section should include a description of all known enforcement activity (state and federal) relating to environmental matters taken against the subject in the past. In addition, any previous efforts by EPA to remedy the present problem through informal, administrative, or civil means should be discussed.*

Finally, if the Region is recommending that the criminal referral be pursued simultaneously with a parallel civil/regulatory proceeding against the subject(s), this fact should be highlighted. The steps taken in the Region to ensure proper coordination and separation of the parallel proceedings should also be described.

Section V--Description of the Evidence. This section will constitute the major portion of the report. Its function is to present the results of the Region's investigative activity and to demonstrate how the criminal conduct uncovered in that investigation will be proved at trial.

Background. There is no one proper way to present the evidence. Any method that is clear and organized is acceptable. A chronological approach is recommended, however, both because it is simple to follow and because prosecutors often present their evidence before the grand jury and at trial within a chronological framework.

Regardless of the organization chosen, all substantial facts detailed in this section should be supported by some item of evidence--a witness interview, a letter from EPA correspondence files, an NPDES permit, results from a compliance inspection, technical analysis of a

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* Care should be taken while writing this report to avoid duplication. If facts relating to past regulatory or enforcement activity are discussed in subsequent sections (e.g., as evidence of a "willful" or "knowing" violation), only a brief summary should be included in this section.

pollutant sample, a photograph, etc. Copies of these items of evidence should be included, in turn, as exhibits to the litigation report, for easy reference by the reviewing personnel at EPA Headquarters, the Justice Department and the United States Attorneys Office.* The existence of evidentiary support for the factual allegations contained in the referral is crucial. The end goal of the referral process is a successful prosecution. The question is not, ultimately, what happened but whether it can be proved at trial.

Required Information. In completing Section V, the following items should be included (although not necessarily in separate portions of the section):

- A detailed review of all facts constituting the alleged criminal behavior. Speculation should be avoided. If the evidence currently available does not support one or more elements of the offense(s) under investigation, this should be highlighted, since this will assist in focusing future investigation by grand jury or otherwise;

- Any statements by the subject(s) of the investigation pertaining to the subject matter of the investigation. Written as well as oral statements should be included;

- Evidence indicating willful or knowing behavior by the investigative targets;

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* The following paragraph is an example of the chronological presentation of evidence supported by exhibits:

> On May 1, an NPDES permit was issued to Company X that contained the following provisions...(see Exhibit 1, NPDES permit). On May 5, the plant's waste treatment system ceased operation. (See Exhibit 2, Interview Report of Informant A.) At that time, Company X faced several imminent production deadlines. (See Exhibit 3, Sales Contract Between Company X and Company Y.) Production continued, resulting in the discharge of raw sewage between May 5 and July 5. (See Exhibit 4, Analytical Reports Provided by Former Chemist of Company X.) Discharge monitoring reports submitted by Company X for this period nevertheless falsely reported compliance. (See Exhibit 5, Company X DMRs.) Moreover, in response to an EPA inquiry, Company X reported the successful operation of its waste treatment system on July 1, almost two months after the breakdown. (See Exhibit 6, Letter, Company X to EPA.)

- Any facts that bear on the reliability of the available evidence. This might include, for example, equipment breakdowns during technical sampling, or prior inconsistent statements of a government witness. Ultimate conclusions should not be made on the reliability of a particular witness or piece of evidence in the report; rather, simply include all facts relevant in assessing the reliability; and

- A complete chronology of contacts between EPA and the subject(s) concerning the environmental problem underlying the referral.

Section VI--Legal Issues. In preparing a case for trial, the Justice Department's prosecutor will want to consider both the weaknesses in the government's case and the affirmative defenses available to the defendants. In completing this portion of the referral package, consider:

- Legal Defenses. This might include, for example, arguments that a discharge of pollution was not into a navigable water for the United States and therefore not regulated under the Clean Water Act; or that dumping activity did not involve a "hazardous waste" identified or listed under the Resource Conservation and Recovery Act.

- Evidentiary Challenges. This might include, for example, challenges to the methods used to obtain evidence, or to the government's ability to authenticate evidence due to a break in the chain of custody.

- Equitable Defenses. This might include, for example, EPA's vascillation of regulatory standards, the cost of compliance, labor difficulties at the facility, etc.

In completing this section, speculation should be avoided. Potential defenses should not be included unless there is some basis for their assertion under the facts of the case.

Section VII--Environmental Impact. This section should provide an assessment of the significance of the environmental harm or human health hazard resulting from the conduct under investigation. Precise statements in this area are not essential elements of most criminal offenses and will often be difficult to support scientifically. When the investigation focuses on historical rather than ongoing conduct, or involves falsified technical documents, the task becomes even more difficult. Normally, however, an educated estimate--based on the type of pollutant involved, the location, and normal operating capacity of the facility--can be made. Where this is possible, the information will provide one significant basis for assessing the gravity of the misconduct.

Section VIII--Recommendation. The report should conclude with a specific recommendation for the appropriate future course of the case. Normally, one of two recommendations will be made:

- o Further Investigation. Where the use of an investigative grand jury is contemplated (for example when witnesses are not talking and compulsory process is required), the referral will recommend further investigation. In this situation, an additional recommendation for prosecution may or not be appropriate. If the evidence in hand provides an adequate basis on which to base such a judgment, a recommendation for prosecution under specific statutory provisions should be included. If the available evidence is not sufficient, a prosecutorial recommenation should be withheld pending completion of the grand jury work and consideration of the results.

- o Prosecution. If the field investigation is complete, the conduct has been documented, and grand jury work is required--if at all--only to present the evidence and secure an indictment, the referral should include a recommendation for prosecution under specific statutory provisions.

Following the specific recommendation, the report should include the best available projection of resources necessary to bring the case to resolution. This projection should discuss investigative, technical, and legal resources and should indicate the Regional Office's ability to provide these resources.

Appendix A--List of Witnesses. This section is particularly useful to prosecutors supervising the case and will frequently be used in issuing subpoenas, planning a grand jury presentation, and estimating the scope of the prosecution. For each witness, the writer should provide all available background data (e.g., name, residence, work address, telephone numbers, etc.) and a brief summary (one paragraph) of the matters on which testimony is anticipated. This section should include not only the key substantive witnesses, but also those who will establish the appropriate foundation for documentary or physical evidence (e.g., photographers, chain of custody record custodians, etc.). Confidential informants should not be identified in this list.

Appendices B and C--List of Exhibits and Exhibits. Copies of every substantial piece of documentary evidence in the case should be included as an exhibit to the report* and should be indexed to allow

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* Exceptions will be made if the exhibit is too bulky or otherwise inappropriate for inclusion in the report. Pollution samples, for example, will remain with the Regional Offices; however, copies of reports reflecting their analysis should be included where possible.

for easy reference in the main body of the report. Original exhibits or documents should not be included in the referral package if this can be avoided. They will normally be used as evidence in trial, and should be retained in the Regional Office until other arrangements are made with the Justice Department prosecutor supervising the case.

Chapter Ten

Post-Settlement Enforcement

Chapter Contents

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Post-Settlement Enforcement

Monitoring Settlement Agreements

The Agency often settles an administrative civil penalty action with a violator prior to the actual hearing, thus obviating the need for costly litigation. Such settlements under TSCA take the form of either consent agreements and consent orders or settlements with conditions (SWC).*

Consent agreement negotiations focus primarily on the appropriate size of the penalty to be imposed on the violator. Adjustments to the penalty are made by considering such factors as the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Remedial performance as a means of remitting a civil penalty assessment is generally not used in the context of a TSCA consent agreement and consent order. However, remedial performance and the remittance of all or part of an assessed penalty is permitted under an SWC.

In order to ensure continued compliance with TSCA as well as with the terms of the consent agreement and consent order or SWC, the Agency performs post-settlement monitoring, which includes:

- Follow-up inspections as a part of routine assignments under a neutral inspection scheme,
- Follow-up inspections as part of an SWC agreement; and
- Ensurance that the violator has paid the stipulated civil penalty.

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* An SWC involves the use of a remittance agreement (compliance program and schedule) and a remittance order in addition to a consent agreement and consent order. (See Appendix 4, "Settlement With Conditions", for guidance on the use of SWC.)

Enforcement of Settlement Agreements

Collecting fines that have been imposed under the terms of a consent agreement and consent order should be followed up on a timely basis by government personnel. The procedures and policies for collection action referrals to the United States Attorneys Office are set forth in Appendix 1.

Enforcement of SWC agreements must be done in accordance with the procedures contained in the SWC guidance (Appendix 4).

Follow-up inspections that reveal continuing violations of a settlement agreement could subject the violator to additional civil penalty actions, to civil court actions, or to possible criminal sanctions. (Consult Chapter Five for the level of action guidance appropriate in these situations.)

Chapter Eleven

Special Considerations

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Chapter Eleven

Special Considerations

TSCA Confidential Business Information

Compliance/enforcement personnel will, on occasion, need to review and use information that is entitled to confidential treatment under Section 14 of TSCA and the EPA regulations at 40 C.F.R. Part 2. That section of the statute and the regulations protect confidential business information (CBI)* from unauthorized disclosure. Material that is designated as CBI includes information considered to be trade secrets that could damage a company's competitive position if such information became publicly known. Because CBI may be used as part of an active enforcement case, the following section on confidentiality and disclosure of information is included in this manual. For a complete guide to TSCA CBI procedures, consult the TSCA Confidential Business Information Security Manual.

Authority

Section 14(a) of TSCA states that any information reported to, or otherwise obtained by, the Administrator (or any representative of the Administrator) under TSCA and that is exempt from disclosure under the Freedom of Information Act [Subsection (b)(4), 5 U.S.C. §552], shall not be disclosed by the Administrator or by any officer or employee of the United States, except that such information may be disclosed:

- To any officer or employee of the United States in connection with the official duties of such officer or employee under any law for the protection of human health or the environment or for specific law enforcement purposes [TSCA §§14(a)(1)(A) and 14(a)(1)(B)];

- To contractors with the United States if the Administrator determines that such disclosure is necessary for the satisfactory performance by the contractor of a contract with the United States [TSCA §14(a)(2)];

* TSCA CBI material does not in any manner refer to classified National Security Information as defined in Executive Order 12065.

- If the Administrator determines it necessary to protect human health or the environment against an unreasonable risk of injury [TSCA §14(a)(3)]; or

- When relevant in any proceeding under TSCA, except that such disclosure is to be made in a manner that will preserve confidentiality to the extent practicable without impairing the proceeding [TSCA §14(a)(4)]. [See Section 22.22(a) of the Consolidated Rules of Practice and Section 26(c) of the Federal Rules of Civil Procedure.]

Section 14(b) of TSCA states that Section 14(a) does not prohibit the disclosure of:

> (A) any health and safety study which is submitted under this Act with respect to--
>
> (i) any chemical substance or mixture which, on the date on which such study is to be disclosed has been offered for commercial distribution, or
>
> (ii) any chemical substance or mixture for which testing is required under section 4 or for which notification is required under section 5, and
>
> (B) any data reported to, or otherwise obtained by, the Administrator from a health and safety study which relates to a chemical substance or mixture described in clause (i) or (ii) of subparagraph (A).

However, Section 14(b) does not authorize the release of any data that discloses processes used in the manufacturing or processing of a chemical substance or mixture, or, in the case of a mixture, the release of data disclosing the portion of the mixture comprised by any of the chemical substances in the mixture.

Section 14(c) of TSCA, in conjunction with 40 C.F.R. Part 2, specifies the requirements and procedures for the designation of information as confidential, as well as the notification requirements that must be met prior to the release of any information so designated.

Penalties

Section 14(d)(1) of TSCA specifies the penalties that may be assessed against any person who knowingly and willfully discloses confidential information contrary to the provisions of the Act. Section 14(d)(1) states:

> Any officer or employee of the United States or former officer or employee of the United States, who by virtue of such employment or official position has obtained possession of, or has access to, material the disclosure of which is prohibited by subsection (a), and who knowing that disclosure of such material is prohibited by such subsection, willfully discloses the material, in any manner to any person not entitled to receive it, shall be guilty of a misdemeanor and fined not more than $5,000 or imprisoned for not more than one year, or both. Section 1905 of title 18, United States Code, does not apply with respect to the publishing, divulging, disclosure, or making known of, or making available, information reported or otherwise obtained under this Act.*

Section 14(d)(2) of TSCA states that for the purpose of imposing criminal liability under Section 14(d)(1), any contractor or any employee of such contractor, who is furnished confidential information, is considered to be an employee of the United States.

Document Control

Procedures for gaining access to CBI documents, and procedures relating to the use of CBI material in case preparation, administrative hearings, and civil and criminal actions, are briefly outlined below. However, the TSCA Confidential Business Information Security Manual should be referenced in all matters pertaining to document control.

Access to CBI Documents. Only those individuals whose names appear on the TSCA Authorized Access List may have access to TSCA CBI. The following steps must be taken to apply for inclusion on the list:

- Section II (Confidentiality Agreement for EPA Employees) of the Authorization Form 7740-6 (Exhibit 1) must be signed by the individual seeking access;**
- Section I (Request for TSCA-CBI Access Approval) of the Authorization Form must be completed and signed by the appropriate authorizing official. An authorizing official must be equivalent to a supervising Division Director, or above, and the official may

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* In addition to these criminal penalties, EPA employees who violate CBI procedures may be subject to disciplinary action in accordance with the procedures detailed in the EPA Conduct and Discipline Manual.

** A different form (see EPA form 7740-7) is used to apply for access to computer systems that process or store TSCA CBI.

only authorize those employees under his or her supervision. In facilities where there is no Document Control Officer (DCO) or Document Control Assistant (DCA), the authorizing official must also execute Section I of the Authorization Form (cross out "DCO" and insert proper title);

- The Authorization Form must be taken to the local DCO or DCA who will certify (by signing and dating Section IV) that all necessary forms have been completed and forwarded to the Security, Management Support Division, EPA Headquarters. (For all employees with permanent appointments or those with temporary appointments of 700 hours or more per annum, and those employees who require full field investigation, the local DCO/DCA may assume that the proper forms were completed at the time of employment.);

- The local DCO/DCA will keep the original of the Authorization Form and send a copy within 10 days to the Chief, Security, Management Support Division: and

- Upon completion of the security processing, the local DCO/DCA will be notified that the employee's name has been placed on the Authorized Access List. The local DCO/DCA will then notify the individual.

Summer EPA employees of four months or less and temporary or seasonal employees limited to three months cannot be processed for access to TSCA CBI without written authorization of the Chief, Security, Management Support Division. Division Directors (or equivalent) must submit a "Request for Approval of Temporary Employee for Access to TSCA/CBI" form to the Management Support Division prior to submission of the required investigative forms.

Obtaining CBI. To obtain a document containing TSCA CBI, the authorized person must request the document from the appropriate DCO/DCA, who will verify that the requester is on the TSCA CBI Authorized Access List. The DCO/DCA will then obtain the document from either local secure storage, another DCO, or an authorized computer facility.

If the requester has access to an acceptable and secure storage cabinet, the individual may check the document out for a maximum of 90 days, renewable at the discretion of the DCO/DCA; otherwise, the document must be returned to the DCO/DCA by close of business the same day it is logged out.

The DCO/DCA will enter the appropriate information in the User Sign Out Log and will ensure that the document has a document control number, a cover sheet, and, at a minimum, a CBI stamp on the first page and on the back of the last page, before releasing the document.

Use of CBI in Case Preparation. In reviewing an inspection file and in the course of case preparation, compliance/enforcement personnel may require access to CBI.

An inspection file may contain a CBI inspection file, which includes information that was gathered during a TSCA inspection and has been declared TSCA CBI. When an inspector returns from an inspection with information that has been declared confidential, the information is immediately given to the DCO, who assigns a document control number to the confidential material. In addition, the inspector informs the DCO of any physical samples that have been declared confidential. Such samples are assigned a document control number by the DCO who, in turn, notifies the laboratory of this number. (The document control number is used by laboratory personnel in completing the sample chain-of-custody and laboratory analysis forms.) The CBI file may also contain the inspection report if the inspector chose to include CBI information on the report. Once the CBI material has been logged in by the DCO, review of the file must be done in accordance with TSCA CBI security procedures.

Compliance/enforcement personnel, when preparing their report based on review of the inspection file, should either:

- Reference TSCA CBI material in a nonconfidential manner or by Document Control Numbers; or

- Include the CBI material in their report (in which case the entire report must be treated as a confidential document).

In preparing a complaint or other pleading that is based in total, or in part, on CBI material, compliance enforcement personnel should prepare the pleading so that it consists of a confidential and a nonconfidential document. The nonconfidential document should be drafted so as to state the charge or substance of the pleading without disclosing the confidential information (see Exhibit 2). The confidential document should contain the CBI material, and the document must be treated in accordance with TSCA CBI security procedures.

Special procedures must be used when filing a complaint or other pleading that contains CBI. For example, when filing a CBI complaint, both the CBI document and the public (non-CBI document) must be hand-delivered to the Hearing Clerk for simultaneous filing. Copies of the complaint may be made after the original pleading has been stamped in by the Hearing Clerk. This ensures that the date and time of filing is reflected on each subsequent copy. The Document Control Officer must then give each confidential copy, excluding the respondent's copy, a document control cover sheet and a copy number. The original CBI complaint remains with the Hearing Clerk, who executes a TSCA CBI loan receipt.

EPA delivers a copy of the CBI complaint to the respondent by placing the document in an envelope bearing the respondent's name and mailing address and the statement "TSCA CBI: To Be Opened By Addressee Only." This envelope, plus a copy of the public non-CBI complaint, is then placed in another envelope bearing the respondent's name and mailing address, but without the statement. The entire package is to be sent by registered mail, return receipt requested.

Use of CBI in Administrative Hearings. Section 14(a)(4) of TSCA states that confidential information may be disclosed when it is relevant to any proceeding under the Act provided that such disclosure shall be made in a manner so as to protect, to the extent practicable, the confidentiality of the information without impairing the proceeding. In addition, Section 22.22(a) of the Consolidated Rules of Practice (CROP), which govern TSCA administrative hearing proceedings, provides that the confidentiality of trade secrets and other commercial and financial information shall not preclude such information from being introduced into evidence. Under the CROP, the Presiding Officer may make such orders as may be necessary to consider such evidence in camera (i.e., in chambers; in private), including the preparation of a supplemental initial decision to address questions of law, fact, or discretion arising out of that portion of the evidence that is confidential.

Use of CBI in Civil and Criminal Proceedings. The Department of Justice represents EPA in most civil and all criminal actions. Department of Justice employees may be furnished TSCA CBI when prosecuting cases under the Act or providing legal assistance to EPA. The Department of Justice, including the FBI, shall be presumed to meet EPA's security requirements. However, any transfer of TSCA CBI documents from EPA to the Department of Justice must be accomplished through an EPA DCO/DCA, and all requirements for security of CBI during transmission must be met. Authorized EPA employees, when necessary and with permission of a Division Director or above, may discuss TSCA CBI with appropriate Department of Justice employees, whether in person or on the phone. Any TSCA CBI discussed must be clearly identified as such.

Determining Confidentiality

EPA's Freedom of Information Act (FOIA) regulations (40 C.F.R. Part 2 Subpart B) contain a procedure for determining whether information is confidential.

Under this procedure, if information submitted to EPA has been claimed as TSCA CBI, the information may not be disclosed to the public until a determination has been made that the information is not confidential, the affected business has been given 30 days' notice of the determination, and the affected business has been given an opportunity to challenge the decision. Final determinations are made by the Office of General Counsel; however, program offices may make initial determinations (see 40 C.F.R. §2.204). If the program office makes the determination that the information may be entitled to confidential treatment, the office must:

- Deny any FOIA request for the information;
- Write to the affected business requesting substantiation of its claim; and
- Refer the matter to the EPA General Counsel's Office for a final confidentiality determination.

If the program office determines that the information in question is clearly not entitled to confidential treatment, the program office must give notice of the decision to the affected business and, after the notice period ends, disclose the information to the requestor.

Disclosure of Confidential Information

Under certain circumstances, EPA may disclose TSCA CBI to specific persons outside the Agency. These disclosures include disclosures to Congress or the Comptroller General [TSCA §14(e) and 40 C.F.R. §2.209(b)], disclosures to other federal agencies [40 C.F.R. §§2.209(c) and 2.306(h)], disclosures to federal courts [40 C.F.R. §2.209(d)], disclosures to contractors [TSCA §14(a)(2) and 40 C.F.R. §2.306(j)], and disclosures when necessary to protect human health or the environment against an unreasonable risk of injury [TSCA §14(a)(3) and 40 C.F.R. §2.306(k)].

Request for TSCA-CBI Access Approval

I. REQUEST FOR TSCA-CBI ACCESS APPROVAL

1. REQUESTING COMPONENT *(Office/Division/Branch)*	2. DCO & PHONE NUMBER

3. FULL NAME *(Last, first, middle)*	4. SOCIAL SECURITY NUMBER	5. LOCATION/CONTRACTOR
6. DATE OF BIRTH *(Month/day/year)*	**7. PLACE OF BIRTH** *(City, State)*	**8. CLEARANCE REQUESTED** *(DDO, DCA, ADP, General Access)*
9. POSITION	**10. PHONE NUMBER**	**11. PREVIOUS CBI CLEARANCE**
		☐ Yes ☐ No — TYPE:
12. TSCA CBI SECURITY BRIEFING DATE	**13. FORMS ATTACHED** ☐ SF 86 (Category II & III) ☐ EPA Form 1480-29 (Category I) ☐ OPM 67 ☐ OPM 329-A ☐ Other *(Specify)*	

14. OTHER CLEARANCES *(Current or past)*

Clearances	Dates	Sponsoring Agency

An authorizing official *(Division Director at Headquarters, Regional Administrator or Laboratory Director in the Field, or Contractor Project Officer)* must sign this section.

SIGNATURE AND TITLE OF REQUESTING OFFICIAL	DATE

II. CONFIDENTIALITY AGREEMENT

I understand that I will have access to certain Confidential Business Information submitted under the Toxic Substances Control Act (TSCA) 15 USC 2601 *et seq.* This access has been granted in accordance with my official duties relating to the Environmental Protection Agency programs.

I understand that TSCA CBI may not be disclosed except as authorized by TSCA and Agency regulations. I understand that under section 14(d) of TSCA (15 USC 2613(d)) I am liable for a possible fine of up to $5,000 and/or imprisonment for up to one year if I willfully disclose TSCA CBI to any person not authorized to receive it. In addition, I understand that I may be subject to disciplinary action for violation of this agreement with penalties ranging up to and including dismissal.

I agree that I will treat any TSCA CBI furnished to me as confidential and that I will follow the procedures set forth in the *TSCA Confidential Business Information Security Manual*.

I have read and understand the procedures.

SIGNATURE	DATE

III. REQUIREMENTS

☐ FFI ☐ NACI ☐ NAC ☐ Pending ☐ OPM ☐ DISCO

SUBMITTED	COMPLETED	APPROVED
		☐ Yes ☐ No

APPROVED BY	DATE

EPA Form 7740-6 (6-83) Replaces EPA Form 7710-47, which is obsolete.

Sample CBI Complaint (With CBI Deleted)*

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re:	)	Docket No. TSCA-H-83-18
	)	
	)	
Firetog Industries, Inc.	)	COMPLAINT
36 Sunshine Drive	)	AND
Clark, MA 02856	)	NOTICE OF OPPORTUNITY
	)	FOR HEARING
Respondent	)	
	)	

Notice of Treatment of Confidential Business Information

Portions of this complaint require use of information that respondent submitted to the United States Environmental Protection Agency as Confidential Business Information (CBI). Information in the complaint constituting or based on CBI has been deleted as indicated by the following: (CBI deleted). The original complaint, which is filed with the Headquarters Hearing Clerk and contains the CBI information, will be treated as confidential unless and until respondent waives confidentiality thereto or the Agency releases the information in accordance with 40 C.F.R. Part 2.

COMPLAINT

This civil penalty action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency by Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (hereinafter referred to as "the Act" or "TSCA"). The complainant is A. E. Conroy II, Director of the Compliance Monitoring Staft, Office of Pesticides and Toxic Substances, United States Environmental Protection Agency, who has been duly authorized to institute this action. The respondent in this action is Firetog Industries, Inc.

Allegations or Counts

This is to notify you that there is reason to believe that respondent has violated Section 15 of TSCA in that respondent manufactured and used for commercial purposes a chemical substance in violation of of Section 5 of the Act. The complainant alleges that the violations occurred in the following manner:

* Note: This sample complaint would be part of the public record.

Count 1

1. On September 18, 1983, respondent submitted to the United States Environmental Protection Agency (EPA) production records revealing that respondent manufactured (CBI deleted).

2. Inspection of respondent's production records revealed that respondent manufactured approximately (CBI deleted).

3. Inspection of respondent's production records revealed that respondent manufactured a total of (CBI deleted).

4. Respondent has stated to EPA that (CBI deleted) was processed into a product that was distributed in commerce.

5. The (CBI deleted) does not appear on the TSCA chemical substance inventory.

6. Respondent failed to submit a notice to the Administrator of EPA of its intention to manufacture the (CBI deleted).

7. Section 5(a)(1) of TSCA states that no person may manufacture a chemical substance that does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing such substance.

8. Section 15(1)(B) of TSCA states that it is unlawful for any person to fail or refuse to comply with any requirement prescribed by Section 5 or 6 of TSCA; Section 15(3)(B) of TSCA states that it is unlawful for any person to fail or refuse to submit reports, notices, or other information as required by TSCA or a rule thereunder.

9. The conduct described in Paragraphs 2 through 6 above constituted a violation of Sections 15(1)(B) and 15(3)(B) of TSCA in that respondent failed to submit a notice to the Administrator of EPA, as required by Section 5(a)(1) of the Act, before respondent manufactured (CBI deleted).

Count 2

1. On September 18, 1983, respondent submitted production records to EPA revealing that respondent used (CBI deleted) in the production of (CBI deleted).

2. Inspection of respondent's production records revealed that respondent used (CBI deleted).

3. Inspection of respondent's production records revealed that respondent used (CBI deleted).

4. Respondent has stated to EPA that (CBI deleted) was distributed in commerce.

5. The (CBI deleted) used in the production of the (CBI deleted) does not appear on the TSCA chemical substance inventory.

6. Respondent failed to submit a notice to the Administrator of EPA of respondent's intention to manufacture the (CBI deleted).

7. Section 15(2) of TSCA states that it is unlawful for any person to use for commercial purposes a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6.

8. The conduct described in Paragraphs 2 through 6 above constitutes violation of Section 15(2) of TSCA in that respondent used for commercial purposes (CBI deleted) that respondent knew or had reason to know was manufactured in violation of Section 5 of the Act.

Proposed Civil Penalty

In arriving at the assessment of the penalty specified below, EPA, as required by Section 16(a)(2)(B) of TSCA [15 U.S.C. §2625(a)(2)(b)], has taken into consideration the following factors:

- The nature, circumstances, extent, and gravity of the violations; and
- The respondent's ability to pay, ability to continue to do business, history of prior violations, degree of culpability, and other matters as justice may require.

Based on the above considerations, EPA proposes to assess the following penalty against Firetog Industries, Inc.:

Count 1

Failure to notify of intention to manufacture a chemical substance not on the TSCA inventory	$275,000

Count 2

Use of an illegally manufactured substance for commercial purposes	$710,000
Total Penalty Assessment	$985,000

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

This administrative civil penalty proceeding will be conducted pursuant to the Consolidated Rules of Practice (CROP) [40 C.F.R. §22.01 et seq.], a copy of which accompanies this complaint. Pursuant to the CROP, you have the right to request a hearing to contest any factual allegation set forth in the complaint or the appropriateness of the proposed penalty. In the event that you wish to request a hearing and to avoid having the above penalty assessed without further proceedings, you must file a written answer to this complaint with the Headquarters Hearing Clerk (A-110), United States Environmental Protection Agency, 401 M Street, S.W., Room 3706, Washington, D.C. 20460.

If you do not request a hearing or file a written answer within 20 days of receipt of this complaint, the above penalty will be assessed without further proceedings, and you will be notified.

Settlement Conference

The Environmental Protection Agency encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning (1) whether the alleged violations in fact occurred as set forth above, or (2) the appropriateness of the proposed penalty in relation to the size of your business, the gravity of the violation, and the effect of the proposed penalty on your ability to continue in business. The request for an informal conference does not stay the running of the 20-day time period for requesting a hearing and filing an answer. To explore the possibility of settlement in this matter, contact Mr. K. Jackson, Office of Enforcement and Compliance Monitoring, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, telephone (202) 690-9680.

_____

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Date: _____ At: _____

Enclosures: TSCA
Consolidated Rules of Practice (CROP)

Sample CBI Complaint (With Hypothetical CBI Included)

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In re:	)	Docket No. TSCA-H-83-18
	)	
	)	
Firetog Industries, Inc.	)	COMPLAINT
36 Sunshine Drive	)	AND
Clark, MA 02856	)	NOTICE OF OPPORTUNITY
	)	FOR HEARING
Respondent	)	
	)	

COMPLAINT

This civil penalty action is instituted pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency by Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (hereinafter referred to as "the Act" or "TSCA"). The complainant is A. E. Conroy II, Director of the Compliance Monitoring Staff, Office of Pesticides and Toxic Substances United States Environmental Protection Agency, who has been duly authorized to institute this action. The respondent in this action is Firetog Industries, Inc.

Allegations or Counts

This is to notify you that there is reason to believe that respondent has violated Section 15 of TSCA in that respondent manufactured and used for commercial purposes a chemical substance in violation of Section 5 of the Act. The complainant alleges that the violations occurred in the following manner:

Count 1

1. On September 18, 1983, respondent submitted to the United States Environmental Protection Agency (EPA) production records revealing that respondent manufactured at its Toledo Pilot Plant and its Clark Pilot Plant, the chemical substance, Heatherstone X.

2. Inspection of respondent's production records revealed that respondent manufactured approximately 175 pounds of Heatherstone X on each of the following dates at its Toledo Pilot Plant--8/9/82, 9/15/82, 10/11/82, and 11/2/82.

3. Inspection of respondent's production records revealed that respondent manufactured a total of 35,000 pounds of Heatherstone X on each of the following dates at its Clark Pilot Plant--1/3/83, 2/4/83, 5/6/83, and 9/1/83.

4. Respondent has stated to EPA that Heatherstone X, manufactured at both the Toledo Pilot Plant and the Clark Pilot Plant, was processed into a product that was distributed in commerce.

5. Heatherstone X does not appear on TSCA chemical substance inventory.

6. Respondent failed to submit a notice to the Administrator of EPA of its intention to manufacture Heatherstone X.

7. Section 5(a)(1) of TSCA states that no person may manufacture a chemical substance that does not appear on the TSCA chemical substance inventory without submitting a notice to the Administrator of EPA at least 90 days before manufacturing such substance.

8. Section 15(1)(B) of TSCA states that it is unlawful for any person to fail or refuse to comply with any requirement prescribed by Section 5 or 6 of TSCA; Section 15(3)(B) of TSCA states that it is unlawful for any person to fail or refuse to submit reports, notices, or other information as required by TSCA or a rule thereunder.

9. The conduct described in Paragraphs 2 through 6 above constituted a violation of Sections 15(1)(B) and 15(3)(B) of TSCA in that respondent failed to submit a notice to the Administrator of EPA, as required by Section 5(a)(1) of the Act, before respondent manufactured Heatherstone X.

Count 2

1. On September 18, 1983, respondent submitted production records to EPA revealing that respondent used Heatherstone X in the production of plastic products at its Toledo Pilot Plant and its Clark Pilot Plant.

2. Inspection of respondent's production records revealed that respondent used Heatherstone X in the production of plastic on the following dates at its Toledo Pilot Plant--10/1/82, 11/6/82,and 12/1/82.

3. Inspection of respondent's production records revealed that respondent used Heatherstone X in the production of plastic on the following dates at its Clark Pilot Plant--2/6/83 and 3/3/83.

4. Respondent has stated to EPA that the plastic product was distributed in commerce.

5. Heatherstone X used in the production of the plastic product does not appear on the TSCA chemical substance inventory.

6. Respondent failed to submit a notice to the Administrator of EPA of respondent's intention to manufacture Heatherstone X.

7. Section 15(2) of TSCA states that it is unlawful for any person to use for commercial purposes a chemical substance or mixture that such person knew or had reason to know was manufactured, processed, or distributed in commerce in violation of Section 5 or 6.

8. The conduct described in Paragraphs 2 through 6 above constitutes a violation of Section 15(2) of TSCA in that respondent used for commercial purposes Heatherstone X that respondent knew or had reason to know was manufactured in violation of Section 5 of the Act.

Proposed Civil Penalty

In arriving at the assessment of the penalty specified below, EPA, as required by Section 16(a)(2)(B) of TSCA [15 U.S.C. §2625(a)(2)(b)], has taken into consideration the following factors:

- The nature, circumstances, extent, and gravity of the violations; and
- The respondent's ability to pay, ability to continue to do business, history of prior violations, degree of culpability, and other matters as justice may require.

Based on the above considerations, EPA proposes to assess the following penalty against Firetog Industries, Inc.:

Count 1

Failure to notify of intention to manufacture a chemical substance not on the TSCA inventory	$275,000

Count 2

Use of an illegally manufactured substance for commercial purposes	$710,000
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This administrative civil penalty proceeding will be conducted pursuant to the Consolidated Rules of Practice (CROP) [40 C.F.R. §22.01 et seq.], a copy of which accompanies this complaint. Pursuant to the CROP, you have the right to request a hearing to contest any factual allegation set forth in the complaint or the appropriateness of the proposed penalty. In the event that you wish to request a hearing and to avoid having the above penalty assessed without further proceedings, you must file a written answer to this complaint with the Headquarters Hearing Clerk (A-110), United States Environmental Protection Agency, 401 M Street, S.W., Room 3706, Washington, D.C. 20460.

If you do not request a hearing or file a written answer within 20 days of receipt of this complaint, the above penalty will be assessed without further proceedings, and you will be notified.

Settlement Conference

The Environmental Protection Agency encourages all parties against whom a civil penalty is proposed to pursue the possibility of settlement as a result of informal conferences. Therefore, whether or not you request a hearing, you may confer informally with the Agency concerning (1) whether the alleged violations in fact occurred as set forth above, or (2) the appropriateness of the proposed penalty in relation to the size of your business, the gravity of the violation, and the effect of the proposed penalty on your ability to continue in business. The request for an informal conference does not stay the running of the 20-day time period for requesting a hearing and filing an answer. To explore the possibility of settlement in this matter, contact Mr. K. Jackson, Office of Enforcement and Compliance Monitoring, United States Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, telephone (202) 690-9680.

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Date: _____ At: _____

Enclosures: TSCA
Consolidated Rules of Practice (CROP)

CERTIFICATE OF SERVICE

The undersigned certifies that on _____(date)_____, copies of the foregoing complaint and notice of opportunity for hearing were served on the following individual(s) by placement in the EPA mailroom at 401 M Street, S.W., Washington, D.C. 20460 to be mailed by registered mail, return receipt requested:

Respondent Name
Company
Street Address
City, State, Zip Code

(Signature of Document Control Officer)
Name
Document Control Officer
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

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1 Collection of Civil Penalty Assessments

Authority

Upon nonpayment of a civil penalty within the prescribed time periods, Section 16(a)(4) of the Act specifies that the matter be referred to the Attorney General for collection. In such an action to recover the assessed civil penalty, the validity, amount, and appropriateness of such penalty is not subject to review.

However, before any referral to the Attorney General, the Agency must satisfy the directives and standards for collection set forth in the Federal Claims Collection Act (31 U.S.C. §§951-953) and the Federal Claims Collection Standards (FCCS, 4 C.F.R. §§101-105, Exhibit A-1).

In general, the procedures in the FCCS are mandatory, but the failure of the Agency to comply with any provision of the standards will not be available as a defense to any party in a subsequent action for collection.

Policy

Under the FCCS, the Agency is held to a policy standard of aggressive collection action, on a timely basis, and with effective follow-up of all civil penalty assessments.

Collection Procedures

Written Demands for Payment

The FCCS require that the Agency make three written demands, at 30-day intervals, on the respondent in terms that inform the debtor of the consequences of failing to cooperate.

The Agency's policy is to initiate the written demands concurrent with the issuance of a final order so that the third and final demand will be made on the same day the payment period elapses (i.e., 60 days after issuance of a final order).

Upon the Issuance of the Final Order. At the time that a final order is issued and served on the respondent, he or she should receive a written demand for any payment of such penalty and the length of time in which he or she has to pay it. Such notice should also inform the respondent of the consequences of failing to cooperate.

Thirty Days After Issuance of the Final Order. After 30 days have elapsed, even though the payment period has not expired, the Agency will again serve on the respondent a demand for the payment and again warn the respondent of the consequences of failing to pay (Exhibit A-2). Given the possibility that the payment may be in the mail when this second warning is sent, the Agency should also make a brief apologetic statement informing respondent to disregard the warning if the payment has been sent.

Sixty Days After the Issuance of the Final Order. The respondent must pay the civil penalty 60 days after the service of a final order unless a motion to reconsider has been made or judicial review of the final order has been sought. Subject to those two exceptions, if payment of the penalty has not been tendered at the end of the 60-day period, the Agency will send a final demand to the respondent for payment of the delinquent civil penalty assessment. This letter should be written to inform the respondent that unless payment is tendered within 15 days, the penalty will be referred to the United States Department of Justice or the United States Attorneys Office for collection in a district court. The letter should state that such action is routinely accomplished through a motion for summary judgment in favor of the United States and that the respondent will be barred from raising any issues as to fact or law that should have been raised in the administrative proceeding (Exhibit A-3).

Follow-up to Final Demand for Payment

Section 102.6 of the FCCS dictates that the Agency undertake personal interviews with the debtors when it is feasible, having regard for the amounts involved and the proximity of Agency representatives to such debtors.

It is PTSCMS policy to arrange personal interviews if it is feasible and convenient for the regional officials involved in the case. In the absence of a personal interview, the Regional Office should at least establish telephone contact with the respondent to urge prompt payment of the claim and to personally warn the respondent of the consequences of failing to pay the penalty.

Good faith inability to arrange a personal interview or to establish telephone contact with the respondent should not deter the Regional Office from referring claims to the United States Attorneys Office for collection.

Documentation of Collection Efforts

The Agency should record and maintain a file of all collection efforts and activities prior to referral.

Types and Methods of Payment

Full Payment

The most preferable method of collection is a check for the full amount owed, payable to the Treasurer of the United States. Such payment should be delivered to the Regional Hearing Clerk for the Region in which the final order was issued.

Collection Installments

Section 102.10 of the FCCS provides for installment payments. This type of payment should be used when the respondent has demonstrated and documented an inability to pay the penalty in a lump sum.

Because Section 16(a)(2)(B) of TSCA requires a consideration of ability to continue in business in assessing the penalty, this installment provision should rarely be needed as the issue will have been resolved previously.

In the event that installment payments are justified and allowed, such payments shall:

- Be on a regular basis;
- Bear a reasonable relation to the size of the debt and the debtor's ability to pay;
- Be sufficient in size and frequency to liquidate the claim in not more than three years; and
- Be no less than $10 except under the most unusual circumstances.

In allowing a respondent to pay by installment, the regional attorney should attempt to obtain an executed confess-judgment note, comparable to the Department of Justice Form USA-70a.

The Agency may accept installment payments notwithstanding the refusal of the respondent to execute a confess-judgment note.

Compromise of the Penalty

The FCCS provide for compromising claims when it can be assured that the respondent's financial ability will not permit payment of the claim in full

or when the litigative risks or the costs of litigation dictate such action.

It is the express policy of PTSCMS that penalty assessments in final orders shall not be subject to compromise except under the most unusual circumstances. For the most part, TSCA requires that ability to pay be considered before a civil penalty is imposed; therefore, the inability to pay the penalty should not be an issue in the post-final order stage of the civil penalty proceeding. However, inability to pay should be considered where:

- The civil penalty was assessed by default, so that the respondent's ability to pay was never confirmed by the respondent in determining the amount of the penalty; or

- The respondent's financial condition has deteriorated dramatically since the time the penalty was assessed. The Agency should be alert to the possibility that assets have been fraudulently concealed or improperly transferred. The burden falls upon the respondent to affirmatively demonstrate and document any such inability.

Section 103.5 of the FCCS provides that, where an enforcement policy is concerned, a penalty should only be compromised if the sum to be agreed upon will adequately serve the Agency's enforcement policy in terms of deterrence and securing compliance.

For this reason, and for the reason that a respondent usually has already had an opportunity for settlement, the compromise provision should be rarely exercised.

In the event such a compromise is effected, it must be authorized by the Regional Administrator for it has the effect of altering the final order.

Suspension or Termination of Collection Activity

Suspension

The Agency may temporarily suspend collection action for payment of a penalty when the respondent cannot be located after a diligent search and/or when future collection prospects seem more promising than present actions.

Section 104.2 of the FCCS provides a partial listing of sources that may be helpful in locating missing respondents. Efforts should be made to avoid any applicable statute of limitations.

Termination

Collection action may be terminated and the Agency's file on the penalty closed under the following conditions:

- Inability to collect any substantial amount;
- Inability to locate debtor;
- Cost will exceed recovery;
- Claim legally is without merit; or
- Claim cannot be substantiated by evidence.

Section 104.3 of the FCCS provides further information on termination of claims.

Referral Procedures

General

Claims on which aggressive collection action has been taken and that cannot be compromised will be referred to the Department of Justice or the United States Attorneys Office. Such referrals should be made as early as possible consistent with the aggressive Agency collection action and the standards for collection set forth in the FCCS.

Referral Parties and Minimum Amounts

Department of Justice. All penalty assessments in the amount of $10,000 or greater should be referred to the Department of Justice.

United States Attorneys Office. All penalty claims in amounts less than $10,000 should be referred to the appropriate United States Attorneys Office.

When referring a claim of less than $600 for collection, the Regional Office must emphasize to the United States Attorney that the referral is important to a significant enforcement policy.

Procedures for a Proper Referral

The regional attorney should prepare the Claims Collection Litigation Report (CCLR) for the United States Attorney consistent with the form and instructions in Exhibit A-4.

CHAPTER II—FEDERAL CLAIMS COLLECTION STANDARDS (GENERAL ACCOUNTING OFFICE—DEPARTMENT OF JUSTICE)

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PART 101—SCOPE OF STANDARDS

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101.1 Prescription of standards.
101.2 Omissions not a defense.
101.3 Fraud, antitrust, and tax claims excluded.
101.4 Compromise, waiver, or disposition under other statutes not precluded.
101.5 Conversion claims.
101.6 Subdivision of claims not authorized.
101.7 Required administrative proceedings.
101.8 Referral for litigation.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13381, Oct. 15, 1966, unless otherwise noted.

§ 101.1 Prescription of standards.

The regulations in this chapter, issued jointly by the Comptroller General of the United States and the Attorney General of the United States under section 3 of the Federal Claims Collection Act of 1966, 80 Stat. 309, prescribe standards for the administrative collection, compromise, termination of agency collection, and the referral to the General Accounting Office, and to the Department of Justice for litigation, of civil claims by the Federal Government for money or property. Additional guidance is contained in Title 4 of the General Accounting Office Manual for Guidance of Federal Agencies. Regulations prescribed by the head of an agency pursuant to section 3 of the Federal Claims Collection Act of 1966 will be reviewed by the General Accounting Office as a part of its audit of the agency's activities.

[44 FR 22701, Apr. 17, 1979]

§ 101.2 Omissions not a defense.

The standards set forth in this chapter shall apply to the administrative handling of civil claims of the Federal Government for money or property but the failure of an agency to comply with any provision of this chapter shall not be available as a defense to any debtor.

§ 101.3 Fraud, antitrust, and tax claims excluded.

The standards set forth in this chapter do not apply to the handling of any claim as to which there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, or to any claim based in whole or in part on conduct in violation of the antitrust laws. Only the Department of Justice has authority to compromise or terminate collection action on such claims. However, matters submitted to the Department of Justice for consideration without compliance with the regulations in this chapter because there is an indication of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other party having an interest in the claim, may be returned to the agency forwarding them for further handling in accordance with the regulations in this chapter if it is determined that action based upon the alleged fraud, false claim, or misrepresentation is not warranted. Tax claims, as to which differing exemptions, administrative consideration, enforcement considerations, and statutes apply, are also excluded from the coverage of this chapter.

§ 101.4 Compromise, waiver, or disposition under other statutes not precluded.

Nothing contained in this chapter is intended to preclude agency disposition of any claim under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, providing for the compromise, termination of collection action, or waiver in whole or in part of such a claim. See, e.g., "The Federal Medical Care Recovery Act," 76 Stat. 593, 42 U.S.C. 2651, et seq., and applicable regulations, 28 CFR 43.1, et seq. The standards set forth in this chapter should be followed in the disposition of civil claims by the Federal Government by compromise or termination of collection action (other than by waiver pursuant to statutory authority) under statutes other than the Federal Claims Collection Act of 1966, 80 Stat. 308, to the extent such other statutes or authorized regulations issued pursuant thereto do not establish standards governing such matters.

§ 101.5 Conversion claims.

The instructions contained in this chapter are directed primarily to the recovery of money on behalf of the Government and the circumstances in which Government claims may be disposed of for less than the full amount claimed. Nothing contained in this chapter is intended, however, to deter an agency from demanding the return of specific property or from demanding, in the alternative, either the return of property or the payment of its value.

§ 101.6 Subdivision of claims not authorized.

A debtor's liability arising from a particular transaction or contract shall be considered as a single claim in determining whether the claim is one of less than $20,000, exclusive of interest, for the purpose of compromise or termination of collection action. Such a claim may not be subdivided to avoid the monetary ceiling established by the Federal Claims Collection Act of 1966, 80 Stat. 308.

§ 101.7 Required administrative proceedings.

Nothing contained in this chapter is intended to require an agency to omit or foreclose administrative proceedings required by contract or by law.

§ 101.8 Referral for litigation.

As used in this chapter referral for litigation means referral to the Department of Justice for appropriate legal proceedings, unless the agency concerned has statutory authority for handling its own litigation.

PART 102—STANDARDS FOR THE ADMINISTRATIVE COLLECTION OF CLAIMS

Sec.

102.1 Aggressive agency collection action.
102.2 Demand for payment.
102.3 Collection by offset.
102.4 Reporting delinquent debts to commercial credit bureaus.
102.5 Contracting for collection services.
102.6 Personal interview with debtor.
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102.14 Documentation of administrative collection action.
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102.16 Prevention of overpayments, delinquencies, and defaults.
102.17 Additional administrative collection action.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

§ 102.1 Aggressive agency collection action.

The head of an agency or his designee shall take aggressive action, on a timely basis with effective followup, to collect all claims of the United States for money or property arising out of the activities of, or referred to, his agency in accordance with the standards set forth in this chapter. However, nothing contained in this chapter is intended to require the General Accounting Office or the Department of Justice to duplicate collection actions previously undertaken by any other agency.

[31 FR 13381, Oct. 15, 1966]

§ 102.2 Demand for payment.

Appropriate written demands shall be made upon a debtor of the United States in terms which inform the debtor of the consequences of his failure to cooperate. In the initial notification, the debtor should be informed of the basis for the indebtedness, the applicable requirements or policies for charging interest and reporting delinquent debts to commercial credit bureaus, and the date by which the payment is to be made (date due). The date due should be specified and, normally, should be not more than 30 days from the date of the initial notification. Three progressively stronger written demands at not more than 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand would be futile and the debtor's response does not require rebuttal. Further exceptions may be made where it

is necessary to protect the Government's interests (e.g., the statute of limitations (28 U.S.C. 2415)). Agencies should respond promptly to communications from the debtor. Agencies should advise debtors who dispute the debt to furnish available evidence to support their contentions.

[44 FR 22702, Apr. 17, 1979]

§ 102.3 Collection by offset.

(a) Collections by offset will be undertaken administratively in accordance with these standards and implementing regulations established by the head of each agency on claims which are liquidated or certain in amount in every instance in which this is feasible. Collections by offset from persons receiving pay or compensation from the Federal Government shall be effected over a period not greater than the period during which such pay or compensation is to be received. See 5 U.S.C 5514.

(b) When the head of an agency, or his designee, pursuant to 5 U.S.C. 5514, 5522, 5705, 5724(f), or other statutory authority, seeks to collect a debt by offset against accrued pay, compensation, accrued benefits derived from Federal service or amount of retirement credit due to a present or former Government employee, a member of the armed forces, a Reserve of the armed forces, or a present or former employee of the U.S. Postal Service, the agency to which the debt allegedly is owed will accord such debtor an opportunity for a pre-offset oral hearing when:

(1) The debtor requests waiver of the indebtedness and the waiver determination turns on an issue of credibility or veracity or (2) when the individual requests reconsideration of the debt and the head of the agency or his designee determines that the question of the indebtedness cannot be resolved by review of the documentary evidence, for example, when the validity of the debt turns on an issue of credibility or veracity: *Provided that*, where the employment or active duty status of a debtor entitled to a hearing under paragraph (b)(1) or (b)(2) of this section terminates, and the creditor agency determines that:

(i) Amounts accruing to the debtor upon such termination are available for offset in satisfaction of the alleged indebtedness, (ii) such amounts would not be available for offset subsequent to termination and (iii) the time prior to termination does not permit a pre-offset hearing, the agency may withhold from amounts accruing to the individual upon termination, a sum not greater than that of the alleged indebtedness and, subsequent to termination, promptly provide an opportunity for an oral hearing to resolve the issue of indebtedness or waiver. Amounts withheld but later determined not owing to the Government shall be promptly refunded.

(c) Except for debt collection systems in which determinations of indebtedness or waiver rarely involve issues of credibility or veracity, or when employment or military status is about to terminate as described in the proviso of paragraph (b) of this section, prior to collecting any indebtedness by offset the head of the agency to which the debt allegedly is owed or his designee shall provide the debtor a written demand containing the notices prescribed in § 102.2 of this part and include therein:

(1) Notice of the agency's intention to collect by offset; (2) an opportunity to request reconsideration of the debt, or if provided for by statute, waiver of the debt, and (3) an explanation of the debtor's rights pursuant to this section.

(d) Collection by offset against a judgment obtained by the debtor against the United States shall be accomplished in accordance with the Act of March 3, 1875, 18 Stat. 481, as amended, 31 U.S.C. 227.

(e) Appropriate use should be made of the cooperative efforts of other agencies in effecting collections by offset, including utilization of the Army Holdup List, and all agencies are enjoined to cooperate in this endeavor.

[46 FR 39113, July 31, 1981]

§ 102.4 Reporting delinquent debts to commercial credit bureaus.

Agencies shall develop and implement procedures for reporting delinquent debts to commercial credit bu-

reaus. In the absence of a different rule prescribed by statute, contract, or regulation, a debt is considered delinquent if not paid by the date due specified in the initial notification, unless satisfactory payment arrangements are made by the date due. Agency procedures for reporting delinquent debts to credit bureaus must give due regard to compliance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a, which includes the following requirements:

(a) Promulgate a "routine use" for the disclosure; (b) keep an accounting for disclosures and make them available to the debtor; (c) provide the credit bureaus with corrections and notations of disagreement by the debtor; and (d) make reasonable efforts to assure that the information to be reported is accurate, complete, timely, and relevant. Prior to exercising the option of reporting delinquent debts to commercial credit bureaus, agencies should send a demand letter advising the debtor that such reporting will take place within a specified period of time unless the debtor makes satisfactory payment arrangements or demonstrates some basis on which the debt is legitimately disputed.

[44 FR 22702, Apr. 17, 1979]

§ 102.5 Contracting for collection services.

Agencies should consider contracting for collection services. Contracts may be entered into for this purpose when they meet the following conditions:

(a) The service must supplement, but not replace, the basic collection program of the agency; (b) the authority to resolve disputes, compromise claims, terminate collection action, and initiate legal action must be retained by the agency and; (c) the contractor shall be subject to the Privacy Act of 1974, as amended, 5 U.S.C. 552a, and, when applicable, to Federal and State laws and regulations pertaining to debt collection practices such as the Fair Debt Collection Practices Act, 15 U.S.C. 1692.

[46 FR 22353, Apr. 20, 1981]

§ 102.6 Personal interview with debtor.

Agencies will undertake personal interviews with their debtors when this is feasible, having regard for the amounts involved and the proximity of agency representatives to such debtors.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.7 Contact with debtor's employing agency.

When a debtor is employed by the Federal Government or is a member of the military establishment or the Coast Guard, and collection by offset cannot be accomplished in accordance with 5 U.S.C. 5514, the employing agency will be contacted for the purpose of arranging with the debtor for payment of the indebtedness by allotment or otherwise in accordance with section 206 of Executive Order 11222 of May 8, 1965, 3 CFR, 1965 Supp., p. 130 (30 FR 6469).

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.8 Suspension or revocation of license or eligibility.

Agencies seeking the collection of statutory penalties, forfeitures, or debts provided for as an enforcement aid or for compelling compliance will give serious consideration to the suspension or revocation of licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay such a claim and the debtor will be so advised. Any agency making, guaranteeing, insuring, acquiring, or participating in loans will give serious consideration to suspending or disqualifying any lender, contractor, broker, borrower or other debtor from doing further business with it or engaging in programs sponsored by it if such a debtor fails to pay its debts to the Government within a reasonable time and the debtor will be so advised. The failure of any surety to honor its obligations in accordance with 6 U.S.C. 11 is to be reported to the Treasury Department at once. Notification that a surety's certificate of authority to do business with the Federal Government has been revoked or forfeited by the Treasury Department will be forwarded by that Department to all interested agencies.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.9 Liquidation of collateral.

Agencies holding security or collateral which may be liquidated and the proceeds applied on debts due it through the exercise of a power of sale in the security instrument or a non-judicial foreclosure should do so by such procedures if the debtor fails to pay his debt within a reasonable time after demand, unless the cost of disposing of the collateral will be disproportionate to its value or special circumstances require judicial foreclosure. Collection from other sources, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance concern unless such action is expressly required by statute or contract.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.10 Collection in installments.

Claims, with interest in accordance with § 102.10 should be collected in full in one lump sum whenever this is possible. However, if the debtor is financially unable to pay the indebtedness in one lump sum, payment may be accepted in regular installments. The size and frequency of such installment payments should bear a reasonable relation to the size of the debt and the debtor's ability to pay. If possible the installment payments should be sufficient in size and frequency to liquidate the Government's claim in not more than 3 years. Installment payments of less than $10 per month should be accepted in only the most unusual circumstances. An agency holding an unsecured claim for administrative collection should attempt to obtain an executed confess-judgment note, comparable to the Department of Justice form USA-70a, from a debtor when the total amount of the deferred installments will exceed $750. Such notes may be sought when an unsecured obligation of a lesser amount is involved. Security for deferred payments, other than a confess-judgment note, may be accepted in appropriate cases. An agency may accept installment payments notwithstanding the refusal of a debtor to execute a confess-judgment note or to give other security, at the agency's option.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.11 Exploration of compromise.

Agencies will attempt to effect compromises (preferably during the course of personal interviews), of claims of $20,000 or less exclusive of interest, in accordance with the standards set forth in Part 103 of this chapter in all cases in which it can be ascertained that the debtor's financial ability will not permit payment of the claim in full, or in which the litigative risks or the costs of litigation dictate such action.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.12 Interest.

In the absence of a different rule prescribed by statute, contract, or regulation, interest should be charged on delinquent debts and debts being paid in installments in conformity with the Treasury Fiscal Requirements Manual. When a debt is paid in installments, the installment payments will first be applied to the payment of accrued interest and then to principal, in accordance with the so-called "U.S. Rule," unless a different rule is prescribed by statute, contract, or regulation. Prejudgment interest should not be demanded or collected on civil penalty and forfeiture claims unless the statute under which the claim arises authorizes the collection of such interest. See Rodgers v. United States, 332 U.S. 371.

[44 FR 22702, Apr. 17, 1979. Redesignated at 46 FR 22353, Apr. 20, 1981]

§ 102.13 Analysis of costs.

Agency collection procedures should provide for periodic comparison of costs incurred and amounts collected. Data on costs and corresponding recovery rates for debts of different types and in various dollar ranges should be used to compare the cost ef-

fectiveness of alternative collection techniques, establish guidelines with respect to the points at which costs of further collection efforts are likely to exceed recoveries, assist in evaluating offers in compromise, and establish minimum debt amounts below which collection efforts need not be taken. Cost and recovery data should also be useful in justifying adequate resources for an effective collection program.

[44 FR 22702, Apr. 17, 1979. Redesignated at 46 FR 22353, Apr. 20, 1981]

§ 102.14 Documentation of administrative collection action.

All administrative collection action should be documented and the bases for compromise, or for termination or suspension of collection action, should be set out in detail. Such documentation should be retained in the appropriate claims file.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

§ 102.15 Automation.

Agencies should automate their debt collection operations to the extent it is cost effective and feasible.

[44 FR 22702, Apr. 17, 1979. Redesignated at 46 FR 22353, Apr. 20, 1981]

§ 102.16 Prevention of overpayments, delinquencies, and defaults.

Agencies should establish procedures to identify the causes of overpayments, delinquencies, and defaults and the corrective actions needed. One action that should be considered is the reporting of debts or loans, when first established, to commercial credit bureaus.

[44 FR 22702, Apr. 17, 1979. Redesignated at 46 FR 22353, Apr. 20, 1981]

§ 102.17 Additional administrative collection action.

Nothing contained in this chapter is intended to preclude the utilization of any other administrative remedy which may be available.

[31 FR 13381, Oct. 15, 1966. Redesignated at 44 FR 22702, Apr. 17, 1979 and 46 FR 22353, Apr. 20, 1981]

PART 103—STANDARDS FOR THE COMPROMISE OF CLAIMS

Sec.

103.1 Scope and application.
103.2 Inability to pay.
103.3 Litigative probabilities.
103.4 Cost of collecting claim.
103.5 Enforcement policy.
103.6 Joint and several liability.
103.7 Settlement for a combination of reasons.
103.8 Further review of compromise offers.
103.9 Restrictions.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13382, Oct. 15, 1966, unless otherwise noted.

§ 103.1 Scope and application.

The standards set forth in this part apply to the compromise of claims, pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, which do not exceed $20,000 exclusive of interest. The head of an agency or his designee may exercise such compromise authority with respect to claims for money or property arising out of the activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. The Comptroller General or his designee may exercise such compromise authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation. Only the Comptroller General or his designee may effect the compromise of a claim that arises out of an exception made by the General Accounting Office in the account of an accountable officer, including a claim against the payee, prior to its referral by that Office for litigation.

§ 103.2 Inability to pay.

A claim may be compromised pursuant to this part if the Government cannot collect the full amount because of (a) the debtor's inability to pay the full amount within a reasonable time, or (b) the refusal of the debtor to pay the claim in full and the Government's inability to enforce collection in full within a reasonable time by enforced collection proceedings. In deter-

mining the debtor's inability to pay the following factors, among others, may be considered:

Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; the availability of assets or income which may be realized upon by enforced collection proceedings. The agency will give consideration to the applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection. Uncertainty as to the price which collateral or other property will bring at forced sale may properly be considered in determining the Government's ability to enforce collection. A compromise effected under this section should be for an amount which bears a reasonable relation to the amount which can be recovered by enforced collection procedures, having regard for the exemptions available to the debtor and the time which collection will take. Compromises payable in installments are to be discouraged. However, if payment of a compromise by installments is necessary, an agreement for the reinstatement of the prior indebtedness less sums paid thereon and acceleration of the balance due upon default in the payment of any installment should be obtained, together with security in the manner set forth in § 102.8 of this chapter, in every case in which this is possible. If the agency's files do not contain reasonably up-to-date credit information as a basis for assessing a compromise proposal such information may be obtained from the individual debtor by obtaining a statement executed under penalty of perjury showing the debtor's assets and liabilities, income and expense. Forms such as Department of Justice form DJ-35 may be used for this purpose. Similar data may be obtained from corporate debtors by resort to balance sheets and such additional data as seems required.

§ 103.3 Litigative probabilities.

A claim may be compromised pursuant to this part if there is a real doubt concerning the Government's ability to prove its case in court for the full amount claimed either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases should fairly reflect the probability of prevailing on the legal question involved, the probabilities with respect to full or partial recovery of a judgment having due regard to the availability of witnesses and other evidentiary support for the Government claim, and related pragmatic considerations. Proportionate weight should be given to the probable amount of court costs which may be assessed against the Government if it is unsuccessful in litigation, having regard for the litigative risks involved. Cf. 28 U.S.C. 2412, as amended by Pub. L. 89-507, 80 Stat. 308.

§ 103.4 Cost of collecting claim.

A claim may be compromised pursuant to this part if the cost of collecting the claim does not justify the enforced collection of the full amount. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time which it will take to effect collection. Cost of collecting may be a substantial factor in the settlement of small claims. The cost of collecting claims normally will not carry great weight in the settlement of large claims.

§ 103.5 Enforcement policy.

Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon. Mere accidental or technical violations may be dealt with less severely than willful and substantial violations.

§ 103.6 Joint and several liability.

When two or more debtors are jointly and severally liable collection action will not be withheld against one such debtor until the other or others pay

their proportionate share. The agency should not attempt to allocate the burden of paying such claims as between the debtors but should proceed to liquidate the indebtedness as quickly as possible. Care should be taken that compromise with one such debtor does not release the agency's claim against the remaining debtors. The amount of a compromise with one such debtor shall not be considered a precedent or as morally binding in determining the amount which will be required from other debtors jointly and severally liable on the claim.

§ 103.7 Settlement for a combination of reasons.

A claim may be compromised for one or for more than one of the reasons authorized in this part.

§ 103.8 Further review of compromise offers.

If an agency holds a debtor's firm written offer of compromise which is substantial in amount and the agency is uncertain as to whether the offer should be accepted, it may refer the offer, the supporting data, and particulars concerning the claim to the General Accounting Office or to the Department of Justice. The General Accounting Office or the Department of Justice may act upon such an offer or return it to the agency with instructions or advice.

§ 103.9 Restrictions.

Neither a percentage of a debtor's profits nor stock in a debtor corporation will be accepted in compromise of a claim. In negotiating a compromise with a business concern consideration should be given to requiring a waiver of the tax-loss-carry-forward and tax-loss-carry-back rights of the debtor.

PART 104—STANDARDS FOR SUSPENDING OR TERMINATING COLLECTION ACTION

Sec.
104.1 Scope and application.
104.2 Suspension of collection activity.
104.3 Termination of collection activity.
104.4 Transfer of claims.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13383, Oct. 15, 1966, unless otherwise noted.

§ 104.1 Scope and application.

The standards set forth in this part apply to the suspension or termination of collection action pursuant to section 3(b) of the Federal Claims Collection Act of 1966, 80 Stat. 309, on claims which do not exceed $20,000 exclusive of interest. The head of an agency or his designee may suspend or terminate collection action under this part with respect to claims for money or property arising out of activities of his agency prior to the referral of such claims to the General Accounting Office or to the Department of Justice for litigation. The Comptroller General or his designee may exercise such authority with respect to claims referred to the General Accounting Office prior to their further referral for litigation.

§ 104.2 Suspension of collection activity.

Collection action may be suspended temporarily on a claim when the debtor cannot be located after diligent effort and there is reason to believe that future collection action may be sufficiently productive to justify periodic review and action on the claim having consideration for its size and the amount which may be realized thereon. The following sources may be of assistance in locating missing debtors: Telephone directories; city directories; postmasters; drivers' license records; automobile title and license records; state and local governmental agencies; district directors of Internal Revenue; other Federal agencies; employers, relatives, friends; credit agency skip locate reports and credit bureaus. Suspension as to a particular debtor should not defer the early liquidation of security for the debt. Every reasonable effort should be made to locate missing debtors sufficiently in advance of the bar of the applicable statute of limitations, such as Pub. L. 89-505, 80 Stat. 304, to permit the timely filing of suit if such action is warranted. If the missing debtor has signed a confess-judgment note and is in default, referral of the note for the entry of judgment should not be delayed because of his missing status.

Collection action may be suspended temporarily on a claim when the debtor owns no substantial equity in realty and is unable to make payments on the Government's claim or effect a compromise thereof at the time but his future prospects justify retentions of the claim for periodic review and action and:

(a) The applicable statute of limitations has been tolled or started running anew or (b) future collection can be effected by offset notwithstanding the statute of limitations.

[31 FR 13381, Oct. 15, 1966, as amended at 44 FR 22702, Apr. 17, 1979]

§ 104.3 Termination of collection activity.

The head of an agency or his designee may terminate collection activity and consider the agency's file on the claim closed under the following standards:

(a) *Inability to collect any substantial amount.* Collection action may be terminated on a claim when it becomes clear that the Government cannot collect or enforce collection of any significant sum from the debtor having due regard for the judicial remedies available to the Government, the debtor's future financial prospects, and the exemptions available to the debtor under State and Federal law. In determining the debtor's inability to pay the following factors, among others, may be considered: Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; the availability of assets or income which may be realized upon by enforced collection proceedings.

(b) *Inability to locate debtor.* Collection action may be terminated on a claim when the debtor cannot be located, there is no security remaining to be liquidated, the applicable statute of limitations has run, and the prospects of collecting by offset notwithstanding the bar of the statute of limitations is too remote to justify retention of the claim.

(c) *Cost will exceed recovery.* Collection action may be terminated on a claim when it is likely that the cost of further collection action will exceed the amount recoverable thereby.

(d) *Claim legally without merit.* Collection action should be terminated on a claim whenever it is determined that the claim is legally without merit.

(e) *Claim cannot be substantiated by evidence.* Collection action should be terminated when it is determined that the evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment are unavailing.

§ 104.4 Transfer of claims.

When an agency has doubt as to whether collection action should be suspended or terminated on a claim it may refer the claim to the General Accounting Office for advice. When a significant enforcement policy is involved in reducing a statutory penalty or forfeiture to judgment, or recovery of a judgment is a prerequisite to the imposition of administrative sanctions, such as the suspension or revocation of a license or the privilege of participating in a Government sponsored program, an agency may refer such a claim for litigation even though termination of collection activity might otherwise be given consideration under § 104.3 (a) or (c). Claims on which an agency holds a judgment by assignment or otherwise will be referred to the Department of Justice for further action if renewal of the judgment lien or enforced collection proceedings are justified under the criteria discussed in this part, unless the agency concerned has statutory authority for handling its own litigation.

PART 105—REFERRALS TO GAO OR FOR LITIGATION

Sec.

105.1 Prompt referral.
105.2 Current address of debtor.
105.3 Credit data.
105.4 Report of prior collection actions.
105.5 Preservation of evidence.
105.6 Minimum amount of referrals to the Department of Justice.
105.7 Referrals to GAO.

AUTHORITY: Sec. 3, 80 Stat. 309; 31 U.S.C. 952.

SOURCE: 31 FR 13384, Oct. 15, 1966, unless otherwise noted.

§ 105.1 Prompt referral.

Claims on which collection action has been taken in accordance with Part 102 of this chapter and which cannot be compromised, or on which collection action cannot be suspended or terminated, in accordance with Parts 103 and 104 of this chapter, will be referred to the General Accounting Office in accordance with R.S. 236, as amended, 31 U.S.C. 71, or to the Department of Justice, if the agency concerned has been granted an exception from referrals to the General Accounting Office. Such referrals should be made as early as possible consistent with aggressive agency collection action and the observance of the regulations contained in this chapter and in any event well within the time limited for bringing a timely suit against the debtor.

§ 105.2 Current address of debtor.

Referrals to the General Accounting Office, and to the Department of Justice for litigation, will be accompanied by the current address of the debtor or the name and address of the agent for a corporation upon whom service may be made. Reasonable and appropriate steps will be taken to locate missing parties in all cases. Referrals to the General Accounting Office, and referrals to the Department of Justice for the institution of foreclosure or other proceedings, in which the current address of any party is unknown will be accompanied by a listing of the prior known addresses of such a party and a statement of the steps taken to locate him.

§ 105.3 Credit data.

(a) Claims referred to the General Accounting Office, and to the Department of Justice for litigation, will be accompanied by reasonably current credit data indicating that there is a reasonable prospect of effecting enforced collections from the debtor, having due regard for the exemptions available to the debtor under State and Federal law and the judicial remedies available to the Government.

(b) Such credit data may take the form of: (1) A commercial credit report, (2) an agency investigative report showing the debtor's assets and liabilities and his income and expenses, (3) the individual debtor's own financial statement executed under penalty of perjury reflecting his assets and liabilities and his income and expenses, or (4) an audited balance sheet of a corporate debtor.

(c) Such credit data may be omitted if: (1) A surety bond is available in an amount sufficient to satisfy the claim in full, (2) the forced sale value of the security available for application to the Government's claim is sufficient to satisfy its claim in full, (3) the referring agency wishes to liquidate loan collateral through judicial foreclosure but does not desire a deficiency judgment, (4) the debtor is in bankruptcy or receivership, or (5) the debtor's liability to the Government is fully covered by insurance, in which case the agency will furnish such information as it can develop concerning the identity and address of the insurer and the type and amount of insurance coverage.

§ 105.4 Report of prior collection actions.

A checklist or brief summary of the actions previously taken to collect or compromise a claim will be forwarded with the claim upon its referral to the General Accounting Office or to the Department of Justice. If any of the administrative collection actions enumerated in Part 102 of this chapter have been omitted, the reason for their omission will be given with the referral. The General Accounting Office and the Department of Justice may return or retain claims at their option when there is insufficient justification for the omission of one or more of the administrative collection actions enumerated in Part 102 of this chapter.

§ 105.5 Preservation of evidence.

Care will be taken to preserve all files, records and exhibits on claims referred or to be referred to the General Accounting Office, or to the Department of Justice for litigation.

§ 105.6 Minimum amount of referrals to the Department of Justice.

Agencies will not refer claims of less than $600, exclusive of interest for liti-

gation unless: (a) Referral is important to a significant enforcement policy or (b) the debtor has not only the clear ability to pay the claim but the Government can effectively enforce payment having due regard to the exemptions available to the debtor under State or Federal Law and the judicial remedies available to the Government.

[42 FR 38891, Aug. 1, 1977]

§ 105.7 Referrals to GAO.

Referrals of claims to the General Accounting Office will be in accordance with instructions, including monetary limitations, contained in the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies.

Model Demand for Payment Letter

Name: Date:
Address:
Docket No.:

Demand for Payment of Civil Penalty - Warning for Failure To Pay

Dear Sir/Madam:

In connection with the enforcement of the Toxic Substances Control Act (15 U.S.C. §2601 et seq.), you are hereby given notice that your penalty payment of $ _____ is due within thirty (30) days and that we expect payment in full before the the expiration of the sixty (60) day payment period that started on _____ and ends on _____.

If payment is not received by the expiration of the payment period, this matter shall be referred to the (United States Attorneys Office/Department of Justice) which shall recover such amount by civil action in the nature of a debt owed to the United States government.

In the event that you have already submitted your payment or that it is currently in transit, please disregard this notice and accept our apologies for any inconvenience it may cause you.

_____
Title

EPA Region _____

_____ Date _____ At _____

Model Final Demand for Payment Letter

Name: Date:
Address:
Docket No.:

Final Demand for Payment of Civil Penalty - Notice of Referral to the United States Attorney

Dear Sir/Madam:

This letter is to inform you that your penalty payment of $ _____ is past due and to demand immediate payment of the above-mentioned sum. The penalty was imposed by a (Final Order, Consent Decree, or Default Order) signed by the Regional Administrator of Region _____ on (date) . You were notified of your obligation to pay upon receipt of the Regional Administrator's order on _____ and you were again informed of your obligation to pay on (date second demand was sent) .

You are hereby notified that unless the payment of the penalty is received in the Regional Office within fifteen (15) days of the date of this notice, this matter will be referred to a United States Attorney who shall recover such amount in a civil action in the appropriate United States district court. Such action is routinely accomplished through a motion for summary judgment in favor of the United States. In this proceeding, you will be barred from raising any issues of fact or of law that should have been raised in the administrative proceeding.

_____
Title

EPA Region _____

_____ Date _____ At _____

Claims Collection Litigation Report

An Overview

The Federal Claims Collection Standards (4 C.F.R. §§101-105) prescribe regulations for the administrative collection, compromise and termination of agency claims, and for the referral of administratively uncollectible claims to the General Accounting Office or to the Department of Justice for litigation. The Standards require that certain information be provided to the Department of Justice when an agency refers a claim for litigation and enforced collection (4 C.F.R. §105.1 et seq.). In cooperation with the General Accounting Office, the attached Claims Collection Litigation Report (CCLR) has been developed by the Debt Collection Section of the Executive Office for United States Attorneys, Department of Justice, as the standard report to provide this information when claims are referred to Justice for litigation and enforced collection. All claims referred to Justice should be accompanied by a completed report.

The CCLR is provided in three different formats: letter (Exhibit 1), memorandum (Exhibit 2), and standard form (Exhibit 3). Each agency may choose the format it prefers to use. Duplicate copies of each format which include bracketed explanatory text are also provided (Exhibits 4, 5 and 6). In addition, an Item Explanation (Exhibit 7) is provided to assist and direct agencies on the specific information required in each item on the report.

Uniform use of the CCLR by all agencies will serve a number of purposes. First, it will provide Justice with all the information it must have to effectively litigate the claim and enforce collection. The CCLR will provide this essential information "on top and up front" so that no time will be lost searching the client agency's file for the necessary information. This will increase the speed at which claims received from agencies are taken to judgment, or otherwise converted to paying status, and, as a result, should increase the amount of money collected by Justice and returned to the agencies.

Second, the CCLR should improve the quality of claim referrals to Justice by prompting agencies to take more aggressive administrative action to collect claims. Such aggressive collection action is required by the Federal Standards (4 C.F.R. §102.1 et seq.) but has often been overlooked or ignored. In this respect, the CCLR will also serve as a checklist and as a reminder to all persons who deal with these matters of the importance of the Federal requirements. Furthermore, both aggressive action by the agency to collect and prompt referral to Justice of claims which are accompanied by current, accurate and complete information, directly affect Justice's success in the enforced collection of claims. Therefore, we hope that each agency will establish the goal that all of its referrable claims be referred to Justice not later than six months after

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* The Pesticides and Toxic Substances Offices have adopted the memorandum format. Therefore, Exhibit 5 (the memorandum format that includes bracketed explanatory text) is included in this appendix. Exhibits 1, 2, and 3 (blank forms) and Exhibits 4 and six, which pertain to other formats, are not included.

the agency's final determination of the amount of the claim. If, as stated in the Item Explanation, preparation of the CCLR is made an integral and contemporaneous function of aggressive collection efforts by all agencies, the CCLR will be completed as and when the agency completes administrative collection action, thus, allowing agencies to promptly refer claims to Justice.

Finally, the CCLR will provide the information needed by Justice from all agencies in the same order and sequence. This will enable Justice personnel to design procedures around the report which will permit better utilization of the modern word and data processing equipment which many law offices now have. Once the information is received in the same sequence, then prerecorded programs will enable such equipment to "read" each "debtor file" to "automatically" produce the documents essential to litigation, for example, the demand letter, complaint, summons and judgment, which relate to a claim. Such automated collections systems will improve the efficiency and speed with which claims are handled and, as a result, Justice should be able to better serve its client agencies.

Because of the uniform order and sequence of this standard report, it will be possible, if an agency so chooses, to provide merely the answers to Items 1 through 51 of the report seriatim. This means that instead of inserting answers to Items 1 through 51 on the actual CCLR form, an agency may follow the standard format of the report, as illustrated in the attached Exhibits 1 through 6, down to Item 1 of the report, and then at that point merely provide a running list of only the Item numbers and corresponding answers for Items 1 through 51. The actual CCLR form and the accompanying Item Explanation would then be used by the agency as its pattern, guide, or key for providing the answers in the running list. When a running list is provided in lieu of inserting the answers onto the actual report form, however, great care should be taken by the agency to assure that the Item numbers and answers provided in the running list correspond to the Item numbers on the report. This method of providing information should both simplify and expedite the agency's preparation of the CCLR. In addition, it should allow for better utilization of available word and data processing equipment to prepare the report.

As both the CCLR and the Item Explanation state, all documentation which supports the claim or, where appropriate, the agency's debtor file should be attached to the report. In addition, the following materials should be prepared and included in the CCLR package:

1) A Certificate of Indebtedness which will provide the United States Attorney with a complete statement of how the claim arose (including the statutory, regulatory, or other authority from which the claim arose, a summary statement or resume of the factual basis for the claim, an

itemization of the dates and amounts of any payments made by the debtor to the agency or any credits made by the agency to the debtor, and an itemization of the amount due and owing) and which may be offered by the United States Attorney into evidence to prove the claim;

2) A Department of Justice Demand Letter (Exhibit 8) which will be used by the United States Attorney to notify the debtor that the Department of Justice has received the claim for litigation and suit will be brought unless full payment is made within 10 days (please note that this letter need only be prepared and included in the CCLR package for those United States Attorneys' offices listed on the Attachment to Exhibit 8);

3) A Department of Justice Acknowledgment ("Comeback Letter") (Exhibit 9) which will be used by the United States Attorney to officially notify the agency that the claim which was referred has been received and will give the referring agency the United States Attorney's claim number; and

4) A Department of Justice Deficiency or Declination Letter ("Sendback Letter") (Exhibit 10) which will be used by the United States Attorney to send deficient claims, or claims which the United States Attorney declines to litigate, back to the agency.

The letters should be prepared in the same format reflected in the exhibits.

The Department of Justice solicited comments on the use, content and format of the report from divers Federal agencies. These comments expressed almost universal support for the concept of the report. To the extent possible, all agency suggestions for changes to the report, or that additional items be included in the report, were incorporated. Several agencies were concerned that some of the items of information requested on the report may be superfluous to their particular claims or impossible to obtain. Inability to obtain all information required by the report should not be viewed as a bar to referral of claims to Justice. However, information requested in the litigation report should be provided to the extent feasible. Questions of feasibility should be answered on the basis of and with a clear understanding of the fact that claims referred to Justice are for litigation following aggressive administrative collection action by the referring agency, and that on the basis of the information contained in the CCLR, including the agency's determination of the debtor's ability to pay, and the accompanying supporting documentation or agency debtor file, Justice should be able to successfully prosecute the claims referred to it to judgment and enforce collection of a substantial sum. Any omissions should be explained in the appropriate item on the face of the report.

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We realize that as agencies gain experience using the CCLR, problems may arise which could not be foreseen while the report was being developed. Although completion of the report is required, its content and format may be modified in the future based upon any comments or suggestions from agencies using the report. Comments should be brought to the attention of Mr. Edward H. Funston, Assistant Director, Debt Collection Section, Executive Office for U. S. Attorneys, Suite 803, 5205 Leesburg Pike, Falls Church, Virginia 22041. In the near future, the General Accounting Office will incorporate the CCLR and accompanying materials in Title 4 of the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies.

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CLAIMS COLLECTION LITIGATION REPORT
(on memorandum of referring agency)

>[Date] †

To: >United States Attorney ††
>[Judicial District] of [State]
>[City, State, Zip Code]

Fm: >[Name]
>[Title]
>[Mailing address if not shown above]
>
>
>[FTS Phone number]

Attention Claims Collection Unit

Re: >*[Debtor's full name (LAST, First, Middle)]*
>[Debtor's mailing address]
>
>

>*[Debtor's file or reference number]*
>$[Amount] is the total principal due.
>$[Amount] is the total interest due.
>$[Amount] is the total administrative charges due.
>$[Amount] is the total penalty charges due.
>$[Amount] is the total amount due.
>[Rate] % is the annual interest rate.
>[Date] is the SOL date.

This claim is referred to you for suit and such other action as you deem appropriate to enforce collection. The prior action taken by this agency and the information provided you complies fully with Federal Claims Collection Standards (4 CFR Parts 101-105). **The documentation required by 4 CFR Parts 101-105 is attached** and the information you have requested follows.

THE DEBTOR

1. Date of Birth: _____

2. Social Security Number: _____

3. Also known as:
[List aliases of debtor, if known.]

4. *Name used on note/application:* _____

5. **Present residence:**
[Show actual place of residence, not merely the debtor's mailing address.]

6. Residence verified by/when:
[From what source and when?]

7. **Present phone number:** _____

8. Phone number verified by/when:
[From what source and when?]

9. Debtor locator (skiptracing) information:
[Show information which will assist the (9. cont'd.) U.S. Attorney's office in relocating the debtor if he or she moves from the residence given at Item 5, above.]

THE CLAIM

10. Basis of claim or cause of action:
[Briefly describe the claim, e.g., benefit overpayment, loan default, bankruptcy, etc.]

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(Memo)

[EXHIBIT 5]

11. Statute of limitations (SOL) runs on:
[Date?]

12. Basis for SOL date:
[E.g., default date, last payment date]
(12. cont'd.)

13. First demand for payment made on:
[Date?]

14. First demand made by:
[Who, i.e., agent, official, office?]

15. Method of first demand:
[E.g., letter, mailgram?]

16. Last demand for payment made on:
[Date?]

17. Last demand made by:
[Who, i.e, agent, official, office?]

18. Method of last demand:
[E.g., letter, phone, personal contact?]

19. Debtor's response:
[When and how did debtor respond?]
(20. cont'd.) to the claim, if known.]

20. Does debtor dispute claim:
[Explain debtor's position with regard

21. Response, if any, to debtor's dispute:
[Agency response to debtor's dispute.]

22. Exhaustion of administrative remedies:
[Describe administrative remedies
(22. cont'd.) available to debtor, how debtor was advised of them, and debtor's action with regard thereto, if any.]

23. Compromise offered or elicited:
$[Amount?]

24. Basis for compromise:
[Was a compromise offer elicited from
(24. cont'd.) the debtor or offered the debtor by the claimant agency? Was a basis for compromise offer given; if yes, what was the basis?]

25. Response by agency or debtor:
[If any, by who and what response?]

26. Others legally responsible for debt:
[E.g., beneficiaries, conservators.]

27. Basis of liability by other parties:
[Is liability joint or several? Action, if any, taken against other parties? If none, why not? If yes, what action and what amount recovered? Give other relevant details.]

ACCOUNT INFORMATION

28. **Certification of Indebtedness:**
$[Amount?] as of [Date of determination.]

29. Original principal owed by debtor:
$[Amount?]

30. Total number/amount of payments made/credits:

31. Amount applied to principal:
$

32. Amount applied to charges assessed, penalties and interest:
$

33. Balance due on principal:
$

34. Balance due on charges assessed, penalties and accrued interest:
$

35. Explain application of payments:
[Explain how payments received from the
(35. cont'd.) debtor are to be applied.]

36. Debtor's last payment:
$[Amount and date?]

37. Interest accrual date:
[The date from which interest is due.]

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(Memo)

DEBTOR'S EMPLOYMENT

38. **Present employment:**
[Employer's name?]
[Employer's address; street and number, City, State and ZIP Code?]
[Employer's phone number?]

39. Employment verified:
[From what source and when?]

40. Debtor's salary:
$[Amount and whether weekly or monthly and whether gross or net?]

41. Salary verified:
[From what source and when?]

42. **Spouse's employment:**
[Employer's name?]
[Employer's address; street and number, City, State, ZIP Code?]
[Employer's phone number?]

43. Spouse's employment verified:
[From what source and when?]

DEBTOR'S ABILITY TO PAY

44. **Having due regard for the exemptions to which the debtor is entitled under state and Federal law, the debtor's age and health, present and potential income, inheritance prospects, and the possibility that assets have been concealed or improperly transferred; the current credit report or financial statement attached (or other information found in the attached file) discloses the present or likely future availability of assets or income from which *a substantial sum* may be obtained by enforced collection proceedings:**
[Explain.]

45. The following information will assist you in locating property in which the United States has a secured interest: [Describe and attach security agreements and describe and give last known location of property in which the United States has a secured interest. Give asset or fair market value of security (which?).]

46. The following information will assist you in locating other assets of the debtor:
[Describe and give the location of real and personal property of the debtor which is or may be vulnerable to attachment or levy (non-exempt assets). Give asset or fair market value of property listed (which?).]

VALUE OF CLAIM

47. If discounted or sold in commerce, the fair market or asset value of this claim would be:
$[Amount? Explain basis for fair market or asset valuation given, if any.]

48. With due regard to the debtor's ability to pay, as defined by question 44, above, a reasonable and acceptable compromise offer by the debtor would be:
$[Amount? What is basis for amount shown? Explain in relationship to the debtor's assets and income which can be reached by garnishment, levy, or attachment.]

TRANSFER OR DIRECT DEPOSIT OF FUNDS

49. Accounting officer:
[Name, title, agency, mailing address.]
[FTS phone number.]

50. Agency accounting/disbursing officer code/symbol/number:

51. Treasury designated appropriation symbol:

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(Memo)

If I can be of any further assistance in this matter, please do not hesitate to call me at the number given above.

Agency Employee Responsible for Handling the Claim:

>[Name]
>[Title]
>[Mailing address if not shown above]
>
>
>[FTS Phone number]

Attachments as listed:

† The symbols, the brackets, the boxes, or the text within either of the latter will not appear on the final typed or printed report, but have been included here to explain or clarify the questions/items. The margin and tab settings are indicated on the first line. Once set, they need not be changed to complete the entire report. This report is designed to be typed onto a printed form or prepared on word processing equipment with either "tab-to-block" or "merge/text/print" features, i.e., merge variable text with pattern ("set") text and print.

†† The address on the first page is the "inside address" but the envelope or "outside address" will have to be more complete. [See Exhibit II for appropriate envelope or "outside address."] The judicial district may be written, "Southern District of Iowa," or "District of Kansas," as appropriate. The State can be the accepted two capital letter abbreviation.

SUPPLEMENTAL SHEET FOR DETAILED ANSWERS

Indicate item numbers to which the answers apply.

If more space is required, use full sheets of paper the same size as this page. Attach all sheets behind page 5.

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(Memo)

CLAIMS COLLECTION LITIGATION REPORT

Item Explanation

The Claims Collection Litigation Report (CCLR) will provide the Department of Justice with the essential information required for litigation and enforced collection of a substantial sum on an agency claim. As you know, the Federal Claims Collection Standards (4 C.F.R. §§101-105) require that this information be forwarded to the United States Attorney with each claim. The following explanations are provided to assist and direct you on the specific information required in each item on the report. Careful review of and frequent reference to these item explanations throughout the course of agency collections endeavors will facilitate the final preparation of the CCLR and accompanying claim package. If preparation of the CCLR is made an integral and contemporaneous function of aggressive collection efforts by the Department's client agencies, the CCLR will be completed as and when the agency completes administrative collection action.

When the space provided on the face of the CCLR is not adequate for your responses, continuation of the responses should be made on the supplemental sheet attached to the report. When this is done, appropriate notations indicating that additional information is attached should be included at the related items on the face of the CCLR. The supplemental sheet should also be used to provide the same information required in "The Debtor," "Debtor's Employment," and "Debtor's Ability to Pay" sections of the report for the additional debtors on a multiple debtor claim. In addition, the supplemental sheet should be used to provide the same information required in "The Claim" and "Account Information" sections of the report for any additional debts of a single debtor. Again, appropriate notations indicating that additional information is attached should be included at the related sections on the face of the report. All information requested in the report should be provided to the extent feasible. Questions of feasibility should be answered on the basis of and with a clear understanding of the fact that claims referred to the Department of Justice are for litigation following aggressive administrative collection action by the referring agency, and that, on the basis of the information contained in the report, including the agency's determination of the debtor's ability to pay, the Department should be able to successfully prosecute the claims referred to it to judgment and enforce collection of a substantial sum. Therefore, any omissions should be explained in the appropriate items on the report.

As stated in the cover "Overview" to this package, the CCLR is a standard litigation report which will provide Justice with the information on all agency claim referrals in the same order or sequence. Because of the uniform order and sequence of this standard report, it will be possible, if an agency so chooses, to provide merely the answers to Items 1 through 51 of the report seriatim. This means that instead of inserting answers to Items 1 through 51 on the actual CCLR form, an agency may follow the standard format of the report, as illustrated in the attached Exhibits 1 through 6, down to Item 1 of the report, and then at that point merely provide a running list of only the Item numbers and corresponding answers for Items 1 through 51. The actual CCLR form and the accompanying Item Explanation would then be used by the agency as its pattern, guide, or key for providing the answers in the running list. When a running list is provided in

[EXHIBIT 7]

lieu of inserting the answers onto the actual report form, however, great care should be taken by the agency to assure that the Item numbers and answers provided in the running list correspond to the Item numbers on the report. This method of providing information should both simplify and expedite the agency's preparation of the CCLR. In addition, it should allow for better utilization of available word and data processing equipment to prepare the report.

As both the CCLR and the following explanations state, all documentation which supports the claim or, where appropriate, the agency's debtor file should be attached to the report. In addition, the following materials should be prepared and included in the CCLR package:

1) A Certificate of Indebtedness which will provide the United States Attorney with a complete statement of how the claim arose (including the statutory, regulatory, or other authority from which the claim arose, a summary statement or resume of the factual basis for the claim, an itemization of the dates and amounts of any payments made by the debtor to the agency or any credits made by the agency to the debtor, and an itemization of the amount due and owing) and which may be offered by the United States Attorney into evidence to prove the claim;

2) A Department of Justice Demand Letter (Exhibit 8) which will be used by the United States Attorney to notify the debtor that the Department of Justice has received the claim for litigation and suit will be brought unless full payment is made within 10 days (please note that this letter need only be prepared and included in the CCLR package for those United States Attorneys' offices listed on the Attachment to Exhibit 8);

3) A Department of Justice Acknowledgment ("Comeback Letter") (Exhibit 9) which will be used by the United States Attorney to officially notify the agency that the claim which was referred has been received and give the referring agency the United States Attorney's claim number; and

4) A Department of Justice Deficiency or Declination Letter (Exhibit 10) which will be used by the United States Attorney to send deficient claims, or claims which the United States Attorney declines to litigate, back to the agency.

The letters should be prepared in the same format reflected in the exhibits.

TOP PORTION

Date: Show the date that the CCLR is signed.

Inside Address or "To" Block: Simply show "United States Attorney," the Federal judicial district, and the city, state and zip code. The judicial district may be written, "Southern District of Iowa," or "District of Kansas," as appropriate. The state can be the accepted two capital

	letter abbreviation. A complete mailing address for the United States Attorney should be provided on the mailing envelope. (Exhibit 11 provides current mailing addresses for United States Attorneys.)
"From" Block:	[When using the "Memorandum" or "Form" format] Show the name, title, complete mailing address and FTS telephone number of the agency official who will sign the report.
Debtor's Full Name:	Show the last, first and full middle name or middle initial of the debtor. Where appropriate, indicate whether debtor is a "Sr.," "Jr.," "II," etc.
Debtor's Mailing Address:	Show the complete mailing address for the debtor which has been verified by the agency within the past six months.
Debtor's File or Reference Number:	Show the agency's debtor file or reference number.
Total Principal Due:	Show the amount of principal due on the claim. Where fees and costs advanced are to be recovered from the debtor, include them in the principal. The Certification of Indebtedness which you attach should include an explanation and itemization when the total principal due is a cumulative total and combines separate items (e.g., recoverable fees and costs advanced, promissory notes of different dates or amounts).
Total Interest Due:	Show the total amount of interest due through the date of the Certification of Indebtedness. The Certification of Indebtedness which you attach should include an itemization and explanation of interest charges and when, for example, the total interest due includes separate items such as interest due on more than one promissory note or a series of discrete claims, each interest charge should be itemized and explained.
Total Administrative Charges Due:	Show the total amount, through the date of the Certification of Indebtedness, of any administrative charges which may have been assessed by the agency to cover the costs of processing and handling the claim pursuant to the Debt Collection Act of 1982, P.L. 97-365, §11(e)(2). The Certification of Indebtedness which you attach should include an itemization and explanation of such charges.

Total Penalty Charges Due:	Show the total amount, through the date of the Certification of Indebtedness, of any penalty charges which may have been assessed by the agency for debtor's failure to pay any portion of a debt more than ninety (90) days past due pursuant to the Debt Collection Act of 1982, P.L. 97-365 §11(e)(2). The Certification of Indebtedness which you attach should include an itemization and explanation of such penalty charges.
Total Amount Due:	Show the total (Grand Total) amount due on the claim through the date of the Certification of Indebtedness.
Annual Interest Rate:	Show the rate of annual interest charged by the agency on the debt.
SOL (Statute of Limitations) Date:	Show the same statute of limitations date which is to be entered at Item 11 of the CCLR.

THE DEBTOR

ITEM 1:	Show the debtor's date of birth. In the case of a non-beneficiary debtor (e.g., a representative payee) and the date of birth of the debtor is unknown, show "Unknown." In the event that the debtor is a corporation or partnership, show "Not applicable [corporate/partnership] debtor."
ITEM 2:	Show the debtor's social security number. In the case of a non-beneficiary and the debtor's social security number is unknown, show "Unknown." In the event that the debtor is a corporation or a partnership, show the tax identification number of the corporation. If the tax identification number of the corporate or partnership debtor is unknown, show "Unknown."
ITEM 3:	Show any other name(s) (alias(es)) used by the debtor. If the debtor is a sole proprietor, show the name under which the sole proprietor conducts business (e.g., d/b/a (doing business as) Smith's Sundries). If no aliases, corporate, partnership, or sole proprietorship names are used by the debtor, or known, show "Not applicable" or "Unknown."

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ITEM 4: Show the name(s) the debtor used on the initial instrument (e.g., application for benefits or loan application) which gave rise to the indebtedness.

ITEM 5: Show the debtor's complete present residence address, i.e., address of dwelling in which the debtor lives so that he or she may be found for personal service of legal process (complaint and summons). Do not provide a Post Office Box address as the residence address. [The U.S. Postal Service will convert a Post Office Box address to a residence street address upon written request.] It is necessary for the United States Attorney to have current residence information in order to make prompt and effective service of process upon the debtor. If available, also show the name of the county in which the debtor resides. In the case of a corporate debtor, the address should be the debtor corporation's principal place of business and the name and address of the corporation's agent for service of process.

ITEM 6: Show the name of the person or the source that verified the debtor's present residence address (e.g., the document which verifies or the method used to make the verification) and the most recent date within the last six months that the debtor's residence address was verified.

ITEM 7: Show the debtor's present telephone number.

ITEM 8: Show the name of the person or the source that verified the debtor's present telephone number (e.g., the document which verifies or the method used to make the verification) and the most recent date within the last six months that the debtor's present telephone number was verified.

ITEM 9: Show any information which will assist the United States Attorney in relocating the debtor if he or she moves from the residence given at Item 5. Such information may include, for example, the names, addresses, and telephone numbers of relatives who may know of the debtor's whereabouts, a forwarding address which the debtor left with neighbors or an employer, or the debtor's drivers license number. If the agency reported the debt to a commercial credit

bureau, include the date the debt was reported and the name, address and telephone number of the commercial credit bureau to which reported.

[Stamping "Address Correction Requested" under the return address block on envelopes mailed to the debtor will alert the U.S. Postal Service to inform the creditor agency of changes in the debtor's address. Registered mail with forwarding and return-receipt requested is also an effective way to locate debtors. In addition, the U.S. Postal Service retains change of address notices for one year after they have been filed by a patron.]

In the case of a corporate debtor, include the current residence address of the principal officers of the corporation. Where there is a legal successor in interest to the corporate debtor, the same information requested in Item 5, above, and this item, should be provided for the successor party or corporation.

THE CLAIM

ITEM 10: Briefly describe or characterize the claim or cause of action (e.g., "Social Security Administration benefit overpayment under ____ U.S.C. §____"). Describe in particularity the nature and type of benefit overpayment, loan default, or other action by the debtor which gave rise to the claim. As shown in the parenthetical example above, be sure to identify the statutory, regulatory, or other authority from which the claim arose. In the event the debtor has filed a bankruptcy petition, include bankruptcy related information in the description of the claim or cause of action. Attach a copy of the initial notice to the debtor of the benefit overpayment, loan default, etc.

ITEM 11: Show the last date (month, day, year) on which suit can be brought to recover the claim or debt, i.e., the statute of limitations (SOL) date.

ITEM 12: Show the basis for SOL (statute of limitations) date, e.g., the default date, date of last payment. As a general rule, unless

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the debtor made a partial payment on the debt, the statute of limitations date would be based upon the date the agency first became aware of the debt. In the event a partial payment was made by the debtor, the statute of limitations date would be based upon the date of the debtor's last payment. (See 28 U.S.C. §2415 which provides, in part, that ". . . every action for money damages brought by the United States . . . shall be barred unless the complaint is filed within six years after the right of action accrues . . . [however] in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment . . . .")

ITEM 13: Show the date (month, day, year) on which the first agency demand for payment was made on the debtor.

ITEM 14: Show the name of the agency official, agent, or office that made the first demand for payment on the debtor.

ITEM 15: Show how the first agency demand for payment was communicated to the debtor (e.g., by letter, mailgram).

ITEM 16: Show the date (month, day, year) on which the last agency demand for payment was made on the debtor.

ITEM 17: Show the name of the agency official, agent or office that made the last demand for payment on the debtor.

ITEM 18: Show how the last agency demand for payment was communicated to the debtor (e.g., by letter, telephone, personal contact with the debtor).

ITEM 19: Briefly explain the debtor's response, if any, to the agency's demands for payment, the date(s) (month, day, year) of any responses, and the manner in which such responses were communicated to the agency (e.g., by letter, telephone, personal contact). If the debtor did not respond to the agency's demands for payment, show "No response."

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ITEM 20: If the debtor denied the claim, in whole or in part, give the date (month, day, year) of such denial and explain how the debtor's denial of the claim was made known to the agency (e.g., letter, telephone call, personal interview). Briefly explain the debtor's position with respect to the claim, if known. Explain any defenses that the debtor raised or can be expected to raise with respect to the claim and the merits of such defenses. Attach copies of any agency records documenting the debtor's denial. If the debtor did not dispute the claim, in whole or in part, show "Claim not disputed by debtor."

ITEM 21: Briefly explain any agency response to the debtor's denial of the claim. Attach copies of any agency response to the debtor's denial, in whole or in part, of the claim. Otherwise, show "No agency response." If the claim was not disputed by the debtor, show "Not applicable."

ITEM 22: Briefly describe any administrative remedies and/or rights available to the debtor (e.g., application for waiver, request for reconsideration, appeal, etc.). Explain how the debtor was apprised of the availability of those remedies and/or rights, and what action was taken by the debtor with regard thereto. Show the date (month, day, year) of any such application for waiver, request for reconsideration, or appeal. Attach copies of any documents evidencing such debtor's application for waiver, request for reconsideration, or appeal. Explain what agency action was taken in response to the debtor's exercise of or attempts to exercise rights to administrative remedies. Show the date (month, day, year) of any such "agency action" and attach copies of documents evidencing the same. Explain any "technical defenses" (procedural deficiencies) that the debtor has raised or can be expected to raise with respect to the claim and the merits of such defenses. (Defenses to the merits of the claim, as distinguished from "technical defenses," are to be discussed under Items 20 and 21.)

Describe and discuss the merits of any counterclaim by the debtor against the United States, as well as any claim for offset which the debtor may assert.

ITEM 23: Show the amount and date (month, day, year) of any compromise offer made by the agency or elicited from the debtor.

ITEM 24: Briefly explain whether the compromise offer was elicited from the debtor or offered to the debtor by the agency. Explain the basis of or reason for the amount of the compromise offer, if known.

ITEM 25: Show the agency or debtor's response (specify which) to the compromise offer and the reason for the acceptance or rejection of the offer in compromise (e.g., "the debtor asserted that he had no funds with which to pay the compromise offered by the agency" or, "the agency rejected the debtor's compromise offer because the debtor's known discretionary expenditures are 10 times the amount of the compromise offer").

ITEM 26: Show the name(s) and present residence address(es) of any other person(s) liable for repayment of the debt (e.g., beneficiaries, guarantors, assumptors, conservators, corporate officers). The present residence address provided should be that of the dwelling in which the person lives so that he or she may be personally served with legal process (complaint and summons). If no other person is legally responsible for the debt, show "None."

ITEM 27: Briefly explain the basis of liability of other parties. Explain whether such liability is joint or several, or both. Provide details of any action taken by the agency against the other parties including, for example, the amount of any recovery from other parties. If no action was taken against the other parties legally responsible, explain why.

ACCOUNT INFORMATION

ITEM 28: Show the total amount of the debt (principal, costs and fees advanced, accrued interest, administrative charges, penalty charges) as of the date (month, day, year) of determination (settlement) as reflected on the Certificate of Indebtedness. The Certificate of Indebtedness should provide the United States Attorney with a complete statement of

how the claim arose (including the statutory, regulatory, or other authority from which the claim arose, a summary statement or resume of the factual basis for the claim, an itemization of the dates and amounts of any payments made by the debtor to the agency or any credits made by the agency to the debtor, and an itemization of the amount due and owing) and should be for the full amount of the debt shown on the first page of the report. Attach the Certificate of Indebtedness to the report. In the event that the debtor has filed a bankruptcy petition and if the nature of the security agreement and the property in which the United States has a security interest is such that the debtor can reaffirm the debt, then list the number, dates and amounts of payments to which the debtor is in arrears.

ITEM 29: Show the original amount owed by the debtor. Although there may be many exceptions, this amount will usually be the principal amount of the indebtedness before the accrual of interest and before the debtor has made any payments.

ITEM 30: Show the total number and amount of any payments made by the debtor to the agency or the agency's assignor, or any credits made by the agency to the debtor. For example, if 5 payments of $25.00 each, show "5 payments/$125"; if 2 credits of $30.00 each, show "2 credits/$60." Indicate the nature of such payments or credits, i.e., whether they were, for example, by offset, lump sum or installment. If no payments or credits were made, show "None."

ITEM 31: If payments or credits were made, show the amount which was applied to the principal of the debt. Otherwise, show "Not applicable."

ITEM 32: Show the total amount which was applied to any administrative charges assessed by the agency, any penalty charges assessed by the agency, and the interest due on the principal amount of the debt, if applicable. If not, show "Not applicable."

ITEM 33: Show the remaining balance due on the principal amount of the debt. In the event that the debtor has filed a bankruptcy petition, show the balance due on the principal as of the date the petition was filed.

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ITEM 34: Show the balance due on any administrative charges assessed by the agency, any penalty charges assessed by the agency, and the accrued interest on the principal amount of the debt, if applicable. If not, show "Not applicable." In the event that the debtor has filed a bankruptcy petition, show the interest due to the date the petition was filed and daily accrual of interest thereafter.

ITEM 35: Explain how payments received from the debtor are to be applied. Normally, when a debt is paid in partial or installment payments, amounts received by the agency should be applied first to any outstanding administrative charges which have been assessed by the agency pursuant to the Debt Collection Act of 1982, P.L. 97-365, §11(e)(2); second, to any outstanding penalty charges which have been assessed by the agency for debtor's failure to pay any portion of a debt more than ninety (90) days past due pursuant to the Debt Collection Act of 1982, P.L. 97-365, §11(e)(2); third, to accrued interest; and fourth, to outstanding principal.

ITEM 36: Show the amount and date (month, day, year) of the last payment which the debtor made to the agency or the agency's assignor.

ITEM 37: Show the interest computation or interest accrual date (i.e., the date from which interest is due), if applicable. If not, show "Not applicable."

DEBTOR'S EMPLOYMENT

ITEM 38: Show the name, complete address and telephone number of the debtor's present employer. If the debtor's actual place of work is different from the employer's address and is known, provide the address and telephone number of the debtor's work place. This information will assist the United States Attorney in making prompt service of process upon the debtor in the event the debtor cannot be found for service of process at his or her residence address.

ITEM 39: Show the date (month, day, year) the debtor's employment was verified by the agency within the past six months, and the source of that verification (e.g., the debtor, debtor's employer, current documentation).

ITEM 40: Show the debtor's weekly or monthly salary and indicate whether the amount shown is gross or net salary. For example, show "$350/weekly/gross."

ITEM 41: Show the date (month, day, year) the salary was verified by the agency within the past six months, and the source of that verification (e.g., the debtor, debtor's employer, current documentation).

ITEM 42: If applicable and known, show the name, address and telephone number of the spouse's employer. If none of the information is available, show "Not available."

ITEM 43: If applicable, show the date (month, day, year) the spouse's employment was verified by the agency within the past six months, and the source of that verification (e.g., spouse's employer, current documentation). If none of the information is available, show "Not available."

DEBTOR'S ABILITY TO PAY

ITEM 44: Explain the evidence that discloses and the basis for the agency's determination that, given the debtor's present or likely future availability of assets or income, a substantial sum may be obtained by enforced collection proceedings against the debtor. The agency's determination should take into account any exemptions to which the debtor is entitled under state and Federal law, the debtor's age and health, the debtor's education, present and potential income, number of dependents, inheritance prospects, and the possibility that assets have been concealed or improperly transferred. Also, provide information concerning any legal proceedings, such as proceedings in bankruptcy, that may affect the government's ability to collect the debt. Attach to the report all supporting documentation including, for example, a current credit report or financial statement. In the event of a corporate debtor, an audited balance sheet of the corporate debtor may be attached.

Note: A realistic determination of a debtor's financial ability to pay is essential to enforced collection, particularly with regard to small, unsecured claims. The financial evidence which is provided to the United States Attorney must be current and complete and must disclose that the debtor has sufficient income to pay the debt, or unencumbered non-exempt assets, real or personal, which can be used to liquidate the debt. Generally, if there is insufficient income or unencumbered assets to meet the debtor's day-to-day "necessaries" (i.e., indispensable things, or things proper and useful, for day-to-day living, such as food, clothing, medical attention, and a suitable place of residence), the claim should not be referred to the United States Attorney for litigation and enforced collection. A good rule of thumb for determining whether there is a reasonable prospect for enforced collection of a substantial sum on a small, unsecured claim is that such a claim should not be referred unless the evidence provided discloses that the debtor has sufficient income to pay for "necessaries" and at least $1800 over a 3-year period, or that the debtor has unencumbered non-exempt assets or property which is at least 10 times greater in value than the amount of the obligation.

ITEM 45: Provide any information which will assist the United States Attorney in locating real or personal property in which the United States has or may have a security interest. Describe and give the last known location of such property. Describe and attach security agreements or real estate or chattel mortgages which give the United States a security interest (e.g., papers in the agency's file which describe or show what property was pledged). Show the asset or fair market value of any such real or personal property (or chose in action), and information concerning any prior liens, mortgages, etc., on the pledged real or personal property listed. In the event the debtor is a corporation, provide any information which will assist the United States Attorney in locating the assets of the corporation.

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ITEM 46: Provide any information which will assist the United States Attorney in locating other assets of the debtor (i.e., assets other than pledged property shown in Item 45). Particular care should be given to identifying non-exempt assets of the debtor (e.g., real estate which is not the homestead of the debtor, a second vehicle, recreational vessels, etc.). In the event of a corporate debtor, provide any information which will assist the United States Attorney in locating other assets of the corporation. If this information is unknown, show "Unknown."

VALUE OF CLAIM

ITEM 47: Show and explain the fair market or asset value of the claim, i.e., the amount of cash which may be realized as a result of litigation of the claim. Explain the basis for the value given. The agency's determination of the value of the claim should be based in part upon the ratio which the amount of the claim or debt bears to the amount of the debtor's assets and income which can be realized by enforced collection and upon the unencumbered value (after prior liens have been satisfied) of any property of the debtor in which the United States has a secured interest. The information provided should reflect the true value of the claim and, thus, enable the United States Attorney to more accurately determine the amount which the government is likely to recover by enforced collection. See the rule of thumb in the Note at Item 44, above, for determining whether there is a reasonable prospect for enforced collection of a substantial sum.

ITEM 48: With due regard to the debtor's ability to pay as defined by Item 44, above, show the agency's recommendation on the amount for which the claim can reasonably be settled or compromised. Explain the basis for the amount shown. This amount should bear a direct relationship to the debtor's assets and income which can be reached by garnishment, levy, or attachment. The agency's recommendation will provide the United States Attorney with the necessary

information and guidance for an informed consideration of any compromise offer or settlement the debtor may make. Furthermore, having such information beforehand will eliminate the delay and expense which would otherwise be necessary for the United States Attorney to obtain the agency's assessment of a debtor's compromise offer made after the claim has been referred to the United States Attorney.

TRANSFER OR DIRECT DEPOSIT OF FUNDS

ITEM 49: Show the name, title, complete mailing address and FTS telephone number of the agency official at the accounting code location, as set forth in Item 50 below, who is responsible for resolving any accounting problems which may arise with respect to the individual claim.

ITEMS 50 and 51: In the near future, monies collected by United States Attorneys will be deposited directly to the Treasury or to banks designated by the Treasury to receive such deposits. Under the system being developed, monies will be deposited to a Department of Justice Suspense Account and then, on a regular basis, funds will be transferred to the referring agencies. United States Attorneys' offices will provide on a regular basis accountings of the amounts of payments received from each debtor to the individuals within the agencies responsible for handling debtor claims.

To accommodate these inter-agency fund transfers (in accordance with the Treasury Fiscal Requirements Manual) the information requested in Items 50 and 51 is needed. Therefore, at Item 50 show the agency accounting location code/disbursing officer code/symbol/number to which the accounting documents on recovery from the debtor on referred claims should be initially forwarded. (Show the agency accounting location code/symbol/number where appropriate. If your agency does not have an accounting location code, show the disbursing office code/symbol/number.) At Item 51 show the Treasury appropriation/suspense account/fund account number (whichever is appropriate) to which any recovery from the debtor should be

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	credited. (Be sure to include the appropriate agency prefix.) [Note: Please remember that the amount of recovery representing court costs should always be deposited into Treasury Miscellaneous Receipts Account No. 003099, substituting your agency prefix for the two zeros in this symbol.]
"Complimentary Closing" Block:	[When using the "Letter" format] Show the name, title, complete mailing address, and FTS telephone number of the agency official who will sign the report.
"Agency Employee Responsible for Handling the Claim" Block:	Show the name, title, complete mailing address and FTS telephone number of the agency employee who is most knowledgeable of the history, facts and details of the individual claim and who is responsible for answering any questions or resolving any problems which may arise with respect to the individual claim.
"Attachments as Listed" Block:	List all supporting documentation which is included in the CCLR package. All documents provided should be legible.

Department of Justice Demand Letter

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

>[Debtor's full name]
>[Debtor's mailing address]
>
>

>Re: [Name of Agency] Indebtedness
>[Amount of claim]
>[Type of overpayment]

Dear>[Mr./Mrs./Ms.]>[Debtor's surname]:

The [Name of Agency] claims that you are indebted to the United States for the amount shown above. The basis for the claim is set forth on the enclosed Certificate of Indebtedness. It is the responsibility of this office to file suit to collect debts owed to the United States after all efforts by the [Name of Agency] to collect have failed.

Unless payment in full is received within the next ten (10) days, we will be compelled to file suit against you in United States District Court to recover the full amount of the claim. In the latter event, court costs, United States Marshal's fees and interest will be added to the amount you now owe. Enforced collection can then be made by the United States Marshal who may be ordered to attach and sell any non-exempt property you have now or may acquire in the future.

Your check or money order for the amount shown above should be made payable to "Treasurer of the United States" and mailed to us in the enclosed self-addressed envelope within ten (10) days.

Only your full cooperation and prompt payment of the amount of the claim will make suit and enforced collection unnecessary.

Very truly yours,

>[Name]
United States Attorney

Enclosure

[EXHIBIT 8]

United States Attorneys' Offices For Which a Department of Justice Demand Letter Should be Prepared and Included in the CCLR Package

Judicial District	City of Headquarters Office
Alabama, Middle	Montgomery
Alabama, Southern	Mobile
Alaska	Anchorage
Arkansas, Eastern	Little Rock
Arkansas, Western	Fort Smith
California, Northern	San Francisco
Connecticut	New Haven
Delaware	Wilmington
Florida, Northern	Pensacola
Georgia, Middle	Macon
Hawaii	Honolulu
Iowa, Northern	Cedar Rapids
Kansas	Topeka
Louisiana, Middle	Baton Rouge
Mississippi, Southern	Jackson
Missouri, Eastern	St. Louis
Missouri, Western	Kansas City
Nebraska	Omaha
Nevada	Las Vegas
New Hampshire	Concord
New York, Eastern	Brooklyn
New York, Southern	New York
New York, Western	Buffalo
North Carolina, Middle	Greensboro
North Carolina, Western	Asheville
Oregon	Portland
Pennsylvania, Middle	Scranton
Puerto Rico	Hato Rey
Rhode Island	Providence
South Carolina	Columbia
Tennessee, Middle	Nashville
Texas, Western	San Antonio
Vermont	Burlington
Virginia, Western	Roanoke
West Virginia, Northern	Wheeling

[Attachment to Exhibit 8]

Department of Justice Acknowledgment "Comeback Letter"

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

>[Name]
>[Title]
>[Agency]
>[Mailing address]
>

Re: Receipt of [Name of Agency] Claim
>[Debtor's full name; LAST NAME, first name, middle name]
>[Agency's file or claim identification number]
United States Attorney's claim number:

Dear> :

This is to acknowledge receipt of the above-referenced claim which was sent to this office for enforced collection. You will be advised of the success of our efforts in this regard in due course. If your future correspondence or other communication with this office relative to this matter references the debtor's full name and our civil claim number above, we will be able to respond more quickly. Please annotate your file accordingly.

Very truly yours,

>[Name]
United States Attorney

[EXHIBIT 9]

Department of Justice Deficiency or Declination Letter

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY

>[Name]
>[Title]
>[Agency]
>[Mailing address]
>

Re: [Name of Agency] Claim
>[Debtor's full name; LAST NAME, first name, middle name]
>[Agency's file or claim identification number]

Dear> :

Our initial review of the above-captioned claim which you recently referred to this office for enforced collection revealed that the claim, as forwarded, does not meet the minimum standards for referral of such claims to the United States Attorney for litigation. As you know, the Federal Claims Collection Standards (4 C.F.R. §§101-105) require that certain information be forwarded to United States Attorneys with each claim.

The reason(s) why we consider this claim to be deficient and we presently decline to enforce collection of the claim through litigation is (are) indicated below.

_____ Claim was not referred well within the time limited for bringing a timely suit against the debtor.

_____ Claim was less than $600.

_____ Claim did not include the debtor's current residence address for service of complaint and summons.

_____ Claim was not accompanied by credit data obtained within the last six months indicating the present or likely future availability of assets or income from which a substantial sum may be obtained by enforced collection proceedings.

[EXHIBIT 10]

_____ Claim was not accompanied by a summary and supporting documentation of the actions previously taken to collect (including agency demands for payment, personal interview with debtor) or compromise the claim.

_____ Claims Collection Litigation Report not adequately completed. See Item(s) _____. Please provide requested information or an explanation of why you cannot.

_____ Other.

If you are able to provide us with the above-indicated information as required by the Federal Claims Collection Standards, then you should resubmit the claim to us for appropriate action.

Very truly yours,

>[Name]
United States Attorney

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U. S. ATTORNEYS' MAILING ADDRESS LIST

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Alabama - Northern	200 Federal Building 1800 Fifth Avenue North Birmingham, AL 35203
Alabama - Middle	Post Office Box 197 Montgomery, AL 36101
Alabama - Southern	Post Office Drawer E Mobile, AL 36601
Alaska	Federal Building & U.S. Courthouse 701 C Street, Room C-252 Mail Box 9 Anchorage, AK 99513
Arizona	4000 U.S. Courthouse 230 North First Avenue Phoenix, AZ 85025
Arkansas - Eastern	Post Office Box 1229 Little Rock, AR 72203
Arkansas - Western	Post Office Box 1524 Fort Smith, AR 72901
California - Northern	450 Golden Gate Avenue San Francisco, CA 94102
California - Eastern	3305 Federal Building 650 Capitol Mall Sacramento, CA 95814
California - Central	312 North Spring Street Los Angeles, CA 90012
California - Southern	940 Front Street Room 5-N-19, U.S. Courthouse San Diego, CA 92189
Colorado	1961 Stout Street Suite 1200 Federal Office Building Drawer 3615 Denver, CO 80294
Connecticut	Post Office Box 1824 New Haven, CT 06508

[EXHIBIT 11]

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Delaware	J. Caleb Boggs Federal Building 844 King Street, Room 5001 Wilmington, DE 19801
District of Columbia	Room 2800 U. S. Courthouse 3rd & Constitution Avenue, N.W. Washington, DC 20001
Florida - Northern	100 North Palafox Street Room 307 Pensacola, FL 32581
Florida - Middle	Robert Timberlake Building 500 Zack Street, Room 410 Tampa, FL 33602
Florida - Southern	155 South Miami Avenue Miami, FL 33130
Georgia - Northern	Richard Russell Building Room 1800 75 Spring Street, S.W. Atlanta, GA 30335
Georgia - Middle	Post Office Box U Macon, GA 31202
Georgia - Southern	Post Office Box 8999 Savannah, GA 31412
Guam	Suite 502-A, PDN Building 238 O'Hara Street Agana, GU 96910
Hawaii	Room C-242 PJKK Federal Building Box 50183 300 Ala Moana Boulevard Honolulu, HI 96850
Idaho	Room 693, Federal Building 550 W. Fort Street, Box 037 Boise, ID 83724
Illinois - Northern	Everett McKinley Dirksen Building, Room 1500 S 219 S. Dearborn Street Chicago, IL 60604

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Illinois - Southern	Room 330 750 Missouri Avenue East St. Louis, IL 62202
Illinois - Central	Post Office Box 375 Springfield, IL 62705
Indiana - Northern	Federal Building, Room 312 507 State Street Hammond, IN 46320
Indiana - Southern	274 U. S. Courthouse 46 East Ohio Street Indianapolis, IN 46204
Iowa - Northern	Post Office Box 4710 Cedar Rapids, IA 52407
Iowa - Southern	122 U. S. Courthouse E 1st and Walnut Street Des Moines, IA 50309
Kansas	444 Quincy Street Topeka, KS 66683
Kentucky - Eastern	Post Office Box 1490 Lexington, KY 40501
Kentucky - Western	USPO & Courthouse, Room 211 601 West Broadway Louisville, KY 40202
Louisiana - Eastern	Hale Boggs Federal Building 500 Camp Street New Orleans, LA 70130
Louisiana - Middle	352 Florida Street Baton Rouge, LA 70801
Louisiana - Western	Room 3B12 Federal Building Shreveport, LA 71161
Maine	P. O. Box 1588 Portland, ME 04104
Maryland	8th Floor, U. S. Courthouse 101 W. Lombard Street Baltimore, MD 21201

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Massachusetts	1107 John W. McCormack Fed. Bldg. USPO & Courthouse Boston, MA 02109
Michigan - Eastern	817 Federal Building 231 W. Lafayette Detroit, MI 48226
Michigan - Western	399 Federal Building Grand Rapids, MI 49503
Minnesota	234 U. S. Courthouse 110 South 4th Street Minneapolis, MN 55401
Mississippi - Northern	Post Office Drawer 886 Oxford, MS 38655
Mississippi - Southern	Post Office Box 2091 Jackson, MS 39205
Missouri - Eastern	U.S. Court & Custom House 1114 Market Street, Room 414 St. Louis, MO 63101
Missouri - Western	549 U. S. Courthouse 811 Grand Avenue Kansas City, MO 64106
Montana	Post Office Box 1478 Billings, MT 59103
Nebraska	Post Office Box 1228, DTS Omaha, NE 68101
Nevada	Box 16030 Las Vegas, NV 89101
New Hampshire	Federal Building Concord, NH 03301
New Jersey	Federal Building Room 502 970 Broad Street Newark, NJ 07102
New Mexico	Post Office Box 607 Albuquerque, NM 87103

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
New York - Northern	Post Office Box 1258 Federal Building Syracuse, NY 13201
New York - Southern	One St. Andrews Plaza New York, NY 10007
New York - Eastern	U. S. Courthouse 225 Cadman Plaza East Brooklyn, NY 11201
New York - Western	502 U. S. Courthouse Court & Franklin Streets Buffalo, NY 14202
North Carolina - Eastern	Post Office Box 26897 Raleigh, NC 27611
North Carolina - Middle	Post Office Box 1858 Greensboro, NC 27402
North Carolina - Western	Post Office Box 132 Asheville, NC 28802
North Dakota	Post Office Box 2505 Fargo, ND 58108
Ohio - Northern	Suite 500 1404 East Ninth Street Cleveland, OH 44114
Ohio - Southern	220 USPO & Courthouse 5th & Walnut Streets Cincinnati, OH 45202
Oklahoma - Northern	Room 460 U. S. Courthouse 333 West Fourth Street Tulsa, OK 74103
Oklahoma - Eastern	Post Office Box 1009 Muskogee, OK 74401
Oklahoma - Western	Room 4434 U. S. Courthouse & Federal Office Building Oklahoma City, OK 73102
Oregon	312 U. S. Courthouse 620 S.W. Main Street Portland, OR 97205

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JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Pennsylvania - Eastern	3310 U.S. Courthouse 601 Market Street Independence Mall West Philadelphia, PA 19106
Pennsylvania - Middle	Post Office Box 309 Scranton, PA 18501
Pennsylvania - Western	633 USPO & Courthouse 7th Avenue & Grant Street Pittsburgh, PA 15219
Puerto Rico	Federal Office Building Room 101 Carlos E. Chardon Street Hato Rey, PR 00918
Rhode Island	Post Office Box 1401 Providence, RI 02901
South Carolina	Post Office Box 2266 Columbia, SC 29202
South Dakota	Post Office Box 1073 Federal Building & Courthouse 400 South Phillips Avenue Sioux Falls, SD 57102
Tennessee - Eastern	Post Office Box 872 Knoxville, TN 37901
Tennessee - Middle	U. S. Courthouse 801 Broadway, Room 879 Nashville, TN 37203
Tennessee - Western	1026 Federal Office Building 167 North Main Street Memphis, TN 38103
Texas - Northern	310 U. S. Courthouse 10th & Lamar Streets Fort Worth, TX 76102
Texas - Southern	Post Office Box 61129 Houston, TX 77208
Texas - Eastern	Post Office Box 1510 Beaumont, TX 77704

JUDICIAL DISTRICT	HEADQUARTERS OFFICE
Texas - Western	John H. Wood, Jr. Federal Bldg. 655 East Durango Boulevard San Antonio, TX 78206
Utah	200 Post Office & Cthse. Bldg. 350 South Main Street Salt Lake City, UT 84101
Vermont	Post Office Box 570 Federal Building Burlington, VT 05402
Virgin Islands	Post Office Box 1440 St. Thomas, VI 00801-1440
Virginia - Eastern	2nd Floor 701 Prince Street Alexandria, VA 22314
Virginia - Western	Post Office Box 1709 Roanoke, VA 24008
Washington - Eastern	Post Office Box 1494 Spokane, WA 99210
Washington - Western	3600 Seafirst 5th Avenue Plaza 800 Fifth Avenue Seattle, WA 98104
West Virginia - Northern	Post Office Box 591 Wheeling, WV 26003
West Virginia - Southern	Post Office Box 3234 Charleston, WV 25332
Wisconsin - Eastern	330 Federal Building 517 East Wisconsin Avenue Milwaukee, WI 53202
Wisconsin - Western	Post Office Box 112 Madison, WI 53701
Wyoming	Post Office Box 668 Cheyenne, WY 82003
N. Mariana Islands	c/o U.S. Attorney's Office Post Office Box Z Agana, GU 96910

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2 Expert Witnesses

Selection of Witnesses

Administrative, civil, and criminal enforcement actions sometimes require the presentation of expert testimony on behalf of the Agency. Witnesses should be chosen for their direct knowledge of the circumstances surrounding the suspected violation. Below follows some guidelines to aid the EPA attorney in choosing witnesses for judicial proceedings.

Headquarters Witnesses

Many of the records pertaining to, and technical experts with knowledge of, regulations concerning chemical substances or mixtures are located within the Office of Toxic Substances at Headquarters. Witnesses from the Office of Toxic Substances are available to testify on:

- Whether a chemical substance or mixture is subject to TSCA;
- Technical data and studies relating to the health and environmental effects of a chemical substance or mixture; and
- The significance of a discrepancy as it relates to the sample's chemical composition or toxicity.

Regional Witnesses

Technical experts in the Regions will generally testify as to:

- Inspection procedures and the facts and findings surrounding an investigation; and
- Programmatic procedures such as inspection schemes, penalty calculations, TSCA violations, etc.

Other Government Witnesses

EPA personnel often work with other federal government personnel in developing casework, either through interagency agreements (IAGs) or memorandums of understanding (MOUs). Other government employees of agencies such as the Food and Drug Administration may be called upon to testify concerning:

- Test procedures, findings, and conclusions related to chemical device studies; and
- Information collected during an investigation but referred to EPA for enforcement.

Contractor Witnesses

Expert witnesses will occasionally have to be utilized under contract to testify as to:

- Test procedures, findings, and conclusions related to chemical or other scientific studies they have conducted; and
- Technical matters for which there are no Agency experts available for testimony.

Procedures for Requesting Witnesses

All requests for witnesses who are not regional personnel should be made in writing to the appropriate HQCDO. The HQCDO will, in turn, arrange for the proper witness to represent the Agency in court and will provide a status of the witness's availability to the requesting Region.

Appearing as a Witness

Vigorous enforcement programs will increase the probability that an inspector will be called upon to testify in court. By the time a case has entered the judicial system, inspectors and case proceedings personnel will have invested many hours in developing a sound program for prosecution. When a witness is called to testify, it is imperative that quality testimony is provided and a professional image is projected in the courtroom.

A witness, to be effective, must make statements that are understandable and must have them accepted as truth by the judge or jury. In addition to be truthful and honest, a witness's principal aim should be to make a favorable impression on the court. The guidelines presented in this section will help prepare the witness to be effective and credible.

Personal Appearance and Conduct

Dress is important. A well-groomed, neatly attired witness makes a more favorable impression in the courtroom. Conduct should reflect the solemn nature of the judicial proceedings. In order that a witness presents the appropriate image, the following considerations should be kept in mind at all times.

Go to the courtroom prepared. Be thoroughly familiar with your facts. Pertinent time and dates should be checked. Order all documents and exhibits so that testimony will be presented without fumbling. Be on time when court opens and be available immediately when called to testify.

Try to avoid:

- Doing anything that may attract attention to you. Make yourself as inconspicuous as possible;
- Sitting in groups of more than two or three colleagues. Spread out in the courtroom;
- Whispering or talking to another person or causing any disturbance in the courtroom;
- Showing incredulity or surprise at any testimony given from the witness stand or at statements made by the defense attorney. Avoid expressing approval or disapproval of any testimony by nod, glance, or other gesture;
- Having anything in your mouth (such as gum, toothpick, tobacco, candy, or food);
- Sitting within the enclosure unless instructed to do so;
- Discussing the case with the defendant or the defending attorney;
- Talking to the jurors or discussing the case within their hearing;
- Consulting with case personnel while court is in session, unless directed to do so; and
- Holding conversations with principals or witnesses for the opposing side. If conversations are unavoidable, confine remarks to matters other than the trial.

Witness Stand Technique

When called to the witness stand, unless previously sworn, go directly to the desk of the Clerk of the Court to be sworn. Take the oath in a solemn manner. Then proceed to the witness chair. If you have a long or unusual name, give a card or paper with the correct spelling to the court stenographer. Assume and maintain proper posture, bearing, and demeanor. Sit erect, but do not appear stiff or tense. Attempt to project an image of poise and self-control.

Speaking. Speak in a clear, distinct, and well-modulated voice. When addressing a jury, look at and speak distinctly to them. Speak loud enough so that the farthest juror can hear you.

Use simple language. If the subject is technical or scientific, reduce the terminology to an understandable level or give definitions of terms used. Avoid idioms or language particular to your profession or to the Agency.

Notes. You may bring notes with you to the witness stand. However, do not bring your field notebook or any other documents you do not want the opposing side to examine. They have a right to see any notes you bring to the witness stand.

Do not hesitate to ask permission to refer to your notes when testifying, provided your notes were made at the time of, or immediately after, the event about which you are testifying. You should not be embarrassed if you cannot recall exact details without referring to your notes. Try not read long passages verbatim from your notes.

Answering Questions. Wait until a question is asked in its entirety before beginning to answer. Never attempt to answer a question you do not fully understand. Ask that the question be repeated or rephrased if its meaning is not clear. If you do not know the answer to a question, say so. Do not try to cover up a lack of knowledge of a particular subject.

Questions should be answered verbally--do not nod assent or shake your head. Answer only what is asked fully and to the point without volunteering information. Do not "spar" or attempt to match wits with the questioning attorney.

Be truthful, and answer all questions frankly, factually, and confidently. Try to limit your testimony to those facts about which you have first-hand knowledge. Anything else may be considered hearsay. Do not exaggerate; state the facts accurately.

Do not express opinions or conclusions unless you are testifying as an expert witness. You cannot assume expert knowledge in a field unless you are an expert by reason of your training and experience. If questioned on a subject beyond your scope, admit that the subject is outside your field or knowledge.

Try not to become listless or "dead pan" in your effort to appear impartial and unbiased. Be natural, candid, frank, and "alive." Conversely, you should not appear impatient or overly anxious to testify. Attempt to minimize nervous tendencies, such as arranging clothes, notes, etc.

Do not speak to the judge unless he or she asks you a question.

Testifying Under Direct Examination

In a proceeding arising out of an Agency judicial enforcement action, direct or re-direct examinations will generally be conducted by an EPA attorney or a United States Attorney. The initial questions he or she will ask will seek to establish:

- Your identity, occupation, and qualifications; and
- The relevancy of your testimony to the proceedings.

Subsequent questions will allow you to relate your testimony to the court. In order to facilitate this questioning, you should:

- Try to give testimony in chronological order. Reveal your first connection with the case. Then give facts in the order they occurred. Your testimony should be memorized, if possible.
- If the opposing attorney objects to a question, do not try to get in an answer before the judge has ruled whether the question is proper.
- Do not try unnecessarily to help the questioning attorney. He will ask additional questions to bring out further details to complete your testimony.
- Be able to identify the defendant.

Testifying Under Cross Examination

Cross examination is the questioning of witnesses by attorneys representing the opposing side. Under cross examination you may be subjected to vigorous questioning.

Do not be afraid to admit that you discussed your testimony with government attorneys. There is nothing improper in a practical discussion of your testimony with the attorneys.

The opposing counsel may attempt to intimidate you by attacking your veracity and integrity, by making uncomplimentary references to your qualifications or length of service, or by emphasizing errors you have made. Remain calm and answer any question asked unless an objection is raised and sustained. If the opposing counsel attempts to confuse you with rapid questions, answer the questions deliberately and at a comfortable

pace. Ask the attorney to repeat or rephrase any question that is unclear or confusing. If asked a double or "two-pronged" question, ask the attorney to restate it, or carefully answer each part separately.

Wait several seconds before you answer a question put to you in cross examination in order to give the government attorney an opportunity to object. Avoid, however, undue delays in answering. If an objection has been raised, do not answer any questions until a ruling on the objection has been made.

Do not lose your patience or temper while testifying. A cross-examining attorney often deliberately baits an irascible witness to anger the witness. Try to remain calm and unruffled. Do not become argumentative with the cross-examiner if your testimony is interrupted or for any other reason. Beware of questions to which the cross-examiner demands a yes or no answer if such an answer will not reveal the entire truth. These are often leading questions. If a simple yes or no does not properly answer the question, inform the cross-examiner that the question cannot be so answered. If the cross examiner should misquote any of your earlier testimony, you may correct the misquote before answering the question.

If you make an error while testifying, correct it at the first opportunity. If you discover the error after you have completed your testimony and have been dismissed, discuss the matter with the government attorney.

You may be asked whether you regard certain persons in the field about which you are testifying as recognized authorities. This is often preparatory to asking you whether you agree with certain statements that those authorities have made. If your answer is no, that you do not recognize them as authorities, that line of cross-examination cannot be pursued. Unless you definitely have heard of the named persons and are familiar with their works and do recognize them as authorities, do not expose yourself by saying that you so recognize them.

Proper Conduct During Recess and After the Trial

During recess, continue to maintain the same demeanor as in the courtroom. Do not engage in loud conversation or joking, especially about the proceedings. Be as discreet as possible when making any comments that might be overheard.

After the trial, continue to conduct yourself in a manner that will bring credit to you and to the Agency. Make no public display of elation or disappointment over the outcome of the trial. If there is occasion to speak to the defendants, be courteous regardless of their demeanor.

3 Enforcement Response Policies and Penalty Policies

The following items are used by the Agency in establishing its penalty policy guidelines:

- Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; 45 Fed. Reg. 59770 (1980)
- Memorandum (8 Jul 1983) -- Enforcement Response Policy for the Friable Asbestos-Containing Materials in Schools: Identification and Notification Regulation
- Memorandum (8 Jul 1983) -- Dioxin Contaminated Waste Enforcement Response Policy
- Interim Guidance for the Determination of Penalties for Violations of the PCB Regulations.

ENVIRONMENTAL PROTECTION AGENCY

[FRL 1601-6]

Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

AGENCY: Office of Enforcement, Environmental Protection Agency (EPA or the Agency).

ACTION: Notice of a policy for implementation of the Toxic Substances Control Act, with respect to the assessment of civil penalties under Section 16; interim guidance for the determination of penalties for violations of the PCB regulations.

SUMMARY: Section 16 of the Toxic Substances Control Act (TSCA or the Act) authorizes the Administrator of EPA to assess civil penalties for violations of the Act. On March 10, 1980, Jeffrey G. Miller, Acting Assistant Administrator for Enforcement, transmitted to the EPA Regional Administrators a document which implements an administrative civil penalty policy for TSCA. This document sets forth a general penalty assessment policy which will be supplemented by regulation-specific penalty assessment guidance. Together, these documents provide internal procedural guidelines to aid EPA personnel to assess appropriate penalties. They are not regulations. The penalty assessment policy establishes standardized definitions and applications of the statutory factors that the Act requires the Administrator to consider in assessing a penalty. It also provides a mechanism whereby Agency personnel may, within specified boundaries, exercise discretion in negotiating consent agreements, and otherwise adapt the proposed penalty to the exigencies of special circumstances.

Separate guidances will apply the penalty system to specific regulatory and statutory provisions. These guidances will be developed on a continuing as-needed basis.

On April 24, 1980, Richard D. Wilson, deputy Assistant Administrator for General Enforcement, transmitted to the EPA Regional Administrators the first of the regulation specific penalty policies. This document consisted of interim guidance for the determination of penalties for violations of the PCB regulations.

The TSCA civil penalty policy and the PCB penalty policy were effective on March 10, 1980 and April 24, 1980, respectively, the dates these policies were issued to the Regional Offices. Although the Agency is not required to publish these documents, EPA is doing so in order to give them the wide circulation that publication will provide.

The full text of the TSCA civil penalty policy, and the PCB penalty policy, with the appropriate transmittal memoranda, appear below in the "Supplementary Information" section.

FOR FURTHER INFORMATION CONTACT: Peter J. Niemiec, Attorney-Advisor, Pesticides and Toxic Substances Enforcement Division (EN-342), 401 M St., SW., Washington, D.C. 20460, (202) 755-9404.

SUPPLEMENTARY INFORMATION: The doucments appearing below were transmitted to the EPA Regional Administrators on March 10, 1980, and April 24, 1980, respectively. The "Technical Support Document" referred to in the TSCA civil penalty document has not been reproduced, but is available upon request from the EPA address above.

Dated: July 7, 1980.

Jeffrey G. Miller,

Acting Assistant Administrator for Enforcement.

TSCA Civil Penalty System

Introduction

The Toxic Substances Control Act (TSCA), passed by Congress and signed into law in 1976, provides for increased regulation of chemical substances and mixtures. The Environmental Protection Agency is charged with carrying out and enforcing the requirements of the Act and any rules promulgated under the Act.

Section 16 of the Act provides for civil and criminal penalities for violations of TSCA or TSCA rules. Civil penalty amounts may range up to $25,000 per violation, with each day that a violation continues constituting a separate violation. Civil penalties are to be administratively imposed, after the person is given a written notice and the opportunity to request a hearing. There is a right to review in the United States Courts of Appeals after the penalty has been imposed by the Administrator.

Section 16 of TSCA requires that a number of factors be considered in assessing a civil penalty, as follows:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, and history of prior such violations, the degree of culpability, and such other matters as justice may require.

The purpose of the general penalty system is to assure that TSCA civil

penalties be assessed in a fair, uniform and consistent manner; that the penalties are appropriate for the violation committed; that economic incentives for violating TSCA are eliminated; and that persons will be deterred from committing TSCA violations.

Scope of the Civil Penalty System

The penalty system described in this document provides the general framework for civil penalty assessment under TSCA. It establishes standardized definitions and applications of factors the Act requires the Administrator to consider in assessing a penalty. As regulations are developed, specific penalty guidelines will be developed adopting in detail the application of the general penalty system to the new regulation. These specific guidelines will generally be issued when enforcement strategies are issued for each new regulation.

Note.—This document does not discuss whether assessment of a civil penalty is the correct enforcement response to a given violative condition. Rather, this document focuses on determining what the proper civil penalty should be if a decision has been made that a civil penalty is the proper enforcement remedy to pursue.

Brief Description of the System

The general civil penalty system is designed to assign penalties for TSCA violations in accordance with the statutory requirements of Section 16. Penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- The "nature" of the violation,
- The "extent" of environmental harm that could result from a given violation, and
- The "circumstances" of the violation.

These factors are incorporated on a matrix which allows determination of the appropriate gravity based penalty.

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors:

- Culpability,
- History of such violations,
- Ability to pay,
- Ability to continue in business, and
- Such other matters as justice may require.

Civil Penalty System and Its Application

This section describes in detail the general civil penalty system, how specific penalty guidances will be developed and applied, and the reasoning behind the development of the system.

The Penalty Factors

The Act requires the consideration of eight named factors in any penalty assessment, as well as "other factors as justice may require."

The first four factors—nature, circumstances, extent, and gravity—relate to the violation. Under the penalty system these four factors are charted on a matrix which yields the Gravity Based Penalty (GBP). This matrix is a *constant* throughout the penalty system. As will be seen below, however, the specific penalty guidelines will affect into which category along each axis of the matrix the violation will fall.

Once a GBP figure is reached, several adjustment factors are applied:

- An upward or downward adjustment may be made for particularly culpable or non-culpable conduct. An upward adjustment of up to 100% may be made where there is a history of such a violation.
- Two other adjustments (not specifically required by the Act, but authorized under the "as justice may require" language of § 16) are to recover cleanup costs paid by the United States, and to reduce or eliminate any financial or competitive advantage gained by the violator as a result of his failure to follow the Act, or its regulations. Other case-by-case adjustments may also be warranted under the "as justice may require" language.
- The final statutory adjustment factors are the violator's ability to pay and the effect on the violator's ability to continue to do business. For several reasons we have combined the concepts involved in these factors onto one "ability to pay" factor. This factor will often act as a limit on the amount of penalty assessed, even where other factors indicate a higher penalty is warranted.

Calculation of the Gravity Based Penalty

The gravity based penalty (GBP) is found on the following matrix:

Circumstances (probability of damages)	Extent of potential damage		
	A major	B significant	C minor
High range:			
1	$25,000	$17,000	$5,000
2	20,000	13,000	3,000
Mid range:			
3	15,000	10,000	1,500
4	10,000	6,000	1,000
Low range:			
5	5,000	3,000	500
6	2,000	1,300	200

NOTE.—Significant violations are assessed at 60–68% of major violations, while minor violations are assessed at 20% and 15% of major violations for levels 1 and 2, and 10% for levels 3–6.

The GBP incorporates nature, extent, circumstances, and gravity as follows:

1. *Nature.* The "nature" factor, as all factors in the penalty system, is used in accordance with its commonly understood meaning: "The essential character of a thing; quality or qualities that make something what it is; essence" (Webster's New World Dictionary).

In the context of penalty assessment, this factor indicates which specific penalty guideline should be used to determine appropriate matrix levels of "extent" and "circumstances" (of environmental harm surrounding the violation). Thus, the nature (essential character) of a violation is best defined by the set of requirements violated, such as the PCB rule, or the premanufacture notification requirement. Since each TXCA section, rule, or other appropriate group of requirements will have a separate specific penalty guideline that will include criteria for assigning violations to the several levels of "extent" of potential harm, and probability of harm, the specific tailoring of these operational criteria for each section or rule ensures that penalties assessed will reflect the nature of the violation.

Also incorporated in the concept of "nature" is whether the violation is of a *chemical control, control-associated data gathering,* or *hazard assessment* nature:

Chemical control: Chemical control regulations are aimed at minimizing the risk presented by a chemical substance, by placing constraints on how it is handled. Sections 6, 7, 12, 13 and subsections 5(e), and 5(f) authorize a wide variety of chemical control actions, from labeling requirements to total bans on manufacture. These requirements are variously imposed by rulemaking, administrative order, court injunction, or by the Act itself.

Control-associated data gathering: Control-associated data gathering requirements are the recordkeeping and/or reporting requirements associated with a chemical control regulation. These requirements enable the Agency to evaluate the effectiveness of the regulation, and to monitor compliance.

Hazard assessment: Hazard assessment requirements are used to develop and gather the information necessary to intelligently weigh and assess the risks and benefits presented by particular chemical substances, and to impose chemical control requirements when appropriate. The requirments include those of premanufacture notification under § 5, testing under § 4, and reporting and recordkeeping under § 8.

As discussed in the next two sections, the "nature" of the violation will have a direct effect on the measure used to determine which "extent" and "circumstances" categories are selected on the GBP matrix.

2. *Extent.* "Extent" is used to take into consideration the degree, range, or scope of the violation. The matrix provides three levels for measuring extent:

Level A (Major):
—Potential for "serious" damage to human health or for *major* damage to the environment.

Level B (Significant):
—Potential for *"significant"* amount of damage to human health or the environment.

Level C (Minor):
—Potential for a lesser amount of damage to human health or the environment.

A number of factors affect into which level of "extent" a particular violation fits. The specific application of these factors depends in large degree on the specific penalty system's treatment of a particular violation. For example, the specific penalty system will not only provide guidance for PCBs in general, but also for the type of PCB violation.

Chemical control: For a chemical control violation (e.g., rules for storage

and disposal of PCBs), the *quantity* of the regulated substance involved might be the principal basis for categorizing extent. In other words, a violation involving under 10 pounds of a given substance might be Level C, 10 to 100 pounds Level B, and over 100 pounds Level A.[1] In the development of specific guidelines, environmental impact data and other analyses developed in support of the chemical control rule making will generally be the basis for determining "extent" levels.

Control-associated data-gathering: For control-associated data gathering regulations, the quantity of regulated substance involved in the recordkeeping will be used as the indicator of the extent of the violation. For example, not reporting the whereabouts of 1,000 pounds of PCBs is more serious than not reporting one pound. In general, the quantity measures used to define the "extent" of such a violation will be the same as those used to define the "extent" categories of the control violation with which it is associated. As with chemical control rules, factors other than quantity may be used when appropriate to indicate the "extent" of potential damage.

Hazard assessment: Hazard assessment data-gathering regulations require a different approach to make an "extent" determination. Unlike chemical control and control-associated data-gathering regulations, the degree of danger or "hazard" presented by the substance in question may not be known. Indeed, this lack of knowledge is the principle reason for the data-gathering. The measure of "extent" of harm will focus on the goals of the given hazard assessment regulation, and the types of harm it is designed to prevent. For example, a § 4 test violation will be of Level A extent *if* it "seriously" affects the validity of a test on a substance which is manufactured in large quantities, with lesser violations treated accordingly, whereas manufacturing a chemical without submitting a premanufacture notification form 90 days in advance, could either be treated as (1) always being of Level A or, (2) varying in level of "extent" according to the volume illegally manufactured. Thus, a great number of judgments must be made in the formulation of the specific penalty policy.

3. *Circumstances.* "Circumstances" is used in the penalty policy to reflect on the probability of the assigned level of "extent" of harm actually occurring. In other words, a variety of facts surrounding the violations as it occurred are examined to determine whether the circumstances of the violation are such that there is a *high, medium,* or *low* probability that damage will occur. The matrix provides the following levels for measuring circumstances (probability factors):

Levels 1 and 2 (High): The violation is *likely* to cause damage.

Levels 3 and 4 (Medium): There is a *significant* chance that damage will result from the violation.

Levels 5 and 6 (Low): There is a *small likelihood* that damage will result from the violation.

The probability of harm, as assessed in evaluating circumstances, will always be based on the risk inherent in the violation *as it was committed.* In other words, a violation which presented a high probability of causing harm when it was committed (and/or was allowed to exist) must be classified as a "high probability" violation and *penalized* as such, even if through some fortuity no actual harm resulted in that particular case. Otherwise some who commit dangerous violations would be absolved. Similarly, when harm has actually resulted from a violation, the "circumstances" of the violation should be investigated to calculate what the probabilities were for harm occurring at the time of the violation. The theory is that violators should be penalized for the violative conduct, and the "good" or "bad" luck of whether or not the proscribed conduct *actually* caused harm should *not* be an overriding factor in penalty assessment. However, the responsibility for clean-up attaches without regard to the probability of harm (see Adjustment Factor 3, Government Clean-up Costs). As with "extent," the specific penalty guidelines are an essential tool in characterizing the circumstances of a violation.

Chemical control: With chemical control violations, probability is determined primarily by physical factors which affect the chance of improper exposure to the chemical's effects. For example, certain types of improper storage of PCBs are more likely than others to result in release of PCBs into the environment, and actual dumping of PCBs is virtually certain to do some harm. Criteria for assessing the probability of harm resulting from a violation will whenever possible be based on information developed in support of the chemical control rule.

Data-gathering and hazard assessment: A slightly different approach is taken to evaluate circumstances of data-gathering

[1] Other criteria, such as number of people exposed or potentially exposed, could have been utilized here, but (1) those factors are difficult and expensive to quantify for individual violations, and (2) these factors are already considered, to some extent, under "circumstances."

violations. The effect on the Agency's ability to implement or enforce the Act is the principal circumstance to be considered. Thus, the matrix levels for measuring circumstances (probability) for data-gathering and hazard assessment violations are as follows:

Levels 1 and 2 (High)—Violations which seriously impair the Agency's ability to monitor (data-gathering) or evaluate chemicals (hazard assessment).

Levels 3 and 4 (Medium)—Violations which impair the Agency's ability to monitor or evaluate chemicals in a less than critical way.

Levels 5 and 6 (Low)—Violations that impair the Agency's ability to monitor or evaluate chemicals in a less than important way.

Under these criteria, a violation of a Section 4 test standard (serious enough to make a study totally unreliable) has a higher probability of resulting in harm to the public through its effect on the Agency and would probably be Level 1 or 2, while late submission of a required report might be only a Level 5 or 6 violation.

Whenever possible, the specific penalty system will attempt to classify certain types of violations according to probability of damage. For example, certain types of violations of a disposal rule might always involve a high probability of damage. But other types of violations might involve such a large range of probability of harm that each case would have to be evaluated individually. In the latter case, the specific penalty guideline will include criteria to guide the evaluation of each violation. It is difficult to estimate the probability of harm presented by given situation, particularly in light of the many variables that make up "circumstances." However, "circumstances" can be evaluated for guideline purposes by comparing situations. For example, it is clear that, as a general rule, there is a greater probability of a falsified laboratory test leading to *actual damage*, than to have such damage resulting from minor errors in test report formatting.

The specific guidelines will also address the range of probabilities within each of the six "circumstances" classifications. For some violations, any probability of causing harm of over 10% might be in the "high" range, while other violations might be classified quite differently. One particular factor that may affect probability determinations is the length of time during which the violation presents a threat to health or the environment. Dumping PCBs in an unapproved landfill may not cause harm immediately but may inevitably cause harm as it leaches into nearby groundwater. But where only temporary improper *storage* is involved, and removal is planned, the probability of harm would be decreased accordingly.

4. *Gravity.* "Gravity" refers to the overall seriousness of the violation. As used in this penalty system, "gravity" is a dependent variable, i.e., the evaluation of "nature," "extent," and "circumstances" will yield a dollar figure on the matrix that determines the gravity based penalty.

The Adjustment Factors

The gravity based penalty reflects the seriousness of the violation's threat to health and environment. The Act also requires the Agency to consider certain factors in assessing the violator's conduct: Culpability, history of such violations, ability to pay, and ability to continue in business. In addition, the Act authorizes the Agency some discretion to consider "other factors as justice may require." Under this last authorization, two additional factors are considered and balanced: the cost of the violation to the government, and the benefits received by the violator due to his non-compliance. In order to compute penalty adjustments in a logical fashion, these adjustment factors are considered in the following sequence:

(1) Culpability;
(2) History;
(3) Cost to the government;
(4) Benefits from non-compliance; and
(5) Ability to pay/ability to continue in business.

1. *Culpability.* Since the law only requires the Agency to consider the culpability of the violator as an adjustment factor, the existence of a violation can be established without relying solely on this "blameworthiness" factor. In other words, the Agency may pursue a policy of strict liability in penalizing for a violation, though some allowance must be made based on the extent of the violator's culpability.[1] Under this penalty system, the gravity based penalty may be increased or decreased, or may remain the same depending on the violator's "culpability."

The two principal criteria for assessing culpability are (a) the violator's *knowledge* of the particular TSCA requirement, and (b) the degree of the violator's *control* over the violative condition.

[1] There are certain circumstances where an "act of God" or some other circumstance totally out of a company's control may not result in assessment of a violation (no legal liability). For example, where PCBs are *properly* stored, and a plane crashes into the storage facility, causing a spill, there will probably be no violation.

(a) *The violator's knowledge:* The lack of knowledge of a particular requirement would not necessarily reduce culpability, since the Agency has no intention of encouraging ignorance of TSCA and its requirements. The test under TSCA will be whether the violator knew or should have known of the relevant TSCA requirement *or* of the general hazardousness of his actions. This latter point will allow the Agency to find a violator fully culpable even if he has no knowledge of a particular regulatory requirement when he does have knowledge that the particular substance he was dealing with was hazardous. For example, lack of knowledge of the PCB rules would not reduce culpability if the violator had knowledge that the dumping of PCBs creates a serious threat to human health. Thus, a reduction in the penalty based on lack of knowledge could only occur where a reasonably prudent and responsible person in the violator's position would not have known that the conduct was hazardous or violative of TSCA. It is anticipated that such situations and attendant reductions will be rare.

(b) *Degree of control over the violation:* There may be situations where the violator may be less than fully responsible for the violation's occurrence. For example, another company may have had some role in creating the violative conditions and thus must also share in the legal responsibility for the resulting consequences. Or an employee whose conduct caused the violation may have been disobeying his employer's instructions. Such situations would probably warrant some reduction in the penalties.

(c) *Initial culpability determination:* For penalty assessment purposes, three levels of culpability have been assigned, as follows:

Level I: The violation is willful, i.e., the violator intentionally committed an act which he knew would be a violation or would be hazardous to human health or the environment.

—Adjust the GBP *Upward* 25%.

Level II: The violator either had sufficient knowledge to recognize the hazard created by his conduct, or significant control over the situation to avoid committing the violation.

—No adjustment to the GBP.

Level III: The violator lacked sufficient knowledge of the potential hazard created by his conduct, and also lacked control over the situation to prevent occurrence of the violation.

Adjust the GBP *downward* 25%.

It is anticipated that most cases will present Level II culpability. Level I situations, in many instances, could be treated as criminal violations (and often will be so treated). However, the decision to file a criminal action has no effect on civil penalty calculations and is a totally separate issue.

(d) *Attitude of the violator:* In assessing the violator's "attitude," the Agency will look at the following factors: Whether the violator is making "good faith" efforts to comply with the appropriate regulations; the promptness of the violator's corrective actions; and any assistance given to EPA to minimize any harm to the environment caused by the violation.

Since "attitude" is already reflected in Level I culpability, and since it is largely irrelevant to Level III culpability, this adjustment will really only be utilized where "knowledge" and "control" result in a Level II culpability finding. While Level II normally yields no reduction or increase in penalty, the attitude of the violator may justify a penalty adjustment of up to 15% of the GBP in either direction. Objective evidence, such as statements or actions of the violator, should be used to justify such adjustments.

2. *History of prior such violations.* The gravity based penalty matrix is designed to apply to "first offenders." Where a violator has demonstrated a similar history of "such violations," the Act requires the penalty to be adjusted upward. The need for such an upward adjustment derives from the violator's not being sufficiently motivated to comply (deterred from non-complying) by the penalty assessed for the previous violation, either because of economic factors consciously analyzed by the firm, or because of negligence. Another reason for penalizing repeat violators more severely than "first offenders" is the increased enforcement resources that are spent on the same violator.

The Agency's policy is to interpret "prior *such* violations" as referring only to prior violations of *TSCA*, even though it would seem "such" could refer to *any* violations of EPA statutes, or remedial statutes in general (e.g., OSHA, CPSC). However, since Congress did not *explicitly* state it wanted the Agency to go beyond TSCA in determining violation history, the Agency is using this narrower interpretation. The penalty system distinguishes between previous TSCA violations in general, and previous violations of the same set of regulatory requirements.

The following rules apply in evaluating history of prior such violations:

(a) In order to constitute a prior violation, the prior violation must have resulted in a *final order*, either as a result of an uncontested complaint, or as a result of a contested complaint which

is finally resolved against the violator. Violations litigated in the Federal courts, under the Act's imminent hazard (§ 7), specific enforcement and seizure (§ 17), and criminal (§ 16(b)) provisions, are part of a violator's "history" for penalty assessment purposes, as are violations for which civil penalties have been previously assessed. However, a notice of non-compliance does *not constitute* a *"prior such violation"*, since no violation has formally been found, and no opportunity to contest the notice has been given.

(b) To be considered a "prior such violation", the violation must have occurred within five years of the present violation. This five year period begins when the prior violation becomes a final order. Beyond five years, the prior violative conduct becomes too distant to require compounding of the penalty for the present violation.

(c) Generally, companies with multiple establishments are considered as one when determining history. Thus, if one establishment of a company commits a TSCA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another TSCA violation. However, two companies held by the same parent corporation do not necessarily affect each other's history if they are in substantially different lines of business, and they are substantially independent of one another in their management, and in the functioning of their Boards of Directors. In the case of wholly- or partly-owned subsidiaries, the violation history of a parent corporation shall apply to its subsidiaries, and that of the subsidiaries to the parent.

(d) If the prior such violation is of a different TSCA provision or regulation, the penalty should be upwardly adjusted 25 percent for a first repetition and 50 percent for a second repetition of the violation. If the prior "such" violation is of the same, or closely similar provision or regulation, the penalty should be upwardly adjusted 50 percent for the first repetition and 100 percent for the second repetition.

For these purposes, a prior such violation is the "same or closely related" if it is *similar* to the present violation. Each TSCA rule or regulation is considered a separate entity for "closely related" purposes. Thus the identical provision does *not* have to be violated both times for this higher adjustment to be made. For example, *two separate* unlawful disposals of PCBs may be "closely similar" if the PCBs were unlawfully dumped on the highways in the first instance, and in the second instance, PCBs of over 500 ppm were burned in a facility that did not comply with the PCB incinerator standards.

The specific guidelines will give some guidance on what violations are "closely similar" to others, and may set up a sliding scale of upward adjustment percentages rather than the 50 percent or 100 percent figures provided here.

3. *Government clean-up costs.* An adjustment factor not specified in the statute, but which the Agency feels "justice * * * require[s]," is reimbursement to the government for funds expended to investigate, clean-up, or otherwise mitigate the effects of a violation.

Generally, the clean-up expense of a violator is to be borne by the violator as a necessary cost of violation in addition to any civil penalty assessed. The government may seek a Federal district court injunction under §§ 7 or 17 to require the violator to clean-up, but there will almost certainly be situations where the government will have to clean-up the violation to quickly alleviate any hazards created. Where these latter situations happen, the government could probably file a non-statutory suit in Federal district court to recover funds which it expended, but it could even more easily assess these costs, when they are sufficiently low, in an administrative proceeding under § 16, particularly where a § 16 particularly where a § 16 action is going to be filed anyway.

The major limitation to seeking reimbursement of government investigatory and clean-up costs is the limit of $25,000 for each violation. However, since each day a violation continues constitutes a separate violation for which a $25,000 penalty may be assessed, in many instances clean-up and investigatory costs can be recovered where the violation is a continuing one. However, where a penalty would be in the area of $25,000 for the violation even before government investigatory and clean-up costs are considered, a § 16 action would be of little value in recovering these additional costs.

In adjusting the penalty, the government investigatory and clean-up cost should be added to the penalty calculated thus far. Where the total penalty under this method exceeds $25,000, the penalty should be cut back to $25,000. As will be discussed later, this type of situation lends itself to utilization of the continuing violation provisions of § 16.

It is important to note that consideration of government investigatory and clean-up costs in the

penalty assessment is *not* intended to in any way affect the *right* of the government to *recover investigatory and clean-up costs* in a separate court action. A violator may argue that investigatory and clean-up costs have been abrogated by settlement of the penalty. Thus, if there is a reasonable possibility that the Agency will seek to recover such costs in a separate suit, this factor *should not* be utilized in assessing the § 16 penalty. Thus the investigatory and clean-up costs will *not* be included twice in calculating a penalty for a violation.

4. *Gains from noncompliance.* Another adjustment factor which "justice * * * require[s]" is that the violator not profit from its violative acts. TSCA's ability to prevent harm to public health and the environment is severely weakened whenever an economic incentive exists to violate the law. The penalty system attempts to eliminate, or at least reduce, these economic incentives, by adding to the base penalty an estimate of the economic gains obtained by the violator as a result of his noncompliance.

Among such economic gains would be money saved by not investing in new equipment, or by not following more costly operating procedures, or profits gained through the sale of illegal products. Removing such gains not only protects the public by deterring violations, but also prevents violators from gaining unfair competitive advantage over those who are complying with the law. For example, a company which manufactures a new chemical without submitting a premanufacture notice, pursuant to § 5, may gain a strong competitive advantage over another company who intends to manufacture the same chemical, but follows the § 5 procedure. The violator should be penalized at least to the extent of the economic gains achieved through his noncompliance. Any other result would put a premium on noncompliance.

The specific penalty guidelines should, where possible, indicate the types of economic gains from noncompliance, and include either standard estimates of such gains (e.g., the purchase price of required new equipment or facilities), or a procedure for estimating the gain. In cases where economic gains resulted from the company's failure to make required capital and operation and maintenance expenditures, those gains must be calculated in accordance with the Agency's September 27, 1978, "Technical Support Document" for computing civil penalties under the April 11, 1978, Civil Penalty Policy. The resulting economic savings figure must be reviewed by the Civil Penalty Policy Panel for consistency with that policy. In many instances, the GEP will be sufficiently high without adjustment for this factor. In other situations where there is no economic motive or benefit from noncompliance, or when the cost of cleaning up a violation outweighs any economic benefits received, this adjustment factor need not be applied.

5. *Ability to pay and ability to continue in business.* (a) *Usage of these terms.* The Act lists "ability to pay" and "ability to continue in business" as two adjustment factors, but for the purposes of the penalty system the distinctions between the two are so narrow and artificial that they are treated as one. In making this determination it was considered that "ability to pay" might be limited (in the extreme sense) to such indicators as the market value of the violator in liquidation, the profits accrued by the firm over a given time period, the net sales or income generated over a given time period, the value of cash and other liquid assets held by the firm, and the value of all liquid assets plus borrowable cash. Essentially, however, a firm can pay up to the point where it can no longer do business.[3] However, it is evident that Congress, by inserting these two factors into the Act, for *most* cases did not intend that TSCA civil penalties present so great a burden as to pose the threat of destroying, or even severely impairing, a firm's business.

Measuring a firm's ability to pay[4] a cash penalty, without ceasing to be operable, can be extremely complex. The focus is on the solvency of the firm. Rather than performing extensive financial analysis of a firm, which would take an unreasonable effort on the part of both the Agency and the firm, it is believed that a year's net income, as determined by a fixed percentage of total sales, will generally yield an amount which the firm can afford to pay. The average ratio of net income to sales level for U.S. manufacturing in the past five years is approximately five percent (*1978 Economic Report of the President*). Since small firms are generally slightly less profitable than average sized firms, and since small firms are the ones most likely to have difficulty paying TSCA penalties, the guideline is reduced to four percent.

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[3] Technically, a firm would often be able to pay even if imposing a penalty would cause it to file for bankruptcy, since a reorganization might still leave the business in operation.

[4] Hereafter, "ability to pay" will be used to include "ability to continue in business".

Even where the net income is negative, four percent of gross sales should still be used as the "ability to pay" guideline, since companies with high sales will be presumed to have sufficient cash to pay penalties even where there have been net losses.

For purposes of calculating the ability to pay, figures for the current year and the prior three years should be averaged. Four percent of the average sales will serve as the guideline for whether the company has the ability to pay.

(b) *Application of ability to pay.* While it would be possible for an inspector to utilize Dunn and Bradstreet, or to inquire during the course of the inspection to ascertain sales data, the firm should be presumed to have the ability to pay at the time the complaint is issued. This is preferable not only for purposes of administrative convenience, but also because many firms will not have their sales information in Dunn and Bradstreet or similar publications, and because the Act indicates that financial and sales data are only subject to inspection when "the nature and extent of such data are described with reasonable specificity in the written notice (of inspection)." § 11(b)(2). This singling out by Congress of these factors indicates that they are not to be routinely asked for in every inspection, and since any alleged violator can raise the issue of ability to pay in his answer to the complaint, both the Agency and the inspected firm will save time and resources by using this approach. Of course, if such information can easily be obtained prior to or during the inspection, there is no harm in doing so.

If the firm raises the issue of inability to pay in its answer, or in the course of settlement discussions, the four percent guideline discussed above should be the model to follow. The firm should be asked to bring appropriate documentation to indicate what their sales have been, such as tax returns, financial statements, etc. If the proposed penalty exceeds four percent of total sales, the penalty may be reduced to an affordable level.

There may be some cases where a firm argues that it cannot afford to pay even though the penalty as adjusted does not exceed four percent of sales. A variety of factors, too complex to discuss here, might require such further adjustment to be made. In complex cases, the agency may need to rely on a management division economist or an accountant to analyze the firm's ability to pay and, on a case-by-case basis, to further reduce the proposed penalty.[8]

6. *Other factors as justice may require.* While two "other factors" have been incorporated as adjustment factors, other issues might arise, on a case-by-case basis, which should be considered in assessing penalties. Among these factors are:

- *Money spent by the violator in cleaning up or otherwise mitigation the harm caused by the violation.* Normally there should be no reduction for these costs, since it is part of the cost of violation. However, there may be instances where the cost of penalty, plus cost of cleanup, are excessive for the particular violation, so that some credit for these expenditures should be given.
- *New ownership for "history of violations."* It may be unfair in some cases to burden new ownership with the previous owner's history.
- *National defense.*
- *Foreign policy.*
- *Conflict or ambiguity vis-a-vis other Federal statutes and regulations* (e.g., OSHA, USDA, DOE).
- *Environmentally beneficial expenditure.* Circumstances may arise where a violator will offer to make expenditures for environmentally beneficial purposes above and beyond those required by law, in lieu of paying civil penalties. The Agency, in penalty actions in the U.S. District Courts under the Clean Air and Water Acts, has determined that crediting such expenditures is consistent with the purpose of civil penalty assessment. Although civil penalties under TSCA are administratively assessed, the same

[8] The analyst must keep several particular points in mind. First, small firms often report no taxable income, and instead provide a return of their owner/operators through salaries and benefits such as automobiles, medical plans, and so forth. When reconstructing the firm's cash flow, owner/operators should receive as payment for services only that amount which they could obtain for providing similar services in the general labor market. The rest of their compensation should properly be assigned to profit for the company. The second point to keep in mind in examining tax returns is that small, privately-owned plants often have several corporations set up to handle various aspects of the business. If one or more of these corporations is culpable for some part of the TSCA violation, the tax returns for all involved corporations should be examined and a combined cash flow prepared. Once the firm's historical cash flows have been assembled, the analyst must make some assessment of the likely future path of the company. In so doing, the analyst must consider the firm's ability to earn cash from its operations, its ability to liquidate assets to meet penalty amounts (and still remain in business), and its ability to raise additional cash from lenders and its owners. The analyst must judge these factors without expending excessive resources on the analysis. Such a process can be assisted through discussions with individuals knowledgeable in the particular industry, such as local bankers, consultants, and others, if appropriate.

rational applies. This adjustment, which constitutes a credit against the actual penalty amount, will normally be discussed only in the course of settlement negotiations. The criteria for acceptable credits are discussed in detail in section VIII of the April 11, 1978 Civil Penalty Policy. Before proposed credit amounts can be incorporated into a settlement, the complainant must assure himself that the penalty (with credit adjustment) is consistent with the April 11, 1978, Civil Penalty Policy, and that the company has not already received credits in another enforcement action for the same environmentally beneficial expenditures. The settlement agreement incorporating such an adjustment should make clear what the actual *penalty* assessment is, after which the terms of the reduction should be spelled out in detail and in a clearly enforceable manner.

• *Significant-minor borderline violations.* Occasionally a violation, while of significant extent, will be so close to the borderline separating minor and significant violations that the penalty may seem disproportionately high. In this situation, additional reduction of up to 25% off the GBP may be applied before the other adjustment factors are considered.

Continuing Violations

Since the Act provides not only that civil penalties may be assessed up to $25,000 for each violation, but that each day a violation continues constitutes a separate violation for which additional penalties may be assessed, there is a potential for very large penalties to be assessed in many situations. In some cases, such large penalties will be appropriate for continuing violations, while for others, such as late inventory reporting, assessing an additional penalty for each day of violation would yield a penalty assessment far greater than the violation merits. The specific penalty guidelines will discuss the types of continuing violations which should be assessed on a per-day basis. This discussion should indicate how criteria such as this will be applied, e.g., which continuing violations should never be penalized on a per-day basis, and which should usually or always be so penalized.

When a penalty is assessed on a per-day basis for a continuing violation, care must be taken to assure that the adjustment factors, "government clean up costs", and "economic benefits from non-compliance" are spread over the entire penalty, since these figures are calculated by looking at the entire violative situation. For example, if a continuing violation lasted four days and generated $40,000 in government clean-up costs, these $40,000 in costs should be added to the daily penalties (although each day would still be limited to a maximum $25,000 penalty).

Continuing violations are distinguished from multiple violations and violations which occur several separate times. These latter violations will generally be separately assessed.

Settlement

This guidance does not prescribe a specific percentage guideline for penalty reductions in the course of settlement. While, as a general rule, penalties may be altered in the course of settlement, there should always be some substantive reason given, which is to be incorporated in any settlement agreement and consent decree and final order for any penalty reduction. Other aspects of settlement are discussed in the context of particular penalty factors.

Designing and Applying a Specific Penalty Guidance

Designing a Specific Penalty Guidance

The specific penalty guidance, which will usually be developed as part of the enforcement strategy for a particular regulation, will provide the detailed information needed to fit particular violations in the overall civil penalty system. Each specific penalty guidance will address:

• To the extent possible, the types of violations that can occur;

• How to evaluate the nature (i.e., whether chemical control or information gathering) of a violation;

• How to determine and classify the extent of possible harm posed by a given violation;

• Special considerations in using the adjustment factors, particularly including means of estimating government clean-up costs and economic benefits from non-compliance;

• How and when to utilize the concept of multi-day violations;

• Any "other matters as justice may require" which may particularly apply to the given regulation; and

• Anything else necessary to effectuate enforcement of the regulation and the Act's penalty policy.

Applying a Specific Penalty Guidance

This section briefly summarizes the steps necessary to calculate a proposed penalty assessment.

Step 1: Utilizing the specific penalty guidances, determine the nature, extent, and circumstances of the violation.

Step 2: Find the appropriate extent and circumstances levels on the gravity based penalty matrix to determine the gravity based penalty (GBP).

Step 3: Determine the percentage adjustment for culpability, if any.

Step 4: Determine the percentage adjustment for history, if any.

Step 5: Add the adjustment percentages from steps 3 and 4 and apply the GBP. If the amount is in excess of $25,000, reduce the penalty to $25,000.

Step 6: Multiply the step 5 figure by the number of days of violation.

Step 7: Apply government cleanup costs adjustment, if applicable. Add to the step 6 figure.

Step 8: Apply economic gains from non-compliance adjustment, if applicable. Add to the step 6 figure.

Step 9: Make other adjustments "as justice may require."

Step 10: Issue formal complaint proposing the penalty.

Step 11: Discuss settlement any time before a final administrative law judge's decision (unless the complaint is not contested and becomes final as a matter of law). If applicable, determine violator's ability to pay. If appropriate, reduce penalty to amount violator can afford to pay. Penalties may be reduced as a condition of settlement.

Step 12: Issue Final order.

Civil Penalty Assessment Worksheet

Name of Respondent: _____

Address of Respondent: _____

_____

(1) Complaint I.D. Number: _____
(2) Date Complaint issued: _____
(3) Date Answer Received: _____
(4) Date Default Order Sent: _____
(5) Date Consent Agreement Signed: _____
(6) Date Final Order Sent: _____
(7) Date Remittance Received: _____

1. Gravity Based Penalty (GBP) from matrix, $____.

2. Percent increase or decrease for culpability, %____.

3. Percent increase for violation history, %____.

4. Add lines 2 and 3, %____.

5. Multiply GBP by percentage total on line 4, $____.

6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage), $____.

7. Enter line 6 amount or $25,000, whichever is *less*, $____.

8. Multiply line 7 by the number of days of violation, $____.

9. Government clean-up costs, if any, $____.

10. Economic gains from non-compliance, if appropriate, $____.

11. Add lines 8 through 10, $____.

12. Total of other adjustments as justice may require, $____.

13. If line 12 represents a net *increase* to the penalty add line 12 to line 11, $____.

or

If line 12 represents a net *decease* to the penalty subtract line 12 from line 1, $____.

Note—Line 13 should be the proposed penalty for a given violation. This procedure is repeated for each violation.

Enforcement Response Policy: Asbestos

Asbestos in Schools Enforcement Response Policy

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PART I INTRODUCTION

The Enviromental Protection Agency (EPA) has published the "Friable Asbestos-Containing Materials in Schools: Identification and Notification Rule" (Asbestos in Schools Rule) (47 Federal Register 23361, May 27, 1982) under Section 6(a) of the Toxic Substances Control Act (TSCA). The purpose of the rule is to identify the location of friable asbestos in school buildings and to notify persons who risk unwitting exposure to asbestos. The rule was effective on June 28, 1982, and allows one year after that date for the performance of required activities.

The EPA's Asbestos in Schools Program began as a voluntary activity known as the Technical Assistance Program (TAP). The TAP was implemented in each of the ten Regions through the Regional Asbestos Coordinator and state and local contacts. The inspection and notification requirements of the rule are now mandatory. Certain other activities associated with asbestos in schools, such as abatement and control procedures, are not requirements of the rule. However, since these activities are often logical consequences of complying with the rule, the EPA will continue to offer advice to school personnel on how to control hazards from friable asbestos-containing material through the Regional Asbestos Coordinators.

This Enforcement Response Policy provides guidance to the Regions in enforcing the provisions of the Asbestos in Schools Rule. The remedies under Sections 16 and 17 of TSCA are available for violations of this rule. Part II of this document provides guidance in the use of notices of noncompliance, civil administrative penalty actions, injunctions and criminal actions for violations of this rule. Part III of this document explains how to use the General TSCA Civil Penalty System (45 Federal Register 59770, September 10, 1980) to arrive at an appropriate civil administrative penalty, where that penalty is utilized.

The Requirements

The requirements of the regulation are directed at Local Education Agencies (LEA's). As discussed in the rule, this term includes:

- Any local education agency as defined in Section 198(a)(10) of the Elementary and Secondary Education Act of 1965.
- The governing authority of any nonprofit elementary or secondary school.

This rule imposes requirements which may be divided into the following five basic action areas:

- Identification: Inspection of all school buildings for friable materials;
- Sampling: Collection of samples of the friable materials;

- o Analysis: Analysis of the samples to determine if they contain asbestos;
- o Notification: Informing the Parent Teachers Association (or parents), faculty and other building users of the presence of asbestos, posting the notice to school employees form and distributing of "A Guide for Reducing Asbestos Exposure" to custodial and maintenance personnel; and
- o Recordkeeping: Maintaining records which describe the actions taken to comply with the rule. This includes a statement signed by the person responsible for compliance with the rule that the requirements of the rule have been satisfied.

The first four areas are sequential steps in achieving compliance with the rule. In the fifth area, the rule requires the LEA to keep records in each school and in the LEA administrative office. These records, available to the public as well as to EPA, document the compliance efforts of the LEA and of each school.

Exemptions

- o Schools which were built after December 31, 1978, are exempt from all requirements of the rule.
- o Schools which can document that no friable asbestos-containing materials were used in building or renovating the school buildings are exempt from all requirements of the rule. Certification, as required by the rule, must be in the school's records.
- o Schools which completed specific requirements of the rule as part of the voluntary Technical Assistance program (see "Compliance Assistance Guidelines") need not repeat these activities. If no asbestos was discovered by the TAP, the appropriate certification must be in the school's records.
- o Schools which have satisfactorily abated (see "Compliance Assistance Guidelines") asbestos-containing materials before June 28, 1983, are exempt from all requirements of the rule.
- o Schools which certify for the record that all friable materials will be treated as asbestos-containing materials for purposes of this rule are exempt only from the inspection, sampling and analysis requirements of this rule. This certification must be in the school's records.

The Violations

Failure to perform any requirement of the rule constitutes a violation of TSCA. Thus, possible violations of the rule include:

- o Failure to inspect;
- o Failure to sample;
- o Failure to analyze;
- o Failure to notify; and
- o Failure to keep records.

The improper use of an exemption would result in at least one, and possibly all of the above violations. If records or certification were falsified to support an exemption claim, the falsification would be a separate violation. TSCA §16 provides for civil and criminal penalties for any person who violates a provision of §15 if the violation is knowing or willful.

Liability

In taking enforcement action to redress violations of this rule, EPA has the option of proceeding against the entity alleged to be in violation and/or against the responsible official who signs the certification.

Generally, EPA will hold only the LEA liable for the actions of its officers and employees. The Agency, however, reserves its right to impose individual liability under appropriate circumstances. Appropriate circumstances for the purposes of this rule are cases where an individual has knowingly or willfully signed a certification statement which is false.

PART II DETERMINING THE LEVEL OF ACTION

The regulations require school officials to perform certain actions in identifying friable asbestos-containing materials and notifying specified persons of the presence of such materials. Since the asbestos in schools regulatory program began as a voluntary program, the EPA will continue the program in the same spirit of cooperation.

However, situations could occur which would require an enforcement response. The various levels of possible enforcement response are the following:

- o Notice of Noncompliance
- o Civil Complaint
- o Injunctive Action
- o Criminal Action

Notice of Noncompliance

When a Regional official determines that an LEA has violated the Asbestos in Schools Rule, the appropriate Regional office should issue a notice of noncompliance. Within 30 days of the receipt of the notice of noncompliance, the LEA should demonstrate compliance with the rule.

Since the LEA is the responsible party, the notice of noncompliance should be sent to the LEA, but a copy should also be sent to any specific school involved. The notice of noncompliance should state that the LEA must demonstrate compliance with the rule and describe the actions it has taken to come into compliance with the rule within thirty days of the receipt of the notice. If the LEA cannot achieve compliance within 30 days of the receipt of the notice of noncompliance, the Regional office should seek a final response.

Final Responses

LEA's which have received a notice of noncompliance and do not comply with the rule within 30 days of the receipt of the notice are subject to one or more types of final enforcement responses. These are: (1) civil penalty, (2) injunctive action or (3) criminal action. The most common enforcement response will be the civil penalty, but injunctive or criminal actions may be pursued in certain instances.

Civil Penalty

If the LEA cannot comply with the rule within 30 days of receiving a notice of noncompliance, the Region should file a Civil Complaint. The Civil Complaint will describe the violations and the amount of the penalty to be assessed. Under certain conditions, all or part of the penalty will be remitted under a negotiated Settlement with Conditions (SWC) if the LEA abides by a Compliance Program and Schedule (CPS). (The Settlement with Conditions is a separate document prepared at the same time as the Civil Compliant.)

To determine if an LEA is a good candidate for negotiating an SWC apply the following criteria:

1. Violations have been documented and have not been corrected within 30 days after a notice of noncompliance.

2. The violations will require more than 30 days to correct.

3. The LEA exhibits a good attitude towards coming into compliance with the rule under a CPS.

4. A CPS acceptable to EPA can be negotiated. (A model CPS for the Asbestos in Schools Rule is the subject of Appendix B.)

More detailed guidance concerning Settlement with Conditions will be sent to the Regions in the near future. Please notice that the only aspect of the rule under negotiation is the deadline for completion. An LEA may not, at this time, offer to abate asbestos in the school if it does not have to notify parents. Any LEA which has allowed school children and staff to be exposed to an friable asbestos containing material after June 28, 1983, must inform the PTA or the parents directly and the staff of the school.

If the LEA fails to demonstrate good faith in abiding by its compliance program and schedule, the penalty will not be remitted and the LEA will be required to pay the total penalty.

Injunctive Action

In certain cases where the EPA's efforts to obtain voluntary compliance by a notice of noncompliance or a civil penalty assessment fail to achieve cooperation on the part of the LEA, injunctive action may be the appropriate response. In such cases, the Regional enforcement attorneys should consider seeking an injunctive relief pursuant to Section 17 of TSCA to compel the LEA to comply with the rule.

Injunctive actions must be initiated in U.S. District Court by the Department of Justice (DOJ) and may be referred to DOJ only by the Associate Administrator (AA), Office of Legal and Enforcement Councel (OLEC), or the AA's designee. Requests for injunctive action should be forwarded to OLEC with a copy to the Compliance Monitoring Staff. For futher guidance see following OLEC memoranda "General Operating Procedures for the Civil Enforcement Program" (July 6, 1982) and "Case Referrals for Civil Litigation" (September 7, 1982).

Criminal Action

Criminal sanctions are available for violations of the Asbestos in Schools Rule, pursuant to Section 16(b) of TSCA. Only serious violations, where there is "guilty knowledge" or intent ("knowing and willful" violations), should be considered for criminal sactions. Guidance on the use of criminal sanctions is available in "Criminal Enforcement Priorities for the Environmental Protection Agency" issued by OLEC October 12, 1982.

PART III ASSESSING AN ADMINISTRATIVE PENALTY

The purpose of this section of the enforcement response policy is to explain how to use the TSCA Civil Penalty System, (45 FR 59770, September 10, 1980,) to arrive at an appropriate penalty where an administrative penalty is the appropriate enforcement response.

The Gravity Based Penalty

The gravity based penalty (GBP), as defined by the TSCA Civil Penalty System, is a function of three factors:

- The "nature" of the violation committed.
- The "extent" of the violation, or the amount of potential risk to human health from the inability of the Agency and the public to assess the health hazard involved.

° The "circumstances" of the violation, or the probability that the violation has impaired the ability of the Agency and the public to assess the health hazard involved.

When all three of these factors are specified for a particular violation, it is possible to determine the gravity based penalty from the GBP matrix. That matrix, which was established in the TSCA Civil Penalty System, appears below.

CIRCUMSTANCES:	EXTENT: LEVEL	MAJOR	SIGNIFICANT	MINOR
HIGH	1	$25,000	$17,000	$5,000
RANGE	2	$20,000	$13,000	$3,000
MID	3	$15,000	$10,000	$1,500
RANGE	4	$10,000	$6,000	$1,000
LOW	5	$5,000	$3,000	$500
RANGE	6	$2,000	$1,300	$200

Nature of Violations

The Asbestos in Schools Rule constitutes a hazard assessment regulation. The rule will serve to identify the location of friable asbestos-containing material and to notify persons who are exposed to asbestos. With this information exposed persons may take measures to reduce the risk to themselves.

Extent Category

In this case the potential risk arises from the inability of the Agency and the public to assess whether exposure is occurring to a material which is known to result in risk to human health. Thus, failure to comply with the rule prevents people from knowing if they are exposed to asbestos and precludes any adequate response to the problem.

Since the presence of friable asbestos-containing material is unknown in the absence of specific information about the building, the possibility of risk can be considered to be evenly distributed among schools subject to the rule which have not complied with the rule. Therefore, all violations are placed in the same extent category. The extent category is the significant category. In this case the information is not reported to EPA

and will not make a major impact on its overall policy, nor does the rule require any action on the part of the LEA in response to the rule. Thus the major category is not appropriate. The information would, however, have an important impact on local programs and policies concerning asbestos in schools, so the minor category is also inappropriate.

Circumstances Category

The circumstances axis measures the probability that the violation has impaired the ability of the Agency and the public to assess whether a health hazard may be involved. The ability of the public and the Agency to assess the health hazard from asbestos is directly proportional to the amount of good quality information available to them. Thus, the violations have been categorized based on the amount of information available to the public and the Agency.

The Agency's goal is to bring about compliance with the rule. Schools, as non-profit public service institutions, will feel the impact of even small fines. Thus, in each Range the lower Level circumstance is applied.

Level 2 Violations

- Falsification of notices to staff and PTA's or parents
- Falsification of records or certification for exemptions

The Agency considers falsification of information about the performance of the rule requirements to constitute a separate violation in that complete and accurate records and notifications are not available. Falsification of records can lead to a sense of false security for school personnel, persons who use the school and children's parents. Additional exposure to asbestos could occur as a result of falsification because employees did not take ordinary precautions to limit asbestos exposure. This result may be worse than failure to keep those records in the first place. Falsification of records or certification which support an exemption claim are violations in this category. In this case the LEA will be assessed a penalty for falsification of records.

Level 4 Violations

- Failure to create and keep accurate records (including certification statement for exemptions)
- Failure to inspect
- Failure to sample
- Failure to analyze samples
- Failure to post warnings and notify (including failure to distribute "A Guide for Reducing Asbestos Exposure")

The intent of the Rule is to identify the location of friable asbestos-containing material in the school and to communicate that information to the school personnel and parents of the children. The requirements of the rule are relatively simple and the Agency has provided guidance documents and other forms of training and assistance for LEA's to comply with the rule. Failure to perform any requirement destroys the integrity of the program. For example, records are meaningless if no inspection was performed. Also, if an inspection located friable materials but no samples were taken or analyzed, then there is still no knowledge about whether there is a hazard from asbestos. If the warning and notification requirements are not followed, then the persons who need to know about the asbestos hazard do not know.

Level 6 Violations

- Failure to keep adequate records in the right place
- Failure to inspect properly
- Failure to sample properly
- Failure to analyze properly
- Failure to notify properly

These violations are activities that the LEA performed technically improperly. Good faith efforts to comply with the rule constitute a lesser violation than outright failures to comply. Nevertheless, improper performance results in unreliable information and unreliable records.

Note that Level 6 violations are instances in which the LEA made a good faith effort to comply. Incomplete compliance which is in bad faith would be Level 4 or Level 2 violations depending on the circumstances.

Independent Assessment

Although each school may have failed to comply with more than one requirement, Regional enforcement personnel should charge an LEA only once for each school in violation. The charge should be for the highest level violation (see "Circumstances", page 7), but cite all others.

The violation for failure to keep records in the district office, which occurs at the LEA level, should be treated as a single violation equal to the failure of one school to maintain records.

Adjustment Factors

TSCA requires the Agency to consider certain factors in assessing the violator's conduct: Culpability, history of such violations, ability to pay and ability to continue in business. The Act also authorizes the Agency some discretion to consider "other factors as justice may require". In the General TSCA Penalty Policy, two factors are considered in this category: cost of the violation to government and benefits received by the violator due to noncompliance. Since this is an identification and notification rule, which does not require any action in response to identification of a hazard other than notification, it is difficult to calculate the benefit from noncompliance. The government does not have to launch expensive clean up activities or investigations so the cost to the government is also not high. Therefore, it is not appropriate to apply cost and benefit factors to adjust the penalty. Also, the rule requires that the activities be performed only once. Therefore, there will be no repeat violations. The other factors will be applied in the following sequence:

(1) Culpability

(2) Ability to pay/ability to continue in business

Culpability

The two principal criteria for assessing culpability are the violator's knowledge of a TSCA requirement and the violator's control over the violative condition. Other criteria are the willfulness of the violator to commit the violation and the attitude of the violator.

Lack of knowledge of this particular rule would reduce culpability only where a reasonably prudent and responsible person in the violator's position would not have known of the rule. The Agency has had an asbestos in schools program for several years, has mailed copies of the rule to all LEA's known to the Department of Education and has supported a vigorous outreach program. The Agency anticipates that situations in which a reasonably prudent and responsible person would not know of the rule would be extremely rare. If such a situation does exist, the penalty could be adjusted downward as much as 25%.

There may be situations where the violator is less than fully responsible for the violation. For instance, an employee or contractor disobeyed the instructions of the employer and as a result of that disobedience, the violation occurred. If properly documented, such situations would warrant some reduction in penalty. The appropriate reduction is up to 25%.

Attitude of the violator is an important factor, particularly with respect to this rule. "Good faith" efforts to comply with the rule can result in a reduction of the penalty by up to 15%. Deliberate recalcitrance can result in an upward adjustment of up to 15%.

Ability to Pay/Ability to Continue in Business

For purposes of this rule the gravity based penalty will be determined based on the parameters and culpability factors already discussed. This amount will be the penalty in the complaint. The LEA may raise ability to pay as an issue. In this case the Regional Office will have to determine what the LEA can be expected to pay.

Many LEA's will have limited funds. Some may argue that they cannot afford the penalty because they have used funds to abate or control the friable asbestos-containing material in the school. The cost of abatement and control activities, even though these activities are not required by the rule, may be deducted from the penalty. To qualify for the deduction, these activities should either be completed, in progress, or under contract, and the costs must be clearly documented. The cost of vaguely "planned actions" will not be deducted. Regional personnel should review the contract and any results reports before determining the amount of reduction. The deduction should not exceed 80% of the penalty, if the LEA has not notified the PTA (or parents) and school staff of any asbestos hazard remaining in the school after June 28, 1983. (An RWC could allow remission of the remaining 20% when the proper persons are notified.)

Appendix A: Sample - Notice of Noncompliance

Local Education Agency
Street
City, State
Zip Code

Dear

The United States Environmental Protection Agency (EPA) finds

(Name of LEA)
(Name of School, if applicable)

in violation of the Friable Asbestos-Containing Materials in Schools: Identification and Notification Regulation, 40 CFR Part 763, Subpart F, promulgated under Section 6 of the Toxic Substances Control Act. The regulation requires Local Education Agencies to identify, sample, and analyze possible friable asbestos-containing materials in schools, to notify the school personnel and the PTA's (or parents) of the results of those efforts if asbestos is discovered and to keep records of these activities.

An Agency investigation has determined that:

(Describe violation(s), citing the section(s)

of the regulation violated)

The EPA is issuing this Notice of Noncompliance rather than pursuing further enforcement action concerning this violation at this time. Please write the Agency within 30 days of your receipt of this letter describing the actions you have taken to achieve compliance.

Should you have any questions regarding this letter, or should you need technical assistance, please contact _____ at _____.

Sincerely yours,

Name
Title
Regional Office

Appendix B: Model Compliance Program Schedule

INTRODUCTION

It is the goal of this Compliance Program Schedule to bring all schools operated by the Local Education Agency (LEA) into compliance with the Asbestos in Schools Rule within a specified time after the effective date of this document. The effective date of this document is the date it is signed by both the Environmental Protection Agency (EPA) and the LEA. A school will be deemed to be in compliance when all five activities required by the rule have been completed. These activities are:

- o Identification: Inspection of all school buildings for friable materials;
- o Sampling: Collection of samples of the friable materials;
- o Analysis: Analysis of the samples to determine if they contain asbestos;
- o Notification: Informing the Parent Teachers Association or parents, faculty and other staff of the presence of asbestos, and distributing "A Guide to Reducing Asbestos Exposure" to custodial and maintenance personnel; and
- o Recordkeeping: Maintaining records which describe the actions taken to comply with the rule. This includes a statement signed by the person responsible for compliance with the rule that the requirements of the rule have been satisfied.

Determination of compliance will be based on the submission by the LEA to the Regional Asbestos Coordinator (RAC) of copies of the records required by the rule to be kept at the LEA's central office and certification that all other requirements have been met. EPA may verify the certification.

If an LEA completes all the compliance program tasks outlined in this document by the dates agreed upon by both EPA and the LEA, the __% of the penalty assessed the LEA for violation of the rule will be remitted by letter.

COMPLIANCE PROGRAM TASKS

Determination of the Extent of Noncompliance

All schools in the LEA which have not documented compliance with the rule or qualified for an exemption, must be brought into compliance with this rule. EPA has assessed penalties for the following violations in the following schools:

(List specific schools, violations and penalties as they appear in the civil complaint and cite the complaint.)

Since EPA did not inspect all schools in the LEA, the possibility exists that other schools are in violation. The LEA should examine its records and develop a list of all schools and their status with respect to the rule (exempt, in compliance with all requirements, not in compliance with one or more requirements) and submit the list to the Regional Asbestos Coordinator. The final compliance program schedule will address all schools which are not in compliance with the rule. If both parties to the CPS agree, the final date for compliance may be renegotiated at the time this list is submitted.

2. Compliance with the Rule

The LEA shall follow the Compliance Assistance Guidelines for the Asbestos in Schools Rule developed by the Environmental Protection Agency (EPA), approved by the Assistant Administrator for the Office of Pesticides and Toxic Substance on December 29, 1982.

EPA will provide assistance such as lists of laboratories which participated in EPA's quality assurance program and development of wording for notification of school staff, PTA and parents.

3. Determination of Compliance

The LEA must submit to the RAC a copy of the records that it must keep according to the Asbestos in Schools Rule and a certification signed by the superintendant or other responsible party stating that the LEA has complied with all requirements of the rule. 1/

An EPA compliance monitoring inspector may visit the LEA to confirm compliance with the rule.

COMPLIANCE SCHEDULE

Tasks	Schedule
1. Determination of the extent of noncompliance	30 days after effective date of CPS
2. Bring schools into compliance with the rule	___ days after effective date of CPS
3. Records and certification submitted to Regional Asbestos Coordinator	Within two weeks of the final compliance date

1/ At the discretion of the Regional counsel other proofs of compliance may be required, such as the a certified receipt from the PTA official who received notification.

OTHER PROVISIONS

1. Enforcement

While this Agreement is in effect, and as long as the LEA has not failed to comply with the terms of the agreement, EPA shall not initiate additional enforcement action against Respondent for violations of the Asbestos in Schools Rule in schools on the list submitted to EPA.

This Agreement does not insulate Respondent from compliance monitoring and enforcement actions for TSCA violations not addressed by this Agreement nor from enforcement actions under other laws administered by EPA, nor under laws administered by state or local environmental authorities, except where the TSCA rule would preempt such laws.

2. Notification of Technical or Operational Difficulties

Respondent shall notify EPA immediately in all cases where technical or operational difficulties will make it impossible for Respondent to meet any of the deadlines in the Compliance Schedule.

3. Technical Assistance

EPA shall provide reasonable technical assistance to Respondent on questions concerning such matters as sampling and analytical procedures, and wording of notifications, for the purpose of complying with this Agreement.

4. Amendments

Upon mutual consent of EPA and Respondent, this Agreement may be amended at any time to modify or add technical and operational requirements (such as, but not limited to, deadline modifications necessitated by technical or operational difficulties) for the purpose of achieving compliance by Respondent with the Asbestos in Schools Rule. Any changes and/or amendments to this Agreement shall be incorporated into this Agreement when the amendment(s) have been signed by authorized representatives of EPA and Respondent.

5. Evaluation

EPA will assist the LEA in the evaluation of the results of its Asbestos Identification and Notification Program.

Enforcement Response Policy: Dioxin

ENFORCEMENT RESPONSE POLICY FOR
THE DIOXIN CONTAMINATED WASTE RULE

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PART I - INTRODUCTION

On March 11, 1980, the U.S. Environmental Protection Agency (EPA) published an immediately effective proposed regulation governing storage and disposal of waste material containing 2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD) (44 Federal Register 15592, 1980). The 1980 rule was effective as a final rule on May 12, 1980 (45 Federal Register 32676, May 19, 1980). The rule prohibits Vertac Chemical Company (Vertac) from disposing of specified wastes containing TCDD. Additionally, the regulation requires all companies intending to dispose of TCDD contaminated wastes to notify the EPA prior to disposal. The information provided in the notification allows the Agency to make a case-specific assessment of the risks involved in the proposed form of disposal. The Agency then decides what action to take under TSCA or another Agency statute. Other parts of the rule provide an exemption for companies that do not detect TCDD using a specified technique to test their wastes. Actual disposal of the waste may be regulated by promulgation of a rule under TSCA or application of the Resource Conservation and Recovery Act (RCRA).

This enforcement response policy provides guidance to the Regions in enforcing the requirements of the regulation entitled "Storage and Disposal of Waste Material; Prohibition of Disposal of Tetrachlorodibenzo-P-Dioxin" (hereinafter, Dioxin Rule). This regulation was promulgated pursuant to Section 6 of the Toxic Substances Control Act (TSCA). Accordingly, the remedies in Sections 16 and 17 of TSCA are available for violations of this regulation. Part II of this document provides guidance in the use of notices of noncompliance, civil administrative penalty actions, injunctions and criminal actions for violations of this rule. Part III of this document explains how to use the TSCA Civil Penalty System, 45 Federal Register 59770 (September 10, 1980) to arrive at an appropriate civil administrative penalty, where that remedy is utilized.

Definitions

The Violations

Violations of the regulation may be divided into the following categories:

o Noncompliance with Prohibitions

- Violation, by Vertac or other parties, of the prohibition against removal for disposal of Vertac's pre-May 12, 1980, TCDD-contaminated wastes; and

- Vertac's failure to place its post-May 12, 1980, TCDD contaminated waste in PCB-approved landfills.1/

o Notification Violations

- Vertac's failure to notify EPA one week prior to shipment of TCDD-contaminated post-May 12, 1980, waste to PCB-approved landfills;

- Failure of persons subject to the regulation to notify EPA 60 days prior to removing TCDD wastes for disposal;

- Submitting inaccurate information in a TCDD-contaminated waste disposal notification;

- Falsifying information in a TCDD-contaminated waste disposal notification;

- Failing to provide all required information in a notice or failing to provide the information to the Agency when requested to do so. (When EPA receives an incomplete notice its first response is to call the company to obtain the missing information. If the information is promptly provided, no violation has occurred.); and

- Late notification.

o Marking Violation

- Vertac's failure to post its Jacksonville facility as required by the rule.

o Testing Violation

- Failure by Vertac to test its post-May 12, 1980 wastes.2/

1/ The disposal requirement was part of the rule published in the Federal Register, but disposal of all wastes on site at Vertac have subsequently become subject to a consent decree, dated January 19, 1982, that effectively forbids disposal of these wastes in landfills.

2/ Vertac has complied with the testing requirement.

Substances Regulated

Waste material containing TCDD is defined by the rule as:

- o Waste material resulting from the manufacture or processing of 2,4,5-Trichlorophenol (2,4,5-TCP) or its pesticide derivatives; or
- o Wastes resulting from manufacturing processes using equipment that was at some time used in the manufacture of 2,4,5-TCP or its pesticide derivatives. For example, 2,4-D is often manufactured on equipment previously used to manufacture 2,4,5-TCP or its pesticide derivatives: Wastes from this 2,4-D manufacture may also contain 2,3,7,8-TCDD from the equipment, and these wastes are regulated by this Rule, unless they qualify for an exemption.

It is important to note that at least two other statutes potentially regulate TCDD contaminated wastes. A product packaged and labelled as a pesticide is regulated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and not TSCA. Disposal of pesticides and pesticide containers is covered in RCRA and FIFRA. Also, when proposed rules under RCRA covering TCDD contaminated wastes become final, the TSCA regulation will be repealed.

For further guidance concerning substances regulated by the rule, consult the chart below.

Regulation of Dioxin Containing Substances

Substance	Law Regulating
Waste from manufacturing of 2,4,5-TCP or its pesticide derivatives	TSCA
Spills of bulk manufacturing intermediates of 2,4,5 -TCP or its pesticide derivatives	TSCA
Residue on equipment used to manufacture 2,4,5-TCP or its pesticide derivatives	TSCA

Packaged, labeled, technical grade or final use pesticide ready for distribution	FIFRA, RCRA
Residue in pesticide container and the container	FIFRA, RCRA (rare instances TSCA)
Residue in bulk storage container with no pesticide label	TSCA
Technical grade pesticide in the process of repackaging or reprocessing	TSCA
Residue on repackaging or reprocessing equipment	TSCA
Repackaged, reprocessed labeled pesticide ready for distribution	FIFRA
Wastes from pesticides manufactured on equipment previously used to manufacture 2,4,5-TCP or its pesticide derivatives	TSCA
Manufacturing wastes that have been disposed of after final RCRA rule becomes effective	RCRA

Persons Regulated

As defined in the regulation, the persons regulated are those whose disposal of TCDD-contaminated wastes for commercial purposes. Such persons include manufacturers, processors, waste haulers, waste disposers, persons who operate storage for disposal facilities[3]/ and others for whom disposal is either for commercial advantage or incidental to their business activities.

3/ Additionally, the rule names Vertac Chemical Company (Vertac) specifically, requiring special treatment of that company's wastes. As a result, a list of potential violations of the rule includes violations naming Vertac, although this does not indicate any greater likelihood of noncompliance on the part of Vertac than on the part of any other company subject to requirements of the rule.

The Agency considers the waste generator to have primary responsibility for complying with the rule's notification requirement. For example, where both a waste generator and a waste hauler did not notify the Agency prior to disposal of TCDD-contaminated wastes, the waste generator should be charged with a notification violation.

Exemptions

Persons holding wastes defined under this regulation as TCDD-contaminated wastes may test their wastes for TCDD using the TCDD detection methodology established by the EPA Dioxin Monitoring Program (capillary column gas chromatography interfaced with high resolution mass spectrometry). If this testing shows that the wastes contain no detectable TCDD, the waste holder is not subject to the regulation. (See 45 Federal Register 32683, May 19, 1980, "The Analytical Methodology for Testing TCDD.")

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PART II - DETERMINING THE APPROPRIATE LEVEL OF ACTION

Final Actions

The first step in planning an enforcement response to a violation of this regulation is to determine the appropriate level of enforcement action. If, after a full review of the investigation file, Regional enforcement personnel determine that a violation of the rule has occurred, enforcement alternatives include notice of noncompliance, civil penalty, injunctive relief or criminal action.

Notice of Noncompliance

Due to the toxicity of TCDD and subsequent seriousness of any noncompliance with the requirements of this regulation, few violations of this regulation warrant only a notice of noncompliance. Notices of noncompliance are appropriate for violations constituting only minor or technical infractions of this rule and then only if there is no pattern of more serious violations or if no previous notice of noncompliance has been issued to the company. Examples of violations which warrant such notices include the following:

- Repeated failure to use certified mail in making a notification;

- Repeated failure to supply noncritical information either in the notification or to Agency personnel requesting the information. The Agency recognizes that not all such omissions are deliberate and its initial response to an incomplete notice will be to telephone the submitter and attempt to obtain the missing information. Only if the submitter continues to fail to provide the required information will the notification be considered incomplete.

- Failure by Vertac to provide results of analysis of its post-May 12, 1980, wastes within two weeks of the date the analyses are completed.

Civil Penalty

The Agency anticipates that an administrative civil penalty will be an appropriate response for most violations of this regulation which do not meet the criteria for a notice of noncompliance, or the criteria for imposing criminal sanctions. Additionally, if a respondent fails to achieve compliance during the time period specified in the notice of noncompliance, a civil penalty is the appropriate response. Civil penalties

should be assessed according to the guidelines in Part III of this policy. Regional enforcement personnel must consult with the Compliance Monitoring Staff of the Office of Pesticides and Toxic Substances and with the Office of Legal and Enforcement Counsel prior to instituting a civil or criminal action. For additional guidance, see "General Operating Procedures for the Civil Enforcement Program" (July 6, 1982) and "Case Referrals for Civil Litigation" (September 7, 1982).

Injunctive Action

Injunctive action, under TSCA or RCRA, may be appropriate as an additional safeguard in protecting the environment from the hazard presented by violation of this regulation.

Although Section 17 of TSCA can be a very effective tool in obtaining compliance, it is also more resource intensive than a civil penalty action. In addition, it has been the Agency's experience that a civil penalty action is usually sufficient to obtain compliance. For these reasons, the Agency believes that the use of Section 17 remedies should be limited to those instances where, in the judgment of the Region, a civil penalty action will not result in swift enough compliance to protect human health or the environment or where there are good reasons why penalties are not appropriate. Injunctive action is appropriate in the following cases:

- To prevent a company or person from violating the TSCA §6 regulation by moving or disposing of contaminated waste without notifying the Agency 60 days in advance as required by the rule.

- To order a clean-up of improperly disposed TCDD-contaminated waste under the authority of RCRA §7003.

The most probable subject of an injunction under Section 17 of TSCA would be a person with a significant amount of 2,3,7,8-TCDD-contaminated waste who had disposed of some of it without notifying EPA and still had some of the waste which EPA had reason to believe might be disposed of without notification. The object of the injunction would be to prevent further disposal without notification.

Injunctive actions must be initiated in Federal District court by the Department of Justice (DOJ) and may be referred to DOJ only by the Associate Administrator (AA), Office of Legal and Enforcement Council (OLEC), or the AA's designee. (If necessary, however, the Region is delegated the authority to obtain an emergency temporary restraining order from the U.S. Attorney to prevent imminent disposal of the waste without notification.) Requests for injunctive actions should be sent to OLEC with a copy to the Compliance Monitoring Staff which will review the technical evidence and inspection procedures used to support the case.

For additional guidance see the following OLEC memoranda, "General Operating Procedures for the Civil Enforcement Program" (July 6, 1982) and "Case Referrals for Civil Litigation" (September 7, 1982).

Criminal Sanctions

Criminal sanctions pursuant to Section 16(b) of TSCA are the most serious sanctions available for violations of the Dioxin rule. Accordingly, criminal sanctions will be sought in situations that -- when measured by the nature of the conduct, the compliance history of the subject(s) or the gravity of the environmental consequences -- reflect the most serious cases of environmental misconduct.

Several factors distinguish criminal cases from administrative or civil actions. First, criminal sanctions will ordinarily be limited to cases in which the prohibited conduct is accompanied by evidence of "guilty knowledge" or intent on the part of the prospective defendant(s). TSCA imposes criminal penalties only for violations of the Act which are done "knowingly or willfully".

A second factor to consider is the nature and seriousness of the offense. As a matter of resource allocation, EPA will investigate and refer only the most serious forms of environmental misconduct. Of primary importance to this assessment is the extent of environmental contamination or human health hazard that resulted from, or was threatened by, the prohibited conduct. Also of significance is the impact, real or potential, on EPA's regulatory functions.

Third, the compliance history of the subject(s) of a potential criminal case is important. Criminal sanctions become more appropriate as incidents of noncompliance increase. While not a prerequisite, a history of environmental noncompliance will often indicate the need for criminal sanctions to achieve effective individual deterrence.

The Criminal Enforcement Division of the Office of Legal and Enforcement Counsel maintains the primary role in the investigation and referral to the Justice Department of allegations of criminal misconduct. (See "General Operating Procedures for the Criminal Enforcement Program" memorandum from , October 12, 1982.)

Multiple Remedies

There may be instances where a particular situation will present facts that suggest that more than one final action should be taken. The purpose of this Section is to outline when multiple remedies are appropriate.

Criminal Sanctions

Simultaneous civil and criminal enforcement proceedings are legally permissible, United States v. Kordel, 397 U.S. 1, 11 (1970), and on occasion are clearly warranted. However, separate staffs will be appointed with the initiation of a grand jury investigation, if not before. Further, the pursuit of simultaneous proceedings provides fertile grounds for legal challenges to one or both proceedings that, even if unsuccessful, will consume additional time and resources. Thus, parallel proceedings should be avoided except where clearly justified.

While simultaneous administrative/civil and criminal enforcement actions are legally permissible, they will be the exception, rather than the rule. As a general rule, an administrative or civil proceeding will be held in abeyance pending the resolution of the criminal investigation. One exception to this general rule will be those situations in which emergency remedial response is mandated.

If the Region is considering the option of simultaneous civil and criminal sactions, the Region must consult with Headquarters CMS and OLEC.

Notice of Noncompliance

In general, a notice of noncompliance should not be used in conjunction with any other final remedy. Where a particular situation presents several violations, some of which would merit a notice of noncompliance, while others would merit civil penalties, no notice of noncompliance should be sent. Instead, an administrative penalty action should be initiated, pleading all violations. The Region may, however, choose not to assess a penalty for minor infractions.

Civil Administrative Penalties and Specific Enforcement

The criteria outlined above already anticipate that civil penalties and specific enforcement will be used sequentially. There may, however, be instances where the concurrent use of these penalties is appropriate. If the Region deems this to be appropriate in any case, it should consult with CMS and the Department of Justice before bringing either action.

PART III - ASSESSING AN ADMINISTRATIVE PENALTY

Summary of the Penalty Policy

Calculation of the Gravity Based Penalty (GBP)

The GBP, a function of the nature, extent, and circumstances of each violation, is based on the following matrix:

Circumstances (Probability of Damages)	Extent of Potential Damage		
	A MAJOR	B SIGNIFICANT	C MINOR
High Range:			
1	$25,000	$17,000	$5,000
2	20,000	13,000	3,000
Mid Range:			
3	15,000	10,000	1,500
4	10,000	6,000	1,000
Low Range:			
5	5,000	3,000	500
6	2,000	1,300	200

As a first step in locating a specific violation on the matrix, the nature of the violation must be classified. A violation may be either chemical control, control-associated data gathering, or hazard assessment in nature. No violations of this regulation are hazard assessment violations.

Chemical control violations of this regulation include:

- o Noncompliance with prohibitions violations:
  - Violation, by Vertac or other parties, of the prohibition against removal for disposal of Vertac's pre-May 12, 1980 TCDD-contaminated wastes;
- o Marking violation:
  - Vertac's failure to post its Jacksonville facility as required by the rule.

Control associated data gathering violations include:

o Notification violations:

- Failure of persons subject to the regulation to notify EPA 60 days prior to removing TCDD-contaminated wastes for disposal;
- Submitting inaccurate information in a TCDD-contaminated waste disposal notification; and
- Falsifying information in a TCDD-contaminated waste disposal notification.
- Failing to provide all required information in a notice or failing to provide the information to the Agency when requested to do so by a follow-up telephone call or later.
- Late notification.

Extent

Regional enforcement personnel should determine the extent of the violation based on the amount of TCDD-contaminated wastes involved in the violation, as follows:

	55-gallon drums	Gallons[4]/	Pounds[5]/
Major:	500 or greater, or amount unknown	25,000 or greater, or amount unknown	100,000 lbs or greater or amount unknown.
Significant:	Greater than 1 but less than 500	Greater than 50 but less than 25,000	600-100,000 lbs
Minor:	1 or less	50 or less	200-600 lbs

Circumstances: Ranges

The range of chemical control violations should be classified as follows:

High Range: Noncompliance with prohibitions
(Levels 1 & 2)

Medium Range: Marking violations
(Levels 3 & 4)

4/ A 55-gallon drum is filled to a 50-gallon capacity.

5/ The amount of dry powder that will fill a 55 gallon drum is approximately 100-600 pounds.

The range of control associated data gathering violations should be classified on the circumstances axis as follows:

High Range: (Levels 1 & 2) Notification violations such as falsification, nonreporting or omission of important information.

Medium Range: (Levels 3 & 4) Testing violations and notification violations such as reports more than 30 days late but before actual disposal.

Low Range: (Levels 5 & 6) Minor notification violations.

Circumstances: Levels

Regional enforcement personnel should determine the level of circumstances of the violation based on the following criteria:

	Waste from production of 2,4,5,-TCP and its pesticide derivatives or mixture of both types of wastes in unknown proportions.	Waste from production on equipment previously used in the production of 2,4,5-TCP or its pesticide derivatives.
Non-compliance with prohibitions	Level 1	Level 2
Marking Violations	Level 3	Level 4
Notification Violations		
Falsification or over 60 days late or nonreporting	Level 1	Level 2
30-60 days late	Level 3	Level 4
Minor Omissions	Level 5	Level 6

See page 16 - 17 for a more detailed discussion of the information in the chart.

Multiple Penalties

Multiple penalties may be charged to the same person or business entity in the following situations:

- o One person or business entity commits several separate violations.
- o One person or business entity repeats the same violation.

All violations of this regulation are considered to be one-day violations.

For the purposes of this penalty policy, a violation is repeated if it occurs on separate days. For example, if a waste holder fails to comply with a prohibition against disposal, and ships waste twice in one day, one violation should be charged. However, if the waste holder ships on two days, two violations should be charged.

Adjustment Factors

The adjustment factors discussed in the TSCA Penalty Policy pages 9-17 should be applied as appropriate to violations of this regulation.

Detailed Explanation of the Policy

This portion of the policy explains the reasons for the specific structure of the TCDD-contaminated waste civil penalty policy and provides detailed instructions on its use.

As noted previously, the gravity based penalty (GBP) is a function of three factors: nature, extent, and circumstances. The basis for classifying each of these factors appears below.

Nature

To determine the "nature" of a violation, the TSCA Civil Penalty System defines three types of TSCA violations:

- o Chemical control violations;
- o Control-associated data gathering violations; and
- o Hazard assessment violations.

Chemical Control Violations. Noncompliance with prohibitions and marking requirements are chemical control violations. Chemical control violations attempt to minimize the risk presented by a toxic substance by placing constraints on how the substance is handled. This rule places constraints on the handling of TCDD-contaminated waste in the following manner:

- o Waste holders must comply with the Agency's restrictions concerning disposal; and
- o Vertac must comply with the specific requirements set out in this rule (See p. 2-3 for complete description)

Violations of these requirements are thus chemical control violations by nature.

Control-Associated Data Gathering Violations. The notification and testing requirements develop information necessary to allow the EPA to assess and control the risks presented by TCDD-contaminated wastes. On that basis, violations of the notification requirements and of the testing requirements qualify as control-associated data gathering violations.

Extent

The extent axis of the GBP matrix measures the degree, range or scope of the harm or potential harm caused by the violation to human health or the environment. Since larger amounts of TCDD-contaminated wastes have more potential to cause harm to human health and the environment, the quantity of waste involved determines the extent of harm or potential harm.

Three weight/volume classes have been chosen to correspond to the three extent categories of the TSCA Civil Penalty System.

The Major category is placed at 500 drums because Vertac stated that its current 2,4-D production generates a monthly average of 500-700 drums of waste. The Agency considers the amount of waste produced by Vertac in 2,4-D production to be a reasonable basis for the Major category because equivalent amounts of other types of wastes regulated by this rule, such as 2,4,5-TCP waste for example, will contain a higher concentration of TCDD and thus a larger amount of TCDD. The Agency considers this amount extremely serious, as indicated by the promulgation of this rule, which is partially aimed at placing constraints on this particular waste.

The Minor category is placed at 1 drum, which is currently the minimum quantity of storage and transfer.

The Significant category encompasses the quantity between the major and minor categories, from greater than 1 drum to less than 500 drums. The definition of the significant category is a direct consequence of the definition of the major and minor extent categories.

In cases where amounts cannot be determined, the Major extent category shall apply.

Circumstances

The circumstances axis of the GBP matrix reflects the probability for harm resulting from a particular violation. Regional enforcement personnel should place violations into ranges based on the category of the violation. The assignment of level is based on the relative concentration of TCDD in the waste based on the type of pesticide production involved.

Circumstances: Ranges. The purpose of the chemical control requirements of this regulation is to avoid the harm caused by exposure of the environment to TCDD-contaminated wastes. Violations of the chemical control requirements are described in this policy as "Noncompliance with prohibitions" and "Marking". These Categories are classified as follows:

- o Violations involving noncompliance with prohibitions are placed in the high range of the circumstances axis. The Agency has placed restrictions or prohibitions on disposal for the purpose of preventing health or environmental harm from TCDD-contaminated wastes. Noncompliance with prohibitions is very likely to result in direct or indirect environmental contamination and potential harm to human health and the environment.

- o Marking violations are placed in the medium range. There is a significant chance that the failure to post the Vertac facility would result in harmful exposure to dioxin because there would be no indication to persons unfamiliar with the situation that TCDD-contaminated wastes are stored on site.

The control-associated data gathering violations of this regulation damage the Agency's ability to make an assessment of hazard. These violations are described as "Notification." These violations are classified as follows:

- o With Notification violations, the Agency is not informed of proposed disposals and cannot control the substance to avoid harm. Since the Agency's ability to monitor this chemical has been seriously impaired by lack of notification, violations of this type are classified as high range on the circumstances axis.

- o Late notification of more than 30 but less than 60 days is placed in the medium range.

- o Minor omissions of information on the notification and notification less than 30 days late are placed in the low range.

Circumstances: Levels. The level assigned to a violation in each range for both chemical control and control-associated data gathering violations is based on the type of pesticide production which generated the waste involved. There are two types of waste subject to the notification requirement:

- o Waste from the production of 2,4,5-TCP and its pesticide derivatives.

- o Wastes from the production of other pesticides (such as 2,4-D) if they are produced on equipment previously used to produce 2,4,5-TCP and its pesticide derivatives.

Wastes generated in the production of pesticides on contaminated equipment are less contaminated than wastes from production of 2,4,5-TCP or its pesticide derivatives. Therefore, a lower level on the circumstances axis is assigned to violations involving wastes produced on contaminated equipment. The following background regarding the formation of TCDD in the production of TCP and its pesticide derivatives will explain the basis for this distinction.

TCDD forms during the process of manufacturing 2,4,5-TCP. TCDD, because of its toxicity, is an undesirable contaminant, and most manufacturers attempt to remove the substance from their product.

As a result, wastes from the production of 2,4,5-TCP contain greater amounts of TCDD than the final product, depending on the success of the process used to remove the contaminant.

The 2,4,5-TCP is processed into a pesticide by the same name and is also used as a starting material for other pesticides. These pesticide derivatives of 2,4,5-TCP are contaminated with TCDD because the original starting material was contaminated. However, their degree of contamination depends on how much TCDD was removed from the original TCP.

In some cases, pesticide producers manufacture 2,4-D immediately after making 2,4,5-TCP. Residues of TCDD-contaminated 2,4,5-TCP left on the equipment cause the contamination of the 2,4-D with TCDD. However, the level of contamination is lower than that found in 2,4,5-TCP and its pesticide derivatives. Additionally, with continued use of the equipment, the concentration of TCDD contamination decreases.

Thus, if the waste is directly contaminated by production of TCP or its pesticide derivatives, the concentration is higher, so a higher level is assigned. If the waste is indirectly contaminated by production on contaminated equipment, the concentration is lower, and decreases with continued use of the equipment, so a lower level in the range is assigned. Therefore, a two-part criterion based on expected contamination levels is the basis for determining the level category of the circumstances axis. (See chart on page 12.)

Multiple Penalties

Regional enforcement personnel should assess multiple penalties in the following situations:

- A separate citation charge for the violation is found in this penalty policy.
- The violation is repeated.

Assessing penalties only for violations named in citation charges ensures that penalties are issued only for discrete and independent violations.

If a person or a business entity repeats an act of violation, he should be assessed a multiple penalty, so that he is penalized more than a one-time violator.

Definition as One-Day Violations

The Agency has decided as a matter of policy that each category of violations of this regulation should be treated as one-day violations for the following reasons:

- o Noncompliance with Prohibitions on Disposal

  This policy defines this violation as a one-day violation to set limits to the act of violation. Shipments or batches on the same day are not considered separate violations, but contribute to the total amount of material disposed which determines the extent of the violation.

- o Notification Violations

  The regulation requires any person who wishes to dispose of TCDD-contaminated wastes to notify the Agency 60 days prior to disposal. This policy defines the violation as occurring on the one day, 60 days prior to a disposal, on which a notification violation may occur. However, this violation is repeated if disposal occurs again.

  Two disposals that occur in one day constitute one violation. Two disposals that occur on two days constitute separate violations, whether they take place on consecutive days or whether they are separated by weeks or months. The extent of the violations is determined by the amount disposed of on a given day. If two types of waste are disposed of on the same day, the penalty is calculated as though the entire disposal was of the type of waste that merits the higher level penalty (see discussion of the types of waste pages 16-17).

- o Marking Violation

  Under established Agency policy all marking violations are considered one-day violations. Therefore posting the Vertac facility will be considered a one-day violation.

Appendix I: Hypothetical Cases

HYPOTHETICAL 1

Case

The ABC Chemical Company did not notify the AA for Pesticides and Toxic Substances when it shipped 1,750 drums of 2,4-D wastes produced on equipment used previously to manufacture the pesticide 2,4,5-TCP. The shipments, each consisting of 250 drums, took place over 7 days.

Action

Region Z investigated anonymous tip and found that disposal of wastes subject to the regulation had taken place without notification of the Agency as required. Region Z assessed a penalty of $91,000.

Explanation

Using the one day equals one violation criterion, Region Z determined that 7 violations had occurred. Regional enforcement personnel used the following factors in finding the total penalty:

1. The amount, 250 drums, placed the violation in the significant category of the extent axis.

2. The category of violation, failure to notify, placed the violation in the high range of the circumstances axis.

3. The type of waste, equipment contaminated waste, placed the violation in the level 2 of the circumstances range.

The penalty at the intersection of the significant extent axis and the high circumstances range, level 2, is $13,000. Seven violations, multiplied by $13,000 produced the total penalty, $91,000.

HYPOTHETICAL 2

Case

A company did not notify the Agency before disposing of 600 drums of 2,4,5-T waste and 300 drums of 2,4-D waste.

Action

Regional enforcement personnel charged the company with failing to notify the Agency, assessing a total penalty of $38,000.

Explanation

Since a mixture of waste was involved, Regional enforcement personnel assessed two violations, as follows:

2,4,5-T waste:	Major category, extent axis High range, circumstances axis Level 1, circumstances axis	
2,4-D waste:	Significant category, extent axis High range, circumstances axis Level 2, circumstances axis	
Total Penalty:		$25,000 13,000 38,000

Hypothetical 3

Case

A company which manufactures 2,4,5-T decides to manufacture 2,4-D on the same equipment. Before beginning 2,4-D manufacture the comany attempts to clean the equipment by rinsing it with water into the city sewer. The company did not notify the Agency of the disposal because it argued that the level of TCDD in the rinsate was not detectable, even though the company did not test either the rinsate or the residue on the equipment.

Action

CMS targetted the company as part of its routine compliance monitoring program. The inspection uncovered the violation and a civil penalty of $17,000 was assessed.

Explanation

The company is in violation of the rule because it did not notify the Assistant Administrator of the disposal, or quailify for the exemption by testing the waste. Based on production records and cleaning practices, the volume of rinsate was estimated to be approximately 20,000 gallons. Therefore, extent of the violation is "significant". The waste in question resulted from the manufacture of 2,4,5-T, so the circumstance of the violation is Level 1. According to the matrix the appropriate civil penalty $17,000.

PCB Penalty Policy

Introduction

Background

On March 10, 1980, the Agency issued a TSCA Civil Penalty Policy memorandum. That document implements a system for determining penalties in administrative actions brought pursuant to Section 16 of the Toxic Substance Control Act (TSCA). Under that system, penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty.

To determine the gravity based penalty, the following factors affecting a violation's gravity are considered:

- The "nature" of the violation.
- The "extent" of environmental harm that could result from a given violation, and
- The "circumstances" of the violation.

These factors are incorporated on a matrix which allows determination of the appropriate gravity based penalty.

Once the gravity based penalty has been determined, upward or downward adjustments to the penalty amount are made in consideration of these other factors:

- Culpability.
- History of such violations.
- Ability to pay.
- Ability to continue in business, and
- Such other matters as justice may require.

The TSCA Civil Penalty Policy system provides a framework for the development of individual penalty guidances for each rule promulgated under TSCA. This document sets forth Agency policy for the use of the GBP Matrix to assess penalties for specific violations of the regulations regarding polychlorinated biphenyls (PCBs). These regulations appear at 43 FR 7150 (Feb. 17, 1978) and 44 FR 31514 (May 31, 1979). The document also will explain where multiple violations should be charged, and how penalties should be determined for such violations.

This policy is being issued as an interim guidance for the determination of penalties for violations of the PCB regulations. The Agency will review its experience with this policy before issuing a final penalty policy for the PCB rule. The final policy will also address any special considerations which the Agency decides should be used to apply the adjustment factors (e.g., removing benefits from non-compliance.)

A summary of the policy appears immediately below the applicability section. That summary is followed by a detailed explanation of the policy.

Applicability

This policy is immediately applicable and should be used to calculate penalties for all administrative actions concerning PCBs instituted after the date of the policy, regardless of the date of violation. Pending cases should be reviewed to determine whether the penalty calculated under this policy is lower than the penalty in the civil complaint. If this policy yields a lower penalty, an amendment to the complaint should be made to substitute the lower penalty. This policy should not be used to raise penalties in existing actions. No case should be settled for an amount higher than the penalty which this policy would yield.

Summary of the Policy

The gravity based penalty (GBP), based on the nature, extent, and circumstances of the violation, is found from the following matrix:

Table I

		Extent of potential damage		
		A Major	B Significant	C Minor
Circumstances (probability of damage):				
High range	1	$25,000	$17,000	$5,000
	2	20,000	13,000	3,000
Mid range	3	15,000	10,000	1,500
	4	10,000	6,000	1,000
Low range	5	5,000	3,000	500
	6	2,000	1,000	200

Since the purpose of the PCB regulation is to prevent additional PCBs from entering the environment, all violations of it are chemical control violations by nature. Thus, the nature is the same for all violations. To use the GBP matrix to determine a penalty for a PCB violation, it is necessary to determine the extent and circumstances of each violation.

Extent

The extent is determined by the amount and concentration of the PCB material involved. The total weight of PCB material should be ascertained for each violation of the rule. That weight should then be reduced, depending on the concentration, as follows:

Table II

Concentration Reductions

(1) 50–499 ppm—70% reduction.
(2) 500–9,999 ppm—50% reduction.
(3) 10,000–99,999 ppm—20% reduction.
(4) over 100,000 ppm—no reduction.

Exceptions: This reduction step does *not* apply in the following circumstances:

(i) Violations of 40 CFR 761.10(d) (road oiling, coating, dust control);
(ii) Where the violation consists of failing to test to qualify for an authorization; or
(iii) For solids, where the unit of measurement is other than the actual weight.

Extent categories: The total weight figures, reduced by the concentration, if applicable, are used to determine extent, as follows:

Table III

(A) Major—5000 kg. or more.
(B) Significant—1000 kg. more, but less than 5000 kg.
(C) Minor—less than 1000 kg.

Alternative measures: If weight is not available, use these alternative measures:

Table IV

(A) *Major:*

Liquid

(a) 1100 gallons or more, or
(b) a contaminated area of 750 square feet or more, or
(c) 300 or more large capacitors.

Non-liquid

(a) 100 or more fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors; or
(b) 25 or more drained transformers, or 100 or more empty drums which once contained PCB fluid, or any other PCB solids having a volume of 750 cubic feet or more.

(B) *Significant:*

Liquids

(a) 220 gallons or more but less than 1100 gallons, or
(b) A contaminated area of 150 square feet or greater, but less than 750 square feet, or
(c) 60 large capacitors or more, but less than 300 large capacitors.

Non-liquids

(a) 20 or more, but less than 100 fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors.
(b) 5 or more, but less than 25, drained transformers, or more than 20, but less than 100, empty drums which once contained PCB fluids, or any other solid having a volume of 150 or more, but less than 750 cubic feet.

(C) *Minor:*

Liquids

(a) Less than 220 gallons, or
(b) A contaminated area of less than 150 square feet.
(c) Less than 60 large capacitors.

Non-liquids

(a) Less than 20 fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors; or
(b) Less than 5 drained transformers, 20 fifty-five gallon drums which previously contained PCB fluids, or any other PCB solid having a volume of approximately 150 cubic feet.

Spills into water, food or feeds. Any PCB disposal which results in contamination of surface or ground water, or food or feeds is *always* major in extent.

Circumstances (Probability for Damage)

To determine which level on the circumstances axis to use, classify each violation of the regulation into one of these eight categories of violation:

(1) Disposal
(2) Marking
(3) Storage
(4) Manufacturing
(5) Processing
(6) Distribution
(7) Use
(8) Recordkeeping

After classifying the violations, determine the level on the circumstances axis from the following chart:

Table V

High range:
Level one:
(1) Improper disposal.
(2) Manufacturing
Level two:
(1) Processing.
(2) Distribution.
(3) Improper use.
Medium range:
Level three:
(1) Major storage violations.
(2) Major recordkeeping violations, disposal facilities.
(3) Major marking violations.
Level four:
(1) Major recordkeeping violations, use and storage facilities.
Low range:
Level five:
(1) Failure to date PCB items placed in storage.
(2) Minor storage violations.
(3) Minor marking violations.
Level six:
(1) Minor recordkeeping violations.
(2) Failure to use "No PCBs" lable as rquired.

Finding the GBP penalty. The extent and circumstances, as determined above, will determine a penalty amount on the GBP Matrix, Table I. This figure should be entered on line one (1) of the

Civil Penalty Assessment Worksheet, (hereinafter, "worksheet") attached as Appendix A. The other penalty factors, such as culpability, ability to pay, and others, should be applied in the manner described in the TSCA Civil Penalty Policy.

Multiple Violations

Assess multiple violations against a single violator in any of the following circumstances:

(1) The violations fall into more than one violation category;
(2) The violations are in substantially different locations; or
(3) There is evidence that the violation has been committed on repeated occasions or has continued for more than one day.

If multiple violations are charged because of evidence of repeated or continuing conditions, the penalty will normally be calculated using the proportional penalty calculation, which appears in Table VI, below. However, the Agency can exercise its discretion either to charge for only one day, or to charge on a straight per day or per violation basis (GBP X number of days or violations), depending on factors such as substantial actual harm, the unusual nature of risk presented, or other unique circumstances.

Table VI

Proportional Penalty Calculation

Step 1: Find the total amount of PCB materials involved. If more than two times the major extent category, (more than 10,000 kg.) go to step 2. If less than two times the minimum amount in the major extent category (less than 10,000 kg.), use this amount to get a penalty from the GBP Matrix. Divide the penalty by the number of days [1] and enter on line one of the worksheet (Appendix A).

Step 2: Divide the amount from step one by the minimum amount in the major extent category (5000 kg). (Round fractions to one decimal place.)

Step 3: Multiply the amount form step two by the dollar amount from the GBP Martix major extent category. This is the total GBP charged.

Step 4: Divide the amount from step 3 by the number of days or violations involved. Enter this daily amount on line one of the worksheet (Appendix A).

Explanation of Policy

Nature

Since the purpose of the PCB regulation is to prevent further introduction of PCBs into the environment, this regulation is a chemical control regulation, as defined by the TSCA Civil Penalty Policy. Accordingly, most violations of this regulation are chemical control violations. The only exception would be violations of the recordkeeping requirements, which are control-associated data-gathering in nature. The Agency has taken this into account in designing a specific policy for PCB penalties. The definitions of the "extent" and "circumstances" categories below reflect the nature of these violations.

Extent

Because the PCB regulations are chemical control and control-associated data-gathering in nature, the greater the amount of PCB containing material (hereinafter, "PCB material") involved in a particular violation, the more likely it is that harm will result from the violation of the PCB rules. For this reason, the amount of PCB material involved in a particular incident will determine whether the major, significant, or minor extent category should be used in deriving a penalty from the GBP Matrix. Since the concentration of the PCB material involved in an incident will also affect the potential for harm, this factor must also be considered in determining which extent category is applicable to a particular violation.

Amount of Material Involved

The most obvious measure of the amount of PCB material involved in a violation is weight. Therefore, the weight of the PCB material involved in a violation is the primary determinant of the extent category to be used to find the GBP. To be consistent with the three extent categories of the GBP Matrix (i.e. major, significant, and minor), three weight classes have been chosen to define the extent of a PCB violation. These classes are as follows:

(A) Major: 5000 kilograms or more.
(B) Significant: Between 1000 and 5000 kilograms.
(C) Minor: Less than 1000 kilograms.

The minor category weight was defined as less than 1000 kilograms because this is slightly less than the amount of PCBs in an average transformer. Since a major portion of the PCBs in existence are in transformers, it is essential that these items be disposed of properly. Accordingly, the Agency defined the minor category as an amount of PCBs less than the contents of an average transformer, so that most transformers would fall in the significant category. The Agency believes this will encourage the proper disposal of transformers.

[1] It should be noted that if the proportional penalty calculation is based on repeated violations, then the calculation at line 8 of the worksheet should represent the number of violations rather than the number of days.

The major category weight was selected at 50 kg. kilograms. This is slightly less than the contents of five average size transformers, and corresponds to the fact that the penalty for a major improper disposal is five times larger than that for a minor improper disposal; that is, $25,000 versus $5,000. (As will be seen below, improper disposal is always level one on the circumstances axis.) The significant category is defined as 1,000 kg. or greater, but less than 5,000 kg. This definition is a direct consequence of the definition of the other two categories.

Units Other Than Weight

The Agency realizes that there will be situations where the number of kilograms of PCBs involved is not easily determined. In many cases, other units of measurement (e.g. gallons, cubic feet, etc.) may be more easily obtained. Additionally, some violations will involve non-liquid PCB material, usually as a result of liquid PCBs being spilled into or cleaned up by absorbent solid materials. Such solids will often weigh considerably more than liquid PCBs. If the penalty for such solids were based on the weight categories outlined above, the result, in the Agency's opinion, would be inequitable.

For these reasons, the Agency has decided to define each of the three extent categories by several different units of measurement. Although these units of measurement are not necessarily equal, it is the Agency's opinion that they are generally comparable.

(A) *Major:*

Liquid

(a) 1100 gallons or more, or
(b) A contaminated area of 750 square feet or more, or
(c) 300 or more large capacitors

Non-liquid

(a) 100 or more fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors, or
(b) 25 or more drained transformers, or 100 or more empty fifty-five gallon drums which once contained PCB fluid, or any other PCB solid having a volume of 750 cubic feet or more.

(B) *Significant:*

Liquids

(a) 220 gallons or more, but less than 1,100 gallons, or
(b) A contaminated area of 150 square feet or greater, but less than 750 square feet, or
(c) 60 large capacitors or more, but less than 300 large capacitors.

Non-liquids

(a) 20 or more but less than 100, fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors.
(b) 5 or more, but less than 25, drained transformers; or more than 20, but less than 100, empty fifty-five gallon drums which once contained PCB fluids, or any other solid having a volume of 150, but less than 750, cubic feet.

(c) *Minor:*

Liquids

Less than 220 gallons, or
(b) A contaminated area of less then 150 square feet, or
(c) Less than 60 large capacitors.

Non-liquids

(a) Less than 20 fifty-five gallon drums containing contaminated soil, rags, debris or small capacitors; or
(b) Less than 5 drained transformers, 20 fifty-five gallon drums which previously contained PCB's fluids, or any other PCB solid having a volume of approximately 150 cubic feet.

The figures above are based on the assumption that the density of PCB fluids is 10 lbs. per gallon, which is the average density of high concentration PCB's. If the actual density of the fluid involved is known, then the actual density should be used to convert the volume of fluids involved into kilograms. The figure for capacitors is based on an average of 38 pounds of fluid in the most popular models of large capacitors.

Because it is often difficult to determine the amount of PCB's in a solid, the Agency did not attempt to define the extent categories for solids by trying to estimate how much solid PCB material had the same amount of PCB's as the average PCB transformer. Instead, the Agency tried to maintain the same economic incentives for solids as for liquids. Thus, the decision to make 20 drums the cut off point for the upper limit of the minor category is based on an estimate that the cost of disposing of twenty 55 gallon drums, either empty or containing PCB solids, is approximately the same as the cost of incinerating the liquid in one transformer.

In certain instances, the use of the different units of measurement discussed above would result in a particular violation falling into more than one category. For example, fluid PCB material having a density less than that of average high concentration PCB's may result in 250 gallons weighing as little as 900 kilograms. Using the gallon measurements, this would be a significant violation; but using the kilogram measurement, this would be a minor violation. In such instances, the penalty should be based on the category determined by the actual weight, in kilograms, of the material involved, if

this information is known. If the weight is not known, the gallon measure should be used.

Exceptions to Extent Category

Spills into water. Where any improper disposal results in a contamination of surface or ground water, the extent will *always* be considered major. Since it is virtually impossible to remove all PCB's from surface or ground water once a spill occurs, environmental harm is almost assured. Because of this clean-up problem, such a spill creates a substantial risk of human exposure, either directly from the water, or through the food chain. For these reasons, the Agency believes that spills into surface or ground water are always major incidents, regardless of the amount and concentration.

Spills into food and feed. Where any improper disposal results directly in contamination of food or feed, the extent is *always* major. If such spills are not quickly detected, they will result in direct human exposure. Even if the problem is detected before humans eat the contaminated food, it is likely that the cost of finding and destroying the contaminated products will be high. Thus, the Agency believes such incidents should always be considered major in extent.

Concentration Adjustments

The Agency recognizes that the concentration of the PCB materials is a relevant factor to consider in determining the amount of damage done from a violation of this regulation. Obviously, a spill of high concentration PCB's puts more contaminants into the environment than a spill of low concentration PCB's. Nonetheless, because PCB's can be toxic at very low concentrations, a spill of a large amount of low concentration PCB material could cause widespread harm. Thus, a system which would require the total weight of PCB material involved to be reduced in direct proportion to the concentration of that material would severely undermine the regulatory scheme.

The problem is illustrated by the following hypothetical: Someone spills 2,000,000 lbs. (or 909,090 kgs.) of fluid containing PCBs at a concentration of 1,000 parts per million (ppm). If, in calculating the penalty, the total weight of the fluid was reduced by the direct proportion of the concentration, less than 1,000 kilograms of PCBs would be involved for the purpose of calculating a penalty. As a result, this incident would be considered minor in extent, and the violator would not be fined more than $5,000. A penalty as small as this would not reflect the potential for harm to the environment and would create an enormous economic incentive for people to improperly dispose of PCBs at low concentrations, contrary to the intent of the regulations.

To account for the effect of the concentration of PCB liquids in determining the extent of a violation, and at the same time establish a system which does not severely hinder the agency's program, the following system has been developed. To determine the extent of probable damage for a particular violation, the total amount of PCB material involved in an incident should be reduced by the percentages which appear below:

(1) 50–499 ppm—70% reduction.
(2) 500–9,999 ppm—80% reduction.
(3) 10,000–99,999 ppm—20% reduction.
(4) 100,000 ppm or above—no reduction.

Thus, in the hypothetical quoted above, where 2,000,000 lbs. of PCB fluid at a concentration of 1,000 ppm was disposed of, the total amount would be reduced by 50%. Thus, the amount of fluids for determining the extent of the probable harm would be 1,000,000 lbs., or 454,545 kilograms.

Exceptions to Concentration Adjustment Calculation

These concentrations adjustment factors are not used in the following circumstances:

Waste oil. The use of waste oil that contains detectable concentrations of PCBs as a sealant, coating, or dust control agent, which is prohibited by 40 CFR 761.10(d), is one situation where the concentration reduction would not apply. The agency chose to prohibit these uses whenever any detectable level of PCBs were present because any such use of PCBs is likely to result in widespread environmental and health damage. Thus, allowing any reduction of the amount of PCBs used by virtue of low concentration would be contrary to the regulatory scheme.

Failure to test. The concentration reduction also does not apply where the violation is the failure to test liquid required to be tested; for example, the contents of a heat transfer system that has contained PCBs, 40 CFR 761.31(d)(1). In such cases, the risk created by the violation is that the fluid will be high concentration PCBs, and that this material will continue in use. Thus, the Agency feels that these persons should not obtain a fortuitous benefit when the liquid is finally tested and found to be of some lower concentration.

Alternative measure for solids. Finally, the concentration adjustment should not be used when the PCB material is measured by one of the

alternative measures for solids which appear in Table IV. These alternative measures were chosen to maintain economic incentives for proper disposal. The cost of disposal of such materials is not dependent on the concentration of the PCBs in them. Accordingly, to allow adjustments for lower concentration might remove the economic incentives to dispose of these materials properly.

Circumstances

The other variable for determining a penalty from the GBP Matrix is the circumstances of the violation, also called the probability of damages. The TSCA Civil Penalty System established three ranges of probability of damages, high, medium, and low. Each of these ranges in turn has two different levels, for a total of six levels of probability of damages.

Explanation of Categories

Because there are many ways the PCB regulation can be violated, and because each of these violations could occur in so many different environmental contexts, it is virtually impossible to assess in advance all the possible factors that logically might have some impact on the probability of damages for a particular PCB violation. It would be even more difficult to try to determine, in advance, how all of these factors would interact in any particular situation. For this reason, the Agency believes it is appropriate to group the different types of PCB violations, assess the probability for harm resulting from each type of violation, and then assign that type of violation to one of the levels on the circumstances axis of the GBP Matrix.

For the purposes of assessing the probability of damages from a particular type of PCB violation, all the possible violations of the PCB rule can be grouped into eight categories, as follows:

(1) Disposal
(2) Marking
(3) Storage
(4) Manufacturing
(5) Processing
(6) Distributing
(7) Use
(8) Recordkeeping

Immediately below is a table assigning the different categories of PCB violations to the levels of probability of damages on the GBP Matrix. After the table, the reasons for the assignment of each category of violation to a level of probability of damages is explained.

High Range

Level one:

(1) Improper disposal of PCBs. This includes operating disposal facilities at conditions which do not meet the requirements of the regulations. It also includes any uncontrolled discharge of PCBs, e.g., Leakage from a stored container.

(2) Manufacturing of PCBs without an exemption or in violation of any condition of an exemption.

Level two:

(1) Processing PCBs without an exemption or in violation of any condition of an exemption.

(2) Distribution in commerce of PCBs without exemption or in violation of any condition of an exemption.

(3) Improper use of PCBs or using PCBs in violation of any condition of authorization. For example, this includes removing a coil from a PCB transformer for servicing, and the failure to test a heat transfer system that once contained PCBs.

Medium Range

Level three:

(1) Major storage violations. A major storage violation means a situation where a significant portion of spilled material would not be contained. Examples of such situations are storage in areas with no curbing, non-continuous or no flooring, or unsealed floor drains. Storage of PCBs in a area with permeable flooring or curbing would also be a major storage violation.

(2) No records or major record keeping violations at disposal facilities, including high efficiency boilers and landfills. Major record keeping violations would include the failure to keep data on incinerator operating parameters.

(3) Major marking violations. A major marking violation is a situation where there is no indication to someone who is unfamiliar with the situation that PCBs are present.

Level four:

(1) No records or major recordkeeping violations at facilities that use or store PCBs. Major recordkeeping violations would include the absence of data on PCB transformers, and the absence of records on any transfer of PCBs from the site.

Low Range

Level five:

(1) Failure to date PCB items placed in storage.

(2) Minor storage violations. Examples of these are small cracks in walls, no roof, or small cracks in otherwise impervious floor or curbing.

(3) Minor marking violations. These are situations in which all the requirements of the rule have not been followed, but there are sufficient indications to notify someone unfamilar with the situation that PCBs are present and enable them to identify PCB items. An example would be the failure to mark a transport vehicle containing PCB items which are themselves marked.

Level six:

(1) Minor recordkeeping violations. Examples of such violations are small errors in the numbers of large capacitors, small errors in number of containers, or the omission of the date of transfer on PCBs.

(2) Failure to label small capacitors, fluorescent light ballasts, or large low voltage capacitors with a "no PCBs" label as required by 40 CFR 761.20(g).

Explanation for Assignment of Levels of Probability of Damage

Level one. This level contains the two violations which the Agency considers most serious, manufacturing and improper disposal. Manufacturing is extremely serious because it creates new PCBs. In so doing, it enlarges the risk of environmental and human exposure, places additional burdens on disposal facilities, and increases the cost of protecting the public from this chemical. Improper disposal creates grave risks of harm to the environment or human health, because it assures the entry of more PCBs into the environment. This is contrary to the main thrust of the PCB regulation, which was to prevent further contamination of the environment with PCBs. Thus, these violations are considered to be the most serious, and provide the standard against which the other PCB violations are measured.

Level two. The violations which were placed in level two on the GBP Matrix were those which the Agency considered to be the most likely to result in improper disposal. For example, processing or distribution of PCBs without an exemption or in violation of a condition of an exemption is likely to result in spillage, leakage, volatilization or other uncontrolled discharges of PCBs. Similarly, improper use of PCBs will, at worst, result in PCB contamination of a wide range of products (as when they are used in a leaking hydraulic system), or at best will result in an increased risk of improper disposal.

Level three. This level includes major storage violations, major recordkeeping violations at disposal facilities, and major marking violations. The Agency regards storage violations, such as the lack of a floor, to be somewhat less dangerous than the risk incurred by use, processing, or distribution of PCBs without an exemption. The latter are very likely to result in improper disposal. However, storage violations will only cause damage where there is an accident, or a leak, which probably would be unintentional. Nonetheless, if such events occurred, the possibility for widespread contamination would be high.

The lack of records, or inadequate records, at disposal facilities similarly does not present as severe a risk of improper disposal as processing of PCBs without an exemption. However, such a violation severely reduces the Agency's ability to enforce the requirements of the regulation as they pertain to the operators of such facilities. Accordingly, the absence of adequate records at these facilities removes a significant incentive for compliance, thus substantially increasing the risk of improper disposal.

Major marking violations have been defined as those situations where someone investigating a situation would not know that PCBs were present or would be unable to tell which items contained PCBs. Such a situation creates a high risk of improper disposal. However, if the other portions of the PCB regulation are observed, records would be kept on PCB materials, thereby creating at least some chance that improper disposal would not occur. For this reason, this violation is not considered as risky as improper use or distribution. However, where major marking is associated with other violations, such as recordkeeping, the increased risk will be reflected by an additional penalty.

Level four. Level four includes major recordkeeping violations at facilities that use or store PCBs. Major recordkeeping violations at facilities that use or store PCBs present a somewhat lower risk than major recordkeeping violations at disposal facilities. Since these facilities do not themselves dispose of the PCBs, there is a greater chance that the PCBs will be identified as such before they are actually disposed of. However, the fact that these violations substantially hinder the Agency's ability to trace the movement of PCB's means that they make improper disposal more likely. For this reason, the Agency considers this violation to be significant.

Level five. Included in this category are the failure to date PCB items placed in storage, minor storage violations, and minor marking violations. The failure to date PCB items placed in storage simply means that the items may be stored longer than is presently permitted by the rule. Assuming these items are otherwise treated in accordance with the rule, the lengthy storage will simply increase, by a small amount, the risk of an accidental spill. Similarly, minor marking violations are, by definition, violations where there is sufficient marking to alert someone investigating the situation that there are PCBs present. Thus, the likely ill effect of such violations is simply that, in emergency situations, the length of time required to discover the presence of PCBs might be increased somewhat. This should not significantly increase the amount of damage done. Finally, minor storage violations are those in which any spilled material will be substantially contained. Thus, the amount of damage that could

result from such violations would be relatively small.

Level six. Level six represents those violations which the Agency believes pose the least risk of causing harm. It includes only minor recordkeeping violations, and failure to label with the "no PCBs" mark. In the case of minor recordkeeping violations, such violations, although they might make enforcement somewhat more difficult, should not seriously impair the Agency's enforcement efforts. The failure to label with the "no PCB" mark will only result in the disposal of certain items more carefully than necessary, thereby increasing the cost of compliance with the regulation.

The risk to the environment and human health in this case is minimal. Moveover, the Agency believes that there are already substantial economic incentives for manufacturers to comply with this labeling requirement, since their customers would probably be anxious to obtain equipment bearing such a label.

Using the GBP Matrix To Find a PCB Penalty

In order to determine a penalty for a specific PCB violation, the following steps should be followed:

Step 1: Determine which category of violation is involved (i.e., disposal, marking, storage, manufacturing, processing and distribution, use, or recordkeeping). If more than one violation category is involved, repeat the calculation in steps 2 through 8 for each violation category.

Step 2: Find which level the violation fits on the circumstances axis of the GBP Matrix.

Step 3: Calculate the total amount of PCBs involved in the violation. If there are several materials involved which fall into different concentration ranges, do a separate calculation for each concentration.

Step 4: Reduce the amounts in step 3 by the concentration adjustment. (Be sure to note the exceptions to this step).

Step 5: If different concentration ranges are present, add up the figures from step 4.

Step 6: Determine which extent category (major, significant, or minor) is applicable to the amount from step 5.

Step 7: Use the level from step 2 and the extent from step 6 to locate the penalty on the GBP Matrix (E.g., Level 3, *significant* is $10,000).

Step 8: Enter the amount from step 7 on line 1 of the Civil Penalty Assessment worksheet attached to the TSCA Civil Penalty Policy. Use that worksheet to complete the calculation of the penalty accounting for factors such as culpability, history of violations etc.

Example

An inspection of X Company reveals that the following items are all stored for disposal in a room with an earthen floor:

2 transformers
3 capacitors

All three capacitors have name plates that show that they contain high concentration PCBs and have a volume of 30 gallons each. One transformer contains 300 gallons, and is tested at 1000 ppm. The second transformer contains 500 gallons, and is tested at 64% PCBs. It is leaking, and X's general foreman says that about 20 gallons have leaked. The equipment is marked, and X has records on this equipment. Assume the density of all fluids is 10 lbs/gal.

Step 1: Determine the categories of violation.
These are:
Disposal
Storage
Because there are two categories, a calculation is needed for each.

Disposal

Step 2: Find the "circumstances" level. This is level one, for disposal.
Step 3: Find the total amount involved.
Total disposal: 20 gallons.

$$20 \text{ gal.} \times \frac{10 \text{ lbs}}{\text{gal.}} = 200 \text{ lbs.}$$

$$200 \text{ lbs.} \times \frac{.45 \text{ kg.}}{\text{lb}} = 90 \text{ kg.}$$

Step 4: Make concentration adjustment.
No reduction for PCBs over 100,000 ppm, which is what was spilled.
Step 5: Not applicable.
Step 6: Determine extent category.
90 kg. = Minor
Step 7: Find penalty from matrix.
Level one + Minor = $5,000
Step 8: Enter $5,000 or line 1 of the worksheet (Appendix A)

Storage

Step 2: Find "circumstances" level.
Major storage (permeable floor) is level 3.
Step 3: Find total amount involved.

(a) over 100,000 ppm:

1 transformer @ 500 gal. 500
3 capicators @ 30 gal. 90
590 gal.

$$590 \text{ gal.} \times 10 \frac{\text{lb.}}{\text{gal.}} \times .45 \frac{\text{kg.}}{\text{lb.}} =$$

2655 kg. over 100,000 ppm

(b) 500-10,000 ppm:

1 transformer @ 300 gal.

$$300 \text{ gal.} \times 10 \frac{\text{lb.}}{\text{gal.}} \times .45 \frac{\text{kg.}}{\text{lb.}} = 1350 \text{ kg.}$$

Step 4: Make concentration adjustment.
(a) over 100,000 ppm—no adjustment 2655 kg.

(b) 500–10,000 ppm—50% reduction 1350 kg. X .50 = 675 kg.

Step 5: Add figures from step 4.

2655 kg.
+ 675kg.
3330 kg.

Step 6: Determine extent category.

3330 kg. = Significant.

Step 7: Find the penalty from the matrix.

Level 3 + significant = $10,000.

Step 8: Enter $10,000 on line 1 of the worksheet (Appendix A).

Penalty Assessment for Multiple Violations

In the past, the Office of Enforcement has had numerous questions about which circumstances were appropriate for the assessment of multiple penalties. For the purpose of promoting consistency between regions and to be consistent with the penalty scheme set forth above, the following guidelines should be followed for assessing multiple penalties.

When Not To Assess Multiple Penalties

There are certain instances when separate counts should not be charged and multiple penalties not assessed. The first type of case where this is not appropriate is where a single situation presents violations of many portions of the regulation, which are all in the same violation category. For example, if X Company has a storage area which is unmarked, and which contains one unmarked PCB container, there are two infractions of the regulation: The failure to mark the container, and the failure to mark the storage area. However, only one violation should be charged; namely, a major marking violation. Both infractions present the same risk: that is, that no one will realize that PCBs are present. Accordingly, only one penalty is assessed. If the violation category is one like marking, which appears at several levels of the circumstances axis, the penalty should be assessed by looking at the most serious infraction committed.

Another situation in which only one count should be alleged and one penalty charged is where there are multiple infractions of the same regulatory requirement. For example, if five transformers are unmarked, only one penalty should be charged. Although five transformers present a greater risk than one transformer, this fact is accounted for by the larger extent category applicable to the situation with five unmarked transformers. Again, the nature of the risk presented is the same, so only one penalty is charged.

When Multiple Penalties Should Be Assessed

The most obvious situation for assessing multiple penalties is where the situation constitutes infractions of different violation categories (e.g., marking and storage). In such instances, one count should be charged for each violation category. This was done in the sample penalty calculation, above.

Another example of multiple penalties used properly is where one company has several PCB situations which are in violation of the regulation in substantially different locations. Different buildings or yards on the same site would be sufficient for a multiple violation; two sites in the same building would not, unless the building is very large (for example, an auto assembly building). In these cases, the separate locations present separate and distinct risks to human health and the environment. Thus, separate penalties are justified.

Assessing Penalties for Continuing or Repeated Violations

Section 16 of TSCA clearly gives the Agency the power to assess penalties on a daily basis for continuing situations, such as where a transfomer is improperly stored for a month. It also gives the Agency the discretion to charge a penalty for each separate act of a repeated course of conduct, such as where someone manufactures PCBs on twenty different occasions, without an exemption. However, any simple rule the Agency might develop concerning when to charge multiple counts in such cases is likely to have undesirable effects. For example, a policy which said that only one charge will be assessed for a continuing violation would not adequately protect the environment. Under such a policy, a company with a leaking PCB transformer would have no incentive to correct the leak, since how quickly it acted would not affect the penalty significantly. Alternatively, a policy that required the Agency to assess multiple penalties whenever there was evidence of a continuing

violation would also cause undesirable effects. Someone who stored an intact PCB transformer improperly for 30 days could be liable for $300,000. This penalty, in the absence of aggravating circumstances, seems excessive.

For these reasons, the Agency has developed the "proportional penalty calculation", which is explained in detail below. This calculation should be used whenever there is evidence of continuing violations, or repeated violations which are part of a single course of conduct. Except in unusual circumstances, this calculation will yield the penalty to be charged for such repeated or continuing violations. The effect of this calculation is that the penalty is multiplied for repeated or continuing violations where substantial amounts of PCBs are involved. The magnitude of the multiplication is proportional to the amount of material involved, subject to the limitation of $25,000 per day. The Agency believes it is appropriate that the very large penalties that can result from continuing or repeated violations be assessed in those situations where large amounts of PCBs are involved.

Nonetheless, the Agency realizes that there may be situations where no multiple penalties are appropriate, or where the violation merits a penalty calculated by multiplying the GBP penalty directly by the number of days or incidents involved. Accordingly, the Agency reserves the discretion to assess penalties for repeated or continuing violations without regard to the proportional penalty calculation.

The Agency expects that in most cases, the penalty for repeated or continuing violations [illegible] computed by use of [illegible] calculation. [illegible] penalties more [illegible] the proportional penalty can be exercised under the following circumstances:

- Where substantial actual [illegible] occurred as a result of the violation;
- Where the unusual circumstances of the violation give [illegible] risks to the environment;
- Other [illegible] unusual circumstances.

The decision to use this discretion should only be made after consultations with Headquarters personnel in which the reasons for this exercise are explained in detail.

Explanation of the Proportional Penalty

The proportional penalty is [illegible] in the following manner:

Step 1: Calculate the total amount of PCBs involved in the situation, reduced by the concentration adjustment. Using as an example an individual who processes 20 gallons of PCBs for 200 days, the total amount is 4,000 gallons (assuming the concentration is greater than 100,000 ppm). If two 50 gallon capacitors are stored improperly for 20 days, the amount involved is 100 gallons.

Step 2: If the amount from step 1 is less than two times the major extent category (10,000 kg. or 2,200 gallons), use this amount to determine the extent category and obtain a penalty from the GBP Matrix. For example, the penalty for the two capacitors improperly stored for 20 days would be $1,500. Twenty counts would be charged, at a penalty of $1,500/20 days or $75 per day. If the amount from step 1 is greater than 2 times the extent category, proceed to step 3.

Step 3: Divide the total amount from step 1 by the major extent category limit (e.g., 5,000 @ kg. or 1,100 gallons). Multiply the result by the amount in the major penalty category. This yields the proportional penalty. Using the example of the individual who processes 20 gallons of PCBs per day for 200 days, the calculation goes as follows:

Amount from Step 1 = 4,000 gal.

$$\frac{4{,}000 \text{ gal.}}{1{,}100 \text{ gal. (major limit)}} = 3.6$$

3.6 × $20,000 (major, level 2) = $72,000. Total penalty

Step 4: Divide the total penalty by the number of days (or events) involved. Enter this amount on line 1 of the TSCA Civil Penalty Assessment Worksheet. In our example:

$72,000 total penalty/200 days = $360 per day.

This figure goes on line 1 of the worksheet.

The proportional penalty should always be used unless the calculation yields more than $25,000 per day. In that case, the penalty should be $25,000 per day, the maximum allowed by statute.

The proportional penalty should be used in the same way as any other penalty derived from the GBP Matrix.

The per day penalty should be entered on line 1 of the TSCA Civil Penalty Assessment Worksheet, and should be adjusted by the factors, such as culpability and violation history, shown on that document, which is attahced to this policy.

Dated: April 24, 1980.

Richard D. Wilson,

Deputy Assistant Administrator for General Enforcement.

Civil Penalty Assessment Worksheet

Name of Respondent: _____

Address of Respondent: _____

(1) Complaint I.D. Number: _____

(2) Date Complaint Issued: _____

(3) Date Answer Received: _____

(4) Date Default Order Sent: _____

(5) Date Consent Agreement Signed: _____

(6) Date Final Order Sent: _____

(7) Date Remittance Received: _____

1. Deputy Assist Penalty (GBP) from Matrix ..... $——
2. Percent increase or decrease for culpability ..... %
3. Percent increase for violation history ..... %
4. Add lines 2 and 3 ..... %
5. Multiply GBP by percentage total on line 4 ..... $——
6. Add lines 1 and 5 (subtract line 5 from line 1 if negative percentage). $——
7. Enter line 6 amount or $25,000, whichever is less. $——
8. Multiply line 7 by the number of days of violation. $——
9. Government clean-up costs, if any ..... $——
10. Economic gains from non-compliance, if appropriate. $——
11. Add lines 8 through 10 ..... $——
12. Total of other adjustments as justice may require. $——
13. If line 12 represents a net increase to the penalty and line 12 to line 11.. $——

or

If line 12 represents a net decrease to the penalty subtract line 12 from line 1. $——

*Line 13 should be the proposed penalty for a given violation. This procedure is repeated for each violation.

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4 Settlement With Conditions

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Introduction

Purpose and Background

This document provides guidance for the settlement of administrative cases involving alleged violations of the Toxic Substances Control Act (TSCA) through a settlement with conditions. Using this kind of settlement, the Environmental Protection Agency (EPA) may remit all or part of a penalty in exchange for specific remedial action performed by the Respondent.

Sections 16 and 17 of TSCA provide the EPA with a choice of remedies with which to respond to violations of section 15 of TSCA. These remedies include civil administrative penalties, injunctive relief, and criminal sanctions. In addition to these remedies, the Agency uses nonstatutory notices of noncompliance to respond to minor technical violations. These remedies are described in TSCA Level of Action Guidance documents, which provide criteria to assist Regions in selecting the appropriate remedy.

Section 16(a)(2)(A) of TSCA authorizes the Administrator to assess civil penalties for violations of TSCA. Section 16(a)(2)(C) permits the Administrator to compromise, modify, or remit[1], with or without conditions, any civil penalty which may be imposed under Section 16(a)(2)(A). The term used to refer to the settlement of a case under terms which commit the Respondent to perform specified acts in exchange for a remittance of all or a portion of the penalty is "Settlement with Conditions" (SWC).

The purpose of the Settlement with Conditions is to enhance the level of compliance where violations require complex remedies. In exchange for the amount of the proposed civil penalty which the Agency is to remit, the violator agrees to take extensive and specific remedial actions. These actions must exceed those normally expected under the circumstances, must be taken within a specific time period and will be strictly monitored by the Agency. The remedial actions may be related not only to the violations discovered by the Agency, but also to other current violations as yet undiscovered, or to deterrence of future violations. In addition to remittance of the penalty, the Agency will also agree to refrain from taking further enforcement action with respect to the specific situations covered by the settlement agreement for the term of the agreement and, as long as the company acts in good faith, to abide by the conditions. At the end of the term, if the Agency is not satisfied that the conditions have been met, the full amount of the penalty is due. The Agency may then elect to reinspect the facility to document further violations or to take injunctive action to remedy the violation.

1/ The term "remit" is not defined in Section 3 or discussed in the legislative history of Section 16. It has, however, been used in other Federal enforcement statutes. In these contexts its meaning is to release from a penalty; to refrain from enforcing; to refrain from exacting as a penalty; to forgive a penalty in whole or in part.

Overview

An SWC is set forth in three documents: (1) a consent agreement and consent order assessing an administrative civil penalty according to Sections 16(a)(2)(A) and (B) and the Consolidated Rules of Practice, (2) a remittance agreement which sets forth the conditions for Remittance (Compliance Program and Schedule (CPS)) and (3) a Remittance Order.

The consent agreement and final order assesses a total penalty and disposes of the proceeding. This document cannot contain any conditions precedent to the assessment of the penalty or it will not be considered a final order.

The remittance agreement sets forth the CPS, the completion of which is a condition precedent to the remittance of all or part of the penalty.

The remittance order formally remits the penalty (or portion of the penalty) and is executed when the Agency is satisfied that the Respondent has met the conditions outlined in the CPS. If the Respondent has not satisfied the conditions, the order informs him that the payment of the previously assessed penalty is due.

When to Use an SWC

Initial Criteria

Using an SWC requires a two-step process: First, a decision must be made to choose an SWC as the appropriate remedy. This is done by applying the criteria set forth in the first part of this section. Second, once an SWC is selected, the amount of the penalty to be remitted is determined by considering the factors set forth in the second part of this section.

Settlements with Conditions should be employed with some restraint. SWCs should not be used in a manner which encourages industries to violate TSCA until they are discovered and then offer to correct actions in hope of a remittance. Most CPSs will describe actions which go beyond correction of violations.2/

A Settlement with Conditions should be considered when non-profit entities are found to be in violation of TSCA. Such settlements allow the Agency to avoid increasing the burden on public service institutions and at the same time increase the level of compliance and benefit the public. However, these

2/ It is important that the remittance agreement specify that the remedial actions are performed in lieu of a civil penalty since this prevents the company from deducting as a business expense the cost of such actions and gaining an unwarranted income tax advantage.

settlements should not automatically be employed for settlement with all nonprofit entities. The criteria listed below should determine if an SWC is an appropriate remedy, regardless of whether the violator is a profit or a non-profit entity.

Criteria for Choosing an SWC

In the following circumstances an SWC should be considered:

- o Violations have been documented which warrant a civil penalty; and
- o The violations do not evidence wanton, knowing, or willful disregard for regulatory requirements; and
- o The violations are continuing (for more than 30 days) or recurring in nature; and
- o To come into compliance, the facility needs to undertake a detailed design, engineering, and/or monitoring program requiring numerous, complex steps over time, and
- o The company has exhibited a good-faith attitude toward solving the noncompliance and has no history of non-compliance; and
- o There are clear public benefits to use of an SWC; and
- o An SWC acceptable to EPA can be negotiated.

Criteria for Determining the Penalty Amount to be Remitted

The amount of the proposed penalty to be remitted should be determined by considering the following factors:

- o The severity of the environmental contamination or health risk associated with the violation; and
- o The degree of good faith the violator has demonstrated in his efforts to correct the problem; and
- o The relationship of the proposed penalty to the estimated clean up cost or other environmentally beneficial expenditure; and
- o The need for the authority of the Agency to be vindicated.

Appendix A of this document provides explicit application of these criteria to the PCB rule (40 C.F.R. Part 761).

Other Considerations

Comparison with Section 17

The CPS portion of the SWC may impose performance requirements identical with those contained in an order for injunctive relief obtained in federal district court under a Section 17 order. Since such an action is more resource intensive than an SWC[3/], injunctive relief should be sought only where:

- Significant environmental contamination or health exposure is actually occurring, and the person responsible for creating the problem refuses to take swift corrective action; or
- The violator refuses to correct a substantial violation; or
- The compliance history and attitude of the violator are such that the Agency believes that the contempt power of the Court is needed to insure that the violator adheres to the program needed to achieve compliance.

Incentives

Although remedies exist to enforce adherence to an SWC, the Agency should not enter into this type of settlement unless the violator is clearly acting in good faith. The Agency expects the violator to strictly adhere to the compliance program and schedule contained in the settlement. The violator's incentives to comply with an SWC should be examined in the context of each case. Possible incentives to the Respondent can include:

- The Respondent may use the SWC to demonstrate his good faith commitment to take responsible remedial action or as evidence that adequate remedial action has been taken. Thus, the SWC would give the Respondent a favorable position in suits that may be brought against it by citizens or other governmental bodies for correction of conditions covered by the SWC.
- The Respondent will benefit from EPA's promise not to reinspect and bring civil penalty actions for each day of a continuing violation covered under the SWC.

3/ Petitioning the Court requires the preparation of formal documents with supporting briefs, and the active involvement of, OLEC/RC, the Department of Justice, and the local U.S. Attorneys Office. Similar steps must be taken to amend a Section 17 court order, in contrast to the simpler procedure required to amend an SWC.

- o The Respondent may desire not to pay the remitted penalty in addition to expenditures needed to achieve compliance.
- o The Respondent may receive favorable publicity from performance of the acts outlined in the compliance program and schedule.

Elements of Settlement with Conditions

An SWC, like any Section 16 settlement, consists of a complaint (40 C.F.R. §22.14) and a consent agreement and consent order (40 C.F.R. §22.18). It also includes a remittance agreement and a remittance order. This part of the guidance describes the specific language which must be incorporated into these documents to constitute a SWC.

Complaint

A complaint alleging violations of TSCA and proposing a civil penalty must be issued to establish the Agency's allegations that violations have occurred and to initiate any SWC negotiations. The complaint should be issued in the same format as in any TSCA administrative civil penalty action. The content of the complaint is prescribed by 40 C.F.R. §§22.14(a) & (e).

Consent Agreement and Final Order

This document must meet the requirements of 40 C.F.R. 22.14(b) and (c). In the agreement the Respondent (1) admits the jurisdictional allegations of the complaint (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations and (3) consents to the assessment of a stated administrative civil penalty. The consent agreement shall include all terms of the agreement and shall be signed by all parties or their counsel or representatives. The consent order[4]/or "final order" disposes of the administrative proceeding and is signed by the Regional Administrator or the Assistant Administrator for OPTS. A sample consent agreement and final order appear in Appendix B.

The consent agreement and final order should consist of the following elements:

Preliminary Statement

This part of the document states that a civil penalty is assessed for specific violations of TSCA. The Respondent admits the jurisdiction of the complaint and may admit or neither admit nor deny the allegations. The Respondent also waives its right to a hearing and consents to the issuance of a final order and payment of a civil penalty.

4/ Unlike judicial consent decrees and consent orders filed in Federal court, the Administrative Law Judge, unlike a federal judge, does not have continuing jurisdiction over a consent agreement and consent order signed by the Regional Administrator. (see Consolidated Rules of Practice, 40 C.F.R. Part 22)

Findings of Fact

This section lists the findings of fact as to each allegation in the complaint.

Conclusions of Law

This section contains conclusions of law which establish a violation of TSCA.

Final Order

The final order contains the assessment of a final penalty which is calculated based on the gravity based penalty matrix and adjustment factors in the enforcement response policy or civil penalty assessment guidance for the rule. A final order in an SWC should contain a statement that indicates that payment of the assessed penalty may be deferred until 60 days after the remittance (or nonremittance) order. Such a procedure is permitted under 40 C.F.R. §22.31(b).

Remittance Agreement

At any point in the negotiation of the consent agreement and consent order or after the final order is signed, the EPA and the Respondent may enter into a Remittance Agreement. Under this agreement, EPA will agree to remit all or part of a penalty if the Respondent performs specific actions. The actions usually include, but go beyond, compliance with TSCA. These activities are described in the Compliance Program and Schedule. The parties which negotiated the agreement may amend it according to the procedures outlined in this document without affecting the consent agreement and consent order. A sample remittance agreement appears in Appendix B.

The most important part of the remittance agreement is the commitment to the CPS. The CPS is referenced in the remittance agreement and attached to it. An example of a CPS is appended to this document in Appendix B.

Compliance Program and Schedule

Generally

The CPS details the steps the Respondent must take to remedy the violations and report its progress to EPA.

The specific provisions of the CPS will vary with each settlement depending upon the facts of the specific case; this guidance discusses factors to consider in drafting any CPS.

Final Compliance

This section of the CPS should state that the goal of the CPS is to bring all the Respondent's facilities subject to the CPS into final compliance with the applicable TSCA regulation no later than the date specified in the CPS for final compliance. The meaning of final compliance should be set forth in this section, e.g., "all of the Respondent's transformers shall contain PCBs in concentrations less than 50 ppm no later than January 1, 1984." The Agency will determine whether the company has complied with the rule based on the monitoring and reporting provisions of this agreement. The Agency will inform the Respondent of its decision concerning compliance in a letter. If the Respondent has adhered to the terms of the CPS, then the Agency will permanently remit the deferred portion of the final penalty. If the Respondent has not complied with the CPS, the uncollected portion of the penalty is due.

Interim Milestones

Because final compliance will often take considerable time to achieve, interim compliance standards will be necessary in most CPSs. Discrete milestones should be established which lead consecutively to final compliance. There may be several separate schedules (e.g., a schedule to develop a plan; to construct equipment or facilities; to decontaminate, to test, etc.). Interim standards are appropriate in those instances in which (1) the final standard is presently unattainable in light of immediately available technology or present knowledge of the noncompliance problem; or (2) cost, or safety risks which immediate imposition of the final standard would require outweigh the continued environmental risk presented by the ongoing violation. For example, necessary equipment may not be available at the execution of the CPS. The CPS can specify an interim standard (e.g., concentration of PCBs in PCB items such as transformers) which the Respondent must meet prior to the final compliance date.

Timetables

The CPS should specify timetables for performing tasks necessary to achieve compliance as quickly as is reasonable under the circumstances. The performance periods for accomplishing relevant milestones may be expressed as dates certain, as working days following the effective date of the consent agreement and consent order, or as days following the performance of some contingent event, such as EPA approval of plans or review of test results.

Monitoring

An important part of the CPS is the inclusion of provisions for monitoring the performance required by the CPS. Monitoring provisions will generally require periodic testing and reporting by the Respondent. In selecting the monitoring provisions, such factors as the impact on Agency resources of different monitoring requirements and the ease with which the Agency can proceed with monitoring should

be considered. Reporting should be required at least quarterly; more frequent reporting should be considered where a CPS is particularly complex; however, reporting should not be so burdensome that it distracts the Respondent's energies from the remedial task. This section will also address issues such as site entry and document review by the Agency both as authorized by Section 11 and to monitor compliance with the CPS.

Notification of Technical or Operational Difficulty

The CPS should provide for prompt notification to EPA by the Respondent of unexpected technical or operational difficulties which compromise the Respondent's ability to meet a deadline.

Technical Assistance

There may be a provision requiring EPA to provide reasonable technical assistance concerning such matters as sampling, analytical procedures, and acceptable disposal options for the purpose of complying with the agreement. This requirement is only appropriate where innovative technology or procedures which are new or not well established are part of the performance requirements.

Amendments to CPS

The remittance agreement should contain an amendment procedure upon mutual consent of EPA and the Respondent. This provision should clarify that the CPS may be amended at any time to modify or add technical and operational requirements (such as, but not limited to, deadline modifications necessitated by technical or operational difficulties) if needed to achieve compliance by the Respondent. Other specific circumstances for amendment may be discussed (i.e., the occurrence of events beyond control of the Respondent, but not including an increase in cost of compliance). Any changes and/or amendment to the agreement will be deemed to be incorporated into the agreement when it is signed by authorized representatives of EPA and the Respondent.

Standing alone, the mere fact that the Respondent is going to miss a deadline should not lead to an amendment. Simple failure to comply, without more, calls for an enforcement response. Where, however, the Respondent has made a good faith effort to comply with a requirement, and (1) that requirement was arrived at by mutual mistake, or (2) a condition precedent to the requirement was not fulfilled (through no fault of the Respondent) such that compliance is impossible, the CPS should be amended.

In general the following are guidelines for granting extensions or amendments:

- o Extensions or amendments will be considered only in circumstances which are entirely beyond the control of the Respondent. Respondent may not claim economic hardship or increased costs as circumstances beyond its control.

- o The burden is on the Respondent to prove that events requiring the extension or amendment are beyond its control.
- o The Respondent must notify the Agency immediately of any need for extension or amendment of the CPS.
- o The Respondent should take measures to prevent or minimize the need for amendment or extension of the CPS.
- o The events which trigger the extension or amendment do not excuse the Respondent from ultimate compliance with the CPS. Compliance should occur as quickly as possible.
- o Disputes concerning the need for extension or amendment of the CPS may be resolved according to the procedures described in the "Dispute Resolution" section.

Specificity and Clarity

To avoid controversy over whether the Respondent met any requirement of the CPS, the performance requirements must be stated in a manner which is capable of only one interpretation. For example, rather than simply requiring the Respondent to prepare a sampling plan, the CPS should set forth the component parts of the plan such as sample volume, method of collection, and sample handling procedures, and location of each sampling point. Requirements should not be so detailed as to be unnecessarily burdensome or to eliminate the Respondent's needed flexibility. For example, it would normally not be necessary to specify the type or brand of equipment necessary to perform certain construction-related tasks. On the other hand, such specifications might be necessary in the case of equipment to detect PCBs.

A CPS with many technical or potentially ambiguous or misleading terms, or terms defined according to agreement reached between the parties, should contain a separate section listing definitions of those terms. Definitions contained in the CPS must conform with definitions given in TSCA and its regulations. Redefinition of terms that have specific statutory or regulatory definitions should not be attempted; however, examples or illustrations of these terms may be appropriate.

Quality Assurance

Depending on the nature of the compliance program, the quality assurance measures to be taken by the Respondent should be discussed. It may be appropriate to require the Respondent to participate in an independent or government quality assurance program or to split some samples with an EPA or State laboratory.

Enforcement

The remittance agreement should include a statement that EPA shall not initiate additional enforcement action against the Respondent concerning the violations which are the subject of the agreement as long as he complies with the CPS. EPA's promise is part of the quid pro quo of the agreement. The clause should state clearly that the insulation from enforcement does not extend to violations of other TSCA provisions or to violations of other laws administered by EPA, nor does this agreement affect the defendant's liability with regard to other State, Federal or local statutes or regulations.

In addition, this agreement does not limit or affect the rights of the United States or of the Respondent against any third parties.

Dispute Resolution

Disputes may arise between EPA and the Respondent after signature of the remittance agreement. The agreement (in the CPS) can provide its own mechanism for resolving some or all of the potential disputes. The parties could agree to submit the matter to arbitration. This approach is useful where technical disputes can be submitted to an expert respected by both parties. If possible, this expert should be selected in advance and named in the decree.

Confidentiality of Documents

The Respondent has the right under TSCA to claim that information submitted to the Agency is Confidential Business Information. This section should cover the procedures the company must follow to exert a confidentiality claim. If the company waives its right to exert a confidentiality claim, that should be stated in this section.

Remittance Order

If the Respondent performs the actions described in the CPS, the Agency will remit all or part of the penalty. The Agency will issue a Remittance Order which formally states that the Administrator is satisfied that the conditions for remittance have been satisfied and that the penalty (or part of the penalty) is remitted.

Roles and Relationships

While Headquarters may assume the lead on the few cases which involve issues of first impression or national significance, the Regions will primarily implement this guidance. Regions may organize their offices in any way consistent with the Administrator's guidance on Regional organization; the suggested allocation of responsibility with regard to SWCs between Program Offices and Counsel is as follows:

Decision to Use SWC

As in any other choice of remedy or level of action determination, the Regional Program Office is responsible for this decision following the criteria set forth in this document.

Negotiations

Negotiations[5/] are a critical part of the SWC process. The adequacy of the remedial measures to be incorporated into the SWC will often depend on information in the Respondent's possession.

Negotiations that take place prior to the filing of a complaint are the primary responsibility of the Regional Program Office[6/]. If the Respondent is represented by counsel, however, Regional Counsel or Headquarters OLEC must attend.

At the start of negotiations, EPA's representatives should inform the Respondent's representatives of the scope of their authority to speak for the Agency and of Agency policy, regulations and concurrence practices which may affect the terms of the SWC and the time necessary for EPA to execute the SWC. Similarly, Agency representatives will want to ascertain the scope of authority of the Respondent's representatives.

It is strongly recommended that EPA representatives conduct negotiations of administrative actions according to their own specific timetables. Establishing milestones of which all negotiators are aware will ensure that enforcement actions proceed and are not unduly delayed by the negotiating process. In order to keep negotiations moving, every offer or request made to the Respondent should contain a definite date for response. A final date ninety days after

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5/ Preliminary discussions which may bear on the decision to proceed with an SWC are not included under "Negotiations" but rather are instrumental in determining good faith under "Criteria".

6/ Once litigation commences, negotiating sessions must be led by the Regional Counsel or Headqarter's OLEC Attorney of Record, with attendance by technical personnel. These sessions should be conducted as part of an overall litigation/settlement strategy.

initiation of negotiations should be established by which all documents required for an SWC must be signed by EPA and the Respondent.

Preparation and Issuance of Documents

The Program Office should prepare the documents necessary for an SWC, with review for legal sufficiency by Regional Counsel.

Drafts of these documents, including tentative performance requirements and schedules, should be prepared for discussion purposes for the first negotiating session. (Although the complaint should be prepared, it should not be subject to negotiation.) These drafts serve to focus the discussion and will provide an early indication of the Respondent's willingness to agree to reasonable proposals. EPA Counsel should be consulted regarding any disputes over findings and admissions.

As set forth in the Delegations Manual and the Consolidated Rules of Practice, the Regional Program Division Director will issue the complaint. The Regional Counsel will sign and execute the consent agreement with concurrence from the Division Director, and the Regional Administrator or Regional Judicial Officer will issue the consent order.

In cases settled at Headquarters, the complaint will be signed by the Assistant Administrator for the Office of Pesticides and Toxic Substances or the delegate, the Director of the Compliance Monitoring Staff, and the consent order by the Administrator or the Headquarters Judicial Officer. The consent agreement will be signed by the Assistant Administrator for Enforcement and Compliance Monitoring or delegate with concurrence from the Assistant Administrator for Pesticides and Toxic Substances or the Director of the Compliance Monitoring Staff.

The remittance agreement may be negotiated by the Program Office with consultation from the Regional Counsel's Office. However, only the Administrator or delegates (Regional Administrator or Assistant Administrator for the Office of Pesticides and Toxic Substances, who may redelegate to the Division Director level) can sign the remittance order.

Monitoring

It is the responsibility of the Program Office to monitor compliance with the CPS. The Regions should establish a specific team to monitor compliance with a CPS. This team will maintain a CPS Monitoring Worksheet. The worksheet should contain four columns.

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- Column #1 lists the task to be completed or the standard to be achieved.
- Column #2 lists the due dates for the items in column #1.
- Column #3 lists the dates that the items in column #1 were completed.
- Column #4 contains a brief evaluation of the quality and timeliness of the completion of the items in column #1. If there is need for additional space, an attached sheet may be referenced.

If any compliance steps require EPA review or approval, the requirements in column #1 should indicate this, and column #4 should indicate the results of the evaluation or approval/disapproval by the Agency. See Appendix D for a sample CPS Monitoring Worksheet.

Determination of Violation

The determination that an enforcement response is appropriate for a Respondent's failure to adhere to the SWC is the responsibility of the Program Office. The EPA may determine that the Respondent is not in compliance with the CPS if any interim milestone is missed. The Agency will not necessarily make a determination of violation based on a missed milestone, if the ultimate goal of the CPS is not compromised. Criteria for determining that a violation which merits an enforcement response has occurred during the CPS are:

- A milestone is missed by a significant number of days and the Respondent has reported no technical difficulties nor justified an amendment to the agreement (see Amendments section);
- Timely ultimate compliance is greatly compromised by the missed milestone; and
- Respondent's actions fails to demonstrate a good faith effort to comply with the CPS.

If the violation is severe enough or violations are repeated, then the Agency may issue a nonremittance order.

Responses to Noncompliance with the SWC

Penalty Payment

If the Respondent fails to adhere to the conditions of the SWC, the Agency will issue a nonremittance order notifying the Respondent that because the Respondent did not meet the conditions for remittance, the uncollected penalty is due and payable within 60 days. The non-remittance order will specify the ways in which the conditions were not met. If the Respondent refuses to pay, the Agency may refer the action to the Department of Justice which may bring a recovery action under Section 16(a)(4) to collect the penalty that was assessed.

Reinspection and Additional Enforcement Action

Inspections conducted by the Region or HQ's during the course of the SWC and/or reports submitted by the Respondent may indicate violations of the statutory/regulatory provisions which are the subject of the SWC. Indeed, this is likely to be the case, given the continuing or recurring nature of the violations that a SWC is intended to remedy. As long as the Respondent complies with the terms of the SWC, however, the Respondent is shielded from additional enforcement action involving the subject matter of the Agreement. Once, however, the Region determines that the SWC has been violated and so notifies the Respondent, EPA should reinspect the facility to document additional violations. However, EPA may not attempt to establish violations during the term of the SWC and prior to a notice to the Respondent. The Respondent remains liable, of course, for violations of regulatory and statutory provisions not covered by the SWC.

When considering additional enforcement actions in response to violations discovered upon reinspection, the Region may give consideration to pursuing injunctive action under Section 17. Clearly, in cases of serious violations where administrative enforcement action cannot be expected to achieve compliance, an injunction may be a desirable enforcement response.

APPENDIX A:

APPLICATION OF SWC CRITERIA TO PCB RULE

This Appendix illustrates the application of the criteria set forth in the SWC guidance document to some typical violations of the PCB rule (40 CFR Part 761; all references herein are to the recodification of the rule at 47 FR 19527, May 6, 1982). The illustrations are not meant to be an exhaustive catalog of all situations in which a SWC should be considered. Each will highlight the consideration of one or more criteria.

I. Marking - §761.40

An SWC should not be considered for Marking violations, since two of the criteria are not met. These violations are easily correctable.

II. Recordkeeping of Use and Disposal - §761.45

An SWC should not be considered for Recordkeeping violations, since these violations are easily correctable.

III. Storage for Disposal - §§761.60 & 761.65

Generally

A storage violation could satisfy several criteria. However, given the relative ease with which a violative storage facility can be upgraded to meet the requirements of §761.65(b)(1), the fourth criterion will not be satisfied in the usual case. Likewise, violations of the conditions for temporary storage of PCBs set forth in §761.65(c) can be easily corrected and should not continue for more than thirty days if adequate corrective action is taken.

Disposal Deadline Violations

Pursuant to §761.65, certain PCB items taken out of use before January 1, 1983 may only be stored until the deadlines set forth in the Rule. The strong Agency policy of encouraging advance planning for proper disposal means that even in instances where a facility alerts EPA that all authorized disposal sites are overcrowded, an SWC is not appropriate.

In the case of the Electrical Equipment Rule (47 FR 37342), failure to remove electrical equipment from zones of exposure in food and feed establishments by the deadlines set forth in this Rule amendment is not a violation qualifying for an SWC. There is ample flexibility in the Rule amendment to allow advance planning to solve storage problems.

IV. Manufacturing - §761.20

Intentional

Intentional manufacture of PCBs without obtaining an exemption, even where an exemption might have been granted, will never satisfy the second criterion.

Incidental (greater than 50 ppm)

Incidental generation of PCBs as a byproduct of the manufacturing process may qualify for an SWC. The first four criteria may be satisfied, and the fifth criterion could be satisfied if the violator (1) voluntarily reports the facts to EPA as soon as it could reasonably be expected to discover them, and (2) will agree to a remedial plan including testing and monitoring beyond the regulatory requirements, i.e., actual testing rather than theoretical analysis. The last criterion will be satisfied where EPA needs the cooperation of the company to investigate the problem and determine solutions and where the shut down of the facility is imminent. The goal of such an SWC would be to encourage the company to both reduce the concentration of PCBs to less than 50 ppm and develop a closed and controlled system.

Incidental (less than 50 ppm) (Closed and Controlled Rule; 47 F.R. 46980)

The factors determining whether to use an SWC here are the same as set forth above in the case of concentrations greater than 50 ppm. The goal of the SWC, however, is to develop a closed and controlled system to contain the PCBs, rather than to reduce their concentration.

Import/Export

Import or export of PCBs after May 1, 1980, even if done without knowledge that the material contained PCBs, will not qualify for an SWC because at least two criteria are not satisfied.

Waste oil

A violation of the prohibition of the use of waste oil containing any detectable PCBs as a sealant, coating, or dust control agent might in some circumstances qualify for an SWC. Although the third criterion would not be met since the use could be stopped at once, if the fourth criterion were met due to widespread contamination, and the second criterion were met because the violator had no reason to know that the oil contained PCBs, an SWC should be considered.

V. Use - §761.30

Generally

The PCB rule calls for the phase out of use of PCBs in a non-enclosed manner in several categories, such as natural gas pipeline compressors and large capacitors in non-restricted access electrical substations. If a facility tells EPA of problems at the earliest date at which it could have reasonably anticipated problems with meeting a deadline, EPA may devise a program to bring the facility into compliance as expeditiously as possible after the deadlines and incorporate that program into an SWC.

New Methods

A use authorization permits the use of PCBs in Heat Transfer Systems and Hydraulic Systems until July 1, 1984, subject to certain testing, draining, and retrofilling requirements. If the Respondent can demonstrate that an alternative to retrofilling will permanently reduce the PCB concentration in the hydraulic or heat transfer system, an SWC could be devised to allow the use of such new method. The Respondent should agree to supply EPA with testing data in addition to the data required by §761.30(d)(5) & (e)(6). The sixth and seventh criteria will be satisfied where the alternative method will result in the conservation of heat transfer or hydraulic fluid.

VI. Disposal - §761.60

PCB Articles

Unauthorized disposal of certain PCB articles, such as Large High or Low Voltage PCB capacitors or PCB hydraulic machines, does not satisfy the second criteria since it is well known in the industry that all such articles may contain PCBs. Therefore an SWC should not be used even if all other criteria are satisfied. On the other hand, disposal of small transformers might not constitute a knowing violation of the rule if the person did not have reason to know the articles contained PCBs.

Landfills and Lagoons

While PCBs and PCB items landfilled prior to February 17, 1978, do not have to be removed for disposal, where the Respondent has disturbed a landfill, this constitutes ongoing disposal. If (1) the clean up of the landfill constitutes a major undertaking requiring many steps over time and/or (2) long-term monitoring to protect groundwater is required, use of an SWC may be in order. Given the seriousness of a disposal violation with threatened groundwater contamination, the full penalty in such a case should not be remitted.

Incineration

Where PCBs must be incinerated (i.e., fluids with PCB concentrations greater than 500 ppm), landfilling evidences a knowing violation and thus an SWC is not appropriate.

Spills - §761.60(d)

Many spills do not normally qualify for an SWC because they are not continuing violations and do not require a major clean-up operation. If, however, the spill is of such proportion as to require clean up of such magnitude, an SWC may be used. Such a major spill calls for only the partial remission of a penalty.

Minor spills and leaks are examples of the kind of routine violations for which an SWC may be negotiated which calls, not for the clean-up of the spill, which should already be accomplished, but for other performance beyond that required by statute or regulation. For example, where Respondent has committed a spill of pipeline condensate from its gas distribution system, and EPA needs that company to perform testing of levels of PCB in the ambient air of homes connected to the system, EPA may remit the penalty for the spill on condition of performing the testing. If EPA could perform the testing itself with minor expenditure of resources, an SWC would not be warranted.

APPENDIX B: SAMPLE DOCUMENTS

Consent Order Agreement and Final Order

Remittance Agreement

Compliance Program and Schedule

Remittance Order

Nonremittance Order

Persons and institutions are fictitious.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

In re:	)	Docket No. TSCA -
	)	
LOUISIANA WESTERN TRANSMISSION CORPORATION	)	
719 S. Carrollton Avenue	)	CONSENT AGREEMENT
New Orleans, Louisiana 71301	)	AND
	)	FINAL ORDER
Respondent	)	

Preliminary Statement

1. This administrative proceeding for the assessment of a civil penalty was initiated pursuant to Section 16(a) of the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (TSCA). The action was instituted by a complaint and notice of opportunity for hearing, filed upon Louisiana Western Transmission Corporation (respondent), on July 23, 1982. The complaint charges that respondent used polychlorinated biphenyls (PCBs) in violation of 40 C.F.R. §761.20(a), thereby violating Section 15(1)(C) of TSCA, 15 U.S.C. §2614(1)(C).

2. For purposes of this proceeding, respondent (1) admits the jurisdictional allegations of the complaint; (2) neither admits nor denies the findings of facts contained in this agreement; and (3) neither concedes no contests the conclusions of law contained in this agreement.

3. Respondent explicitly waives the right to request a hearing on any issue contained in this agreement.

4. Respondent consents to the issuance of the final order hereinafter recited.

Findings of Fact

1. Respondent is a domestic corporation incorporated under the laws of the State of Delaware.

2. Between February 12, 1981, and June 12, 1981, respondent was conducting its business of natural gas transmission at Armagh, Bechtelsville, Bernville, Delmont, Entriken, Grantville, and Lilly, Pennsylvania; Barton, Alabama; Danville, Kentucky; Gladeville, Tennessee; Hanover, New Jersey; Kosciusko, Mississippi; and White Castle, Louisiana, and other locations.

3. During that period, respondent was inspected by representatives of the U.S. Environmental Protection Agency (EPA) (Complainant), pursuant to Section 11 of TSCA (15 U.S.C. §2610).

4. On June 12, 1981, respondent, in response to an informational request from EPA, sent a letter to A. E. Conroy II, Director of the Compliance Monitoring Staff, of EPA's Office of Pesticides and Toxic Substances.

5. Information from the EPA inspections and Repondent's letter evidence that on sixteen (16) occasions, PCB levels in Respondent's compressors exceeded the 50 ppm limit after May 1, 1980. respondent's June 12, 1981, letter indicates that only one exceedance of the 50 ppm limit remained when a subsequent sampling ("9th Analysis") was conducted by respondent between February 3 and March 9, 1981.

6. Respondent has made good faith efforts to comply with the prohibition against use of PCBs in natural gas pipeline compressors. Even prior to enactment of TSCA, respondent, in 1972, had commenced a program to phase out PCBs in its compressors. This program was accelerated in early 1976. Respondent conducted decontamination procedures which included draining PCB liquids and refilling with non-PCB liquid. Respondent participated in the EPA/natural gas industry sampling program to determine the extent and magnitude of its contamination problem.

   Although the information respondent submitted to EPA -- and upon which EPA relied in establishing its deadline -- indicated the requisite PCB removal from compressors could be achieved by May 1, 1980, subsequent findings indicated that additional draining and refilling not contemplated by the regulation was required. These findings were comparable to those relied upon by EPA in initially establishing a July 1, 1984, deadline for eliminating PCBs from heat transfer and hydraulic systems. See 40 C.F.R. §761.31(d) and (e); May 31, 1979, Preamble, 44 Fed. Reg. 31,534; and Support Document, p. 100. Although EPA believed the total cost for PCB removal for all pipeline compressors would be approximately $200,000 Louisiana Western alone has expended to date over $3,000,000 in clean-up costs.

7. Respondent has at all relevant times acted in good faith and cooperated with EPA in attempts to gauge the extent of pipeline compressor contamination, and in implementing remedial measures.

8. Respondent has voluntarily instituted remedial measures including testing, draining, and other decontamination measures to remove PCBs from its gas pipeline compressors.

Conclusions of Law

By reason of the facts set forth in the "Findings of Fact," it is concluded that repondent has violated Section 15(1)(C) of TSCA, 15 U.S.C. §2614(1)(C), by failing to comply with a rule issued under Section 6 of TSCA, 15 U.S.C. §2605: 40 C.F.R. Part 761, which prohibits the use of PCBs in an other than totally enclosed manner.

Respondent hereby consents to the issuance of the following order, and complainant hereby recommends that the Headquarters Judicial Officer issue the following order:

Order

Pursuant to the authority of Section 16(a) of TSCA, 15 U.S.C. §2615(a), and upon consideration of: the "Findings of Fact" and "Conclusions of Law" contained in the consent agreement; the factors expressed in Section 16(a)(2)(B) of TSCA; PCB Penalty Policy" [45 Fed. Reg. 59,770 (1980)] it is hereby ORDERED that:

Respondent is assessed a civil penalty in the amount of $158,800, payable to the Treasurer, United States of America. Such payment shall be made by forwarding to the Hearing Clerk (A-101), Environmental Protection Agency, Washington, D.C. 20460, a cashier's or certified check in the amount of the penalty assessed in this order. Payment shall be made within sixty (60) days of receipt of this consent agreement and final order. However, if agreed to by the parties, payment of the civil penalty may be deferred until sixty (60) days after the receipt of an order of remittance or order of nonremittance.

(Signature of respondent)

(Signature of complainant)

Date: _____ At: _____

It is so ordered. This order shall become effective immediately.

(Signature of Headquarters Judicial Officer)
Judicial Officer*

Date: _____ At: _____.

*or Regional Administrator

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SAMPLE REMITTANCE AGREEMENT

Introduction

On (date of consent agreement and final order), Louisiana Western Transmission Corporation was assessed a penalty of $158,800 by administrative consent agreement and final order for violations of the Toxic Substances Control Act (TSCA). Pursuant to 40 C.F.R. § 22.31(b), Respondent and EPA agree to defer payment of the assessed penalty* until issuance of a remittance or nonremittance order. The Environmental Protection Agency agrees to remit all* of the penalty if the actions described in the attached Compliance Program and Schedule are completed by the date specified in the schedule.

Louisiana Western Transmission Corporation
New Orleans, Louisiana
Respondent

Dated: _____ At: _____

Administrator, EPA, or delegatee

* If only part of the penalty is to be deferred, the agreement should indicate the amount of the penalty to be deferred. This will be equal to the amount which may be deleted if the compliance program and schedule are adhered to by the Respondent.

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COMPLIANCE PROGRAM AND SCHEDULE

Final Compliance

It is the goal of this Compliance Schedule to bring all natural gas pipeline compressors operated by Louisiana Western into final compliance within eighteen (18) months of the effective date of this Agreement. A compressor will be deemed to be in compliance when the PCB level in the compressor is less than 50 ppm. This determination shall be based on analytical tests of the compressor lubricating oil sampled after the compressor has been in operation a minimum of six (6) months after the last decontamination of the compressor.

Respondent will achieve final compliance with this compliance Program and Schedule by the agreed date. When EPA has determined that compliance is satisfactory, the Agency will write a letter to Louisiana Western remitting the unpaid portion of the penalty. If compliance is not satisfactory, EPA will notify the Respondent that the penalty is due and payable within sixty days.

Interim Milestones

1. Initial Testing: In order to determine which compressors must be decontaminated, Respondent shall test each natural gas pipeline compressor operated by Respondent which ever contained PCBs as indicated by the June 12, 1981 letter. The initial testing shall be conducted by Respondent within thirty (30) days of the effective date of this Agreement. For purposes of this initial testing, tests conducted on these compressors within six (6) months prior to the effective date of this Agreement shall meet the

requirements of this Part. Any compressor(s) which have been decontaminated within the six (6) months prior to the effective date of this Agreement will automatically be included in this program until it is shown that these compressor(s) meet the requirement for final compliance in Part 1.

2. Sampling and Analysis: Sampling shall be conducted by Respondent using EPA-approved sampling procedures. Information on sampling developed by EPA and provided to Louisiana Western as part of the EPA/natural gas industry cooperative sampling program shall serve as guidance for this sampling.*

To allow for comparison of analytical results, Respondent shall prepare a Sampling Plan which specifies sample volume, method of collection, and sample handling procedures. The Sampling Plan shall set forth (a) the location of each compressor covered by this agreement and (b) the specific sampling point(s) on each compressor to be sampled during each sampling required under this agreement. All samples collected under this agreement shall be collected from the same sampling point(s) chosen by Respondent in its Sampling Plan. Louisiana Western shall prepare this Sampling Plan within thirty (30) days of the effective date of this Agreement and supply a copy of this Sampling Plan to EPA within sixty (60) days of the effective date of this Agreement.

Samples shall be analyzed by Louisiana Western using the EPA methodology set forth in the EPA document entitled "Analysis of PCBs in Transformer Fluid and Waste Oil" which EPA supplied to

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* Each sample shall be collected using a separate sampling device, such as a glass tube, pipette, or metal dipper, to avoid cross-contamination of samples. Sample containers shall consist of clean glass bottles with teflon lined lids, metal containers or equivalent.

Louisiana Western during the EPA/natural gas industry cooperative sampling program. On-going quality control including analysis of blank sample containers, duplicates, and spiked samples shall be conducted as outlined in the laboratory quality assurance guidance provided to Respondent by EPA during the EPA/natural gas industry cooperative sampling program, and in the method of analysis specified above.

EPA shall supply Respondent with reasonable technical assistance on sampling and analytical techniques when requested by Respondent for the purpose of complying with this Agreement.

3. Decontamination: Within one hundred and twenty (120) days of the effective date of this Agreement, Respondent shall decontaminate each compressor found to contain PCB concentrations of 50 ppm or greater, as determined by testing conducted in accordance with Part 2. Respondent shall decontaminate each compressor found to contain 50 ppm or greater PCBs by thoroughly draining the PCB contaminated oil from the compressor and refilling the compressor with non-PCB lubricating oil.

After the initial decontamination, each compressor still found to contain 50 ppm or greater PCBs, as determined in accordance with Part 7, shall be decontaminated within one hundred and twenty (120) days of the date of Respondent's receipt of the laboratory report indicating such PCB levels in the subject compressor. All PCBs removed during decontamination operations shall be handled, stored, and disposed of in accordance with the PCB Rule.

4. Assessment of Decontamination: Respondent shall sample and test oil from each compressor decontaminated in accordance with Part 4 above after the unit has been in operation for a minimum of sixty (60) days after decontamination.

5. Determination of Compliance: If after a minimum of sixty (60) days of operation PCB levels remain below 50 ppm, each compressor shall be tested again after six (6) months of operation. If after six (6) months of operation since the last decontamination, PCB levels remain below 50 ppm, units shall be considered to be in compliance as stated in Part 1.

6. Additional Decontamination: If results of testing after decontamination and sixty (60) days or six (6) months of operation show PCB levels of 50 ppm or greater, the compressor(s) shall be decontaminated again in accordance with Part 4. Parts 4 through 7 shall be repeated until each compressor is deemed to be in final compliance.

Timetable

Louisiana Western agrees to comply with this Agreement within the time frames summarized below. Times in the following schedule are times from the effective date of this Agreement and all days referred to in this Agreement are calendar days.

1. Complete Sampling Plan:	Thirty (30) days
2. Initial Testing:	Thirty (30) days or on the basis of tests conducted within the six (6) months prior to the effective date of this Agreement

3. Decontaminate Compressors:	One hundred and twenty (120) days
4. Assess Decontamination:	After a minimum of sixty (60) days of operation, and after six (6) months of operation when sixty (60) day result is less than 50 ppm
5. Additional Decontamination:	Implemented within one hundred and twenty (120) days of test result showing PCB concentrations of 50 ppm or greater
6. Reports:	
o Initial Report	Sixty (60) days
o Status reports	Every one hundred and twenty (120) days after previous report.
o Final compliance report	Thirty (30) days after final compliance is achieved for all units.
7. Final Compliance Target Date:	Eighteen (18) months

Monitoring

Louisiana Western shall prepare an initial report including the Sampling Plan developed under Part 3, initial compressor PCB levels as determined through testing conducted in accordance with Part 2, and a tentative compressor decontamination schedule. The initial report shall be submitted to EPA within sixty (60) days of the date of this Agreement.

Louisiana Western shall also provide EPA with periodic status reports on the progress of this decontamination program as set forth below. Each status report shall contain: (a) a list of testing results; (b) the date each compressor subject to this program was decontaminated; (c) the amount of PCB liquid resulting from decontamination procedures which was stored and/or disposed of;

(d) the location of the storage and/or disposal facility or facilities; (e) the amount of non-PCB liquids added to each compressor, and (f) other pertinent information which will allow the Agency to evaluate the progress of decontamination activities.

These status reports shall be sent to EPA every one hundred and twenty (120) days until final compliance is achieved. The final report should indicate that all compressors subject to this agreement contain PCB concentrations of less than 50 ppm after being in operation for a minimum of six (6) months subsequent to the last decontamination. Reports shall be sent to:

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances
U. S. EPA EN-342
401 M Street, S.W.
Washington, D.C. 20460

Inspectors from EPA may visit Louisiana Western facilities at any time to exercise the Agency's rights under section 11 of TSCA and to inspect facilities and records to determine compliance with this consent agreement.

Notification of Technical or Operational Difficulties:

If technical or operational difficulties will make it impossible for Louisiana Western to meet any of the deadlines in the Compliance Schedule, Louisana Western will immediately notify EPA.

Technical Assistance

EPA shall provide reasonable technical assistance to Louisiana Western on questions concerning such matters as sampling and analytical procedures, and acceptable disposal options, for the purpose of complying with this Agreement.

Amendments

Upon mutual consent of EPA and Louisiana Western, this Agreement may be amended at any time to modify or add technical and operational requirements (such as, but not limited to, deadline modifications necessitated by technical or operational difficulties) for the purpose of achieving compliance by Louisiana Western with the PCB rule. Any changes and/or amendments to this Agreement shall be incorporated into this Agreement when the amendment(s) have been signed by authorized representatives of EPA and Respondent.

If after complying with the schedule set forth on pp. 5 and 6 (or any subsequently agreed to schedules) of this Agreement, Louisiana Western finds that gas pipeline compressors still contain concentrations of 50 ppm or greater PCBs on the final compliance target date, EPA and Louisiana Western will evaluate options and select one for resolving this problem. That approach, including an agreed upon revised Compliance Schedule, will be incorporated into this Agreement which shall remain in effect until final compliance is achieved.

Enforcement

While this agreement is in effect, EPA shall not initiate additional enforcement action against Louisiana Western for use of those gas pipeline compressors which are the subject of this Agreement and which may contain 50 ppm or greater PCBs. In the event that Louisiana Western fails to meet the requirements of this agreement, EPA may issue a Notice of Reinstatement of Penalty nullifying this Agreement and reinstating the penalty proposed in the Complaint and Assessed by the Final Order.

This agreement does not insulate Louisiana Western from compliance monitoring and enforcement actions for TSCA violations not addressed by this Agreement nor from enforcement actions under other laws administered by EPA, nor under laws administered by state or local environmental authorities.

This agreement does not limit or affect the rights of the Louisiana Western or the United States as against any third parties.

Dispute Resolution

Should disputes arise between Louisiana Western and EPA concerning compliance with the agreement, the parties may resolve the dispute by arbitration. EPA and the Respondent may submit disputes of technical issues to Dr. Alpha Romeo of the Tulane University Electric Engineering Department for arbitration.

Quality Assurance

The laboratory performing analysis of the samples will participate in the Southeastern Regional PCB Quality Assurance Program administered by the Southeastern Chemists Society.

Confidentiality of Documents

The Louisiana Western may claim that any reports submitted to EPA are confidential business information. The Louisiana Western waives this right.

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Louisiana Western Corporation
719 S. Carrollton Avenue
New Orleans, Louisiana 71301

RE: Remittance Order

Dear Mr.

This remittance order is issued pursuant to section 15(a)(2)(C) of the Toxic Substances Control (TSCA), which permits the Administrator to "compromise, modify, or remit, with or without conditions, any civil penalty."

On July 6, 1983, Louisiana Western was assessed by final order a penalty of $158,800. On July 6, 1983, Louisiana Western and EPA entered into a remittance agreement under which EPA agreed to remit $158,800 of the penalty on condition that Louisiana Western performs the activities described in the agreement.

On May 2, 1984, EPA determined that Louisiana Western met all the conditions for remittance. By completion of these conditions, LWC has fully satisfied its obligations pursuant to the Consent Agreement and Final Order dated July 6, 1983. The Agency therefore remits $158,800 the penalty.

William D. Ruckelshaus*
Administrator

*or delegate

Louisiana Western
719 S. Carrollton Avenue
New Orleans, Louisiana 71301

RE: Nonremittance Order

Dear Mr.

This nonremittance order is issued pursuant to section 16(a)(2)(C) of the Toxic Substances Control Act (TSCA) which permits the Administrator to "compromise, modify or remit, with or without conditions, any civil penalty."

On July 6, 1982, Louisiana Western was assessed by consent order a penalty of $158,800. On July 6, 1983, Louisiana Western and EPA entered into a remittance agreement under which EPA agreed to remit $158,800 of the penalty on condition that Louisian Western performed the activities referenced in the agreement.

On May 2, 1983, EPA determined that Louisiana Western has not met all the conditions for remittance. Specifically, Louisiana Western has fallen six weeks behind its interim deadlines in the Compliance Program and Schedule and has not notified the Agency of any technical or operational difficulties.

The Agency, therefore, will not remit any portion of the penalty. The deferred amount of the penalty, $158,800 is due in sixty days. Payment may be made by certified check payable to the United States of America to the Hearing Clerk (A-101), Environmental Protection Agency, Washington, D.C. 20460.

William D. Ruckelshaus, Administrator
Environmental Protection Agency

APPENDIX C

Penalty Remittance Worksheet

Supplement to Penalty Calculation

_____ Assessed penalty [justification]

_____ Amount due immediately

_____ Amount deferred

_____ Cost of compliance

_____ Cost of additional conditions

_____ Total Cost of Performance under CPS

_____ Amount remitted at the end of the deferral period

_____ Total amount paid to the Agency

APPENDIX D

CPS Monitoring Sheet

Performance Requirement	Date Due	Date Completed	Performance Evaluation
Submit Sampling Plan to the Agency for	9/3/82	9/3/82	Plan was satisfactory; it listed ten facilities in four states and a realistic plan for sampling.
Initial Testing	9/3/82	9/9/82	Testing reports were six days late but otherwise satisfactory. The six days late will have no major impact on the CPS.
Decontaminate Compressors	12/3/83	12/17/83	Respondent reported that an unseasonable ice storm had isolated facility in Kentucky causing the delay. Performance was satisfactory. Other deadlines will not slip as a result of this delay.
Assess Decontamination	2/3/83 additional dates may be be scheduled		
Interim Reports Schedule	10/3/82 2/3/83 6/3/83	10/3/83	Work progressing.
Final Compliance Target Date	6/30/83		

5 Additional Sources of Compliance/ Enforcement Information

The following is a listing of all TSCA compliance/enforcement-related policies and guidances that are currently in effect.

Copies of these documents may be obtained from Headquarters PTSCMS and OECM.

TITLE OF DOCUMENT	DATE OF DOCUMENT
General Guidance	
Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (45 Fed. Reg. 24,360)	4/9/80
Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy (45 Fed. Reg. 59,770)	9/10/80
Technical Guidance	
General	
"Neutral Administrative Inspection Schemes for TSCA Enforcement"	11/7/79
Use of TSCA Section 11(c) Subpoenas	12/4/79
TSCA Inspection Manual (Supplement: Volume Four: Section 5 Inspection Manual)	1980 Edition (September 1981)

Asbestos

Compliance Strategy for the Friable Asbestos-Containing Materials in Schools: Identification and Notification Regulation	6/24/82
Model Asbestos in Schools; Cooperative Compliance Program	9/21/82
Compliance Assistance Guidelines for the Asbestos-In-Schools Rule	12/15/82
Enforcement Response Policy for the Friable Asbestos-Containing Materials in Schools: Identification and Notification Regulation	7/6/83

Dioxin

Dioxin Contaminated Waste Compliance Strategy	January 1982
Dioxin Contaminated Waste Enforcement Responce Policy	7/6/83

Chlorofluorocarbons

Enforcement Facts and Strategy: Chlorofluorocarbons	November 1979

Polychlorinated Biphenyls

Enforcement Facts and Strategy: Polychlorinated Biphenyls (PCBs)	February 1980
"PCB Enforcement Policy Subsequent to Appellate Court Opinion Remanding Portions of the PCB Regulation"	10/11/80
"New Requirements for PCB Transformers Pursuant to Appellate Court Order"	3/9/81
Enforcement Facts and Strategy PCB Interim Measures Program	August 1981

Pre-manufacture Notices

"Civil Penalty Cases Involving Use of PCBs in Hydraulic Systems"	9/14/81

Enforcement Facts and Strategy: Premanufacture Notification (PMN) (Includes strategy, neutral administrative inspection scheme, and penalty policy. Document will be revised in response to final PMN regulation.)	August 1980
Compliance Strategy for the TSCA §5(h)(4) Premanufacture Notice Exemption for Chemicals Used in or for Instant Photographic or Peel-Apart Film Articles	11/15/83

Reporting Policies

Inventory Enforcement Strategy	4/25/79
"Inventory Penalty Policy"	5/23/80
Compliance Strategy for Preliminary Assessment Information Reporting Rule (Level A)	7/22/82
Asbestos Reporting Rule Compliance Strategy	8/22/82
Compliance Strategy for TSCA Section 8(d)	11/21/83

State-Related Guidance

Guidance for Pilot TSCA Cooperative Enforcement Agreements	12/31/80
Supplemental Guidance Procedures for State Inspectors Acting Under the Authority of TSCA Section 11	6/19/81

TSCA Compliance Program Policies

6-PCB-1: Responsibility for Compliance with PCB Rule	3/4/82
6-PCB-2: Distillation, Solvent Extraction, Filtration, and Other Physical Separation Methods for PCBs	8/16/83
6-PCB-3: Residual PCBs in Processed Liquids and Solids	8/16/83
6-PCB-6: Allocation of Enforcement Liability for Violation of the One-Year Disposal Deadline for PCB Articles or PCB Containers	8/16/83
6-PCB-7: Reference Date for Violations of the One-Year Storage for Disposal Deadline for PCB Waste Resulting from Physical Separation	8/16/83
6-CFC-1: Product Labeling for Both Essential and Non-Essential CFC Aerosol Propellent Uses	8/30/82

Compendium

General Enforcement Policy Compendium	3/3/83

Titles Contained Within Compendium:

"Visitor's Releases and Hold Harmless Agreements as a Condition to Entry to EPA Employees on Industrial Facilities"	11/8/72
"Professional Obligations of Government Attorneys"	4/19/76
"Memorandum of Understanding Between the Department of Justice and the Environmental Protection Agency"	6/15/77
"'Ex Parte' Contacts in EPA Rulemaking"	8/4/77
"Conduct of Inspections After the Barlow's Decision"	4/11/79
"Contacts with Defendants and Potential Defendants in Enforcement Litigation"	10/7/81
"'Ex Parte' Rules Covering Communication which are the Subject of Formal Adjudicatory Hearings"	12/10/81
"Quantico Guidelines for Participation Litigation"	4/8/82
"Agency Guidelines for Participation in Grand Jury Investigations"	4/30/82
"Reorganization of the Office of Regional Counsel (includes Administrator's Memorandum of September 15, 1981)"	5/7/82
"Coordination of Policy Development and Review"	6/23/82
"General Operating Procedures for EPA's Civil Enforcement Program"	7/6/82
"Case Referrals for Civil Litigation"	9/7/82
"Criminal Enforcement Priorities for the Environmental Protection Agency"	10/12/82
"General Operating Procedures for the Criminal Enforcement Program"	10/27/82
"Regional Counsel Reporting Relationship"	8/3/83
"Guidance for Drafting Judicial Consent Decrees"	10/19/83

"Implementation of Direct Referrals for Civil Cases"	11/28/83
"Consent Decree Tracking Guidance"	12/16/83
"Guidance on Evidence Audit of Case Files"	12/30/83

Additional Sources of TSCA Compliance/Enforcement Information

EPA Delegations of Authority Manual

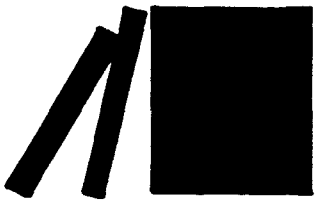
NEIC Policies and Procedures Manual (Multi-Media)

Multi-Media Compliance Audit Inspection Procedures

TSCA Confidential Business Information Security Manual

Bookshelf for Environmental Professionals

New titles to save your company money & enhance your career growth!



1. Environmental Law Handbook, 7th Edition

A best-seller in the environmental field, this remarkably useful Handbook provides practical and current information on the major environmental areas with a chapter each on air pollution, water pollution, land use, pesticides, toxic substances, noise, hazardous wastes (RCRA), OSHA, Superfund, and NEPA, plus a single chapter on some of the fundamentals basic to environmental law: environmental torts, constitutional law, evidence, defenses, who can sue, civil and criminal liability.
528 pp., Hardcover

2. Environmental Statutes, 1984 Edition

All major environmental laws are incorporated into a single, convenient book. The complete text of each statute as currently amended is included with a detailed Table of Contents for your quick referral. Contents: Clean Air Act; Federal Water Pollution Control Act; National Environmental Policy Act; Noise Control Act; FIFRA, Marine Sanctuaries Act; Occupational Safety and Health Act; Resource Conservation and Recovery Act; Safe Drinking Water Act; Toxic Substances Control Act; Superfund; and the Used Oil Recycling Act of 1980.
640 pp., Hardcover

3. 1984 Hazardous Material Spills Conference Proceedings

In these proceedings, all sixty-eight experts that attended the 1984 Conference explain and analyze approaches to prevention and cleanup of hazardous material spills, new technologies for detecting and monitoring spills and leaks, and prevention and cleanup training. You will learn: how to minimize and respond to the dangers caused by hazardous material spills; what to do about dioxins, chemical fires, gas leaks, and contaminated soil and groundwater, as well as, emergency procedures and safe evacuation distances
458 pp., Softcover

4. Clean Air Act Handbook

New guide for cost-effective compliance with the Clean Air Act, this comprehensive book provides background on environmental legislation; an analysis of the technology of air pollution control; an overview of the Clean Air Act Amendments; details on PSD; discussions of permit requirements and other preconstruction considerations; plus a wealth of other details and practical suggestions to save you time and money.
230 pp.

5. Multi-Media Compliance Inspection Manual: U.S. Environmental Protection Agency

Pollution sources may vary in media: air, water, hazardous waste, and toxic substances. So EPA's Office of Enforcement created a manual to guide their inspectors in conducting a multi-media compliance audit inspection of facilities that result in effluents, emissions, wastes or materials regulated under several laws such as the Clean Water Act, Clean Air Act, RCRA and TSCA. Check your own environmental compliance, avoid wasted time, disruption of your business, and fines for violation.
195 pp., Softcover

6. Environmental Audits, 3rd Edition

Identify problem areas and save needless compliance expenses with this special manual developed by experienced environmental professionals. You will get a step-by-step guide to conducting an environmental audit of your facility — including a description of the elements of a successful program, plus a review of some typical audit programs and a sample audit manual with checklists and questionnaires for the most cost-effective analysis possible.
240 pp.

7. EPA's RCRA Inspection Manual

Developed by EPA to support its inspectors in conducting the complex field inspections fundamental to hazardous waste enforcement. Now you can better understand what compliance is expected of you and how you can most effectively and efficiently comply with the law—*before* the inspector arrives. Contains information-packed sections covering the key topics that will help you eliminate deficiencies and satisfy an inspection, thereby avoiding civil and criminal penalties.
300 pp.

8. Hazardous Wastes Handbook, 4th Edition

Cut through the confusing red tape surrounding your industrial wastes. Get clear, concise answers which take you step-by-step through the maze of EPA hazardous wastes regulations — the largest environmental program ever undertaken. The Handbook carefully anaylzes the impact of RCRA on your business and provides practical suggestions — in non-legalese language — on how you can cost-effectively and efficiently comply. This Handbook contains a comprehensive analysis of the laws and regulations plus a copy of the statutes and regulations.
656 pp., 3-ring binder

9. Acid Rain: Planning for the Eighties

This is a practical book which documents the acid rain problem together with what is being done to cope with the problem. The notebook features papers on current plans, technology options for utilities and industry, the legislative and regulatory considerations, plus copies of key legislative proposals. Prepared by leading authorities from the Washington legal community, EPRI, the National Academy of Science, the U.S. Congress, Canadian Government, U.S industry, and the financial community.
324 pp.

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