EPA

Toxic Substances Control Act

Compliance/Enforcement Guidance Manual

Policy Compendium

U.S. Environmental Protection Agency
Washington DC 20460

Issued by

Pesticides and Toxic Substances
Compliance Monitoring Staff

and

Office of Enforcement and Compliance Monitoring

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EPA 0649

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAR 5 1984

MEMORANDUM

SUBJECT: FIFRA and TSCA Compliance/Enforcement Guidance Manual Policy Compendiums

FROM: A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Glenn Unterberger, Director
Office of Legal and Enforcement Policy
Office of Enforcement and Compliance Monitoring

TO: Addressees

As part of our effort to produce guidance manuals for personnel involved in case development activities for the United States Environmental Protection Agency, we are transmitting to you the Compendium of Operative Enforcement Policies for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Toxic Substances Control Act (TSCA). The Compendiums not only identify those FIFRA and TSCA compliance/enforcement guidances and policies that are currently in effect, but they also provide a mechanism for organizing such memoranda.

We intend to update the Compendiums periodically and we welcome comments on them or on policy issues that might be addressed in the future. Questions or comments on the contents of the Compendiums can be addressed to Ted Firetog (FTS 426-7503) or Barbara Paul (FTS 382-7826).

1200 Sixth Avenue/Seattle, WA 98101

Addressees:

Regional Counsels
Associate Enforcement Counsel for Pesticides
and Toxic Substances
Director, Office of Criminal Investigations
Director, NEIC
Director, Air Management Division - Region I
Director, Air and Waste Management Division - Regions II,
IV, VI, VII, VIII, and X
Director, Environmental Services Division - Region III
Director, Waste Management Division - Region V
Director, Toxics and Waste Management Division - Region IX

Attachments

cc: Assistant Administrator for Pesticides
and Toxic Substances
Assistant Administrator for Enforcement
and Compliance Monitoring
General Counsel
Senior Enforcement Counsel

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This Compendium contains the following TSCA Compliance/Enforcement-related policies and guidances currently in effect.

Any questions or comments concerning these documents should be addressed to:

Director of Compliance Monitoring Staff
Office of Pesticides and Toxic Substances (EN-342)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Asbestos

Dioxin

Chlorofluorocarbons

Polychlorinated Biphenyls

Premanufacture Notices

Reporting Policies

State Related Guidance

TSCA Program Compendium

Additional Sources of Compliance/Enforcement Information

General Enforcement Policy Compendium

Titles Contained Within Compendium:

Miscellaneous Sources (These sources are not contained in this Compendium but may be obtained from Headquarters.)

GENERAL GUIDANCE

TECHNICAL GUIDANCE

federal register

Wednesday
April 9, 1980

Exhibit 1

Part III

Environmental Protection Agency

Consolidated Rules of Practices Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 22, 80, 168, 226

[FRL 1337-3]

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rules of practice.

SUMMARY: This document sets forth consolidated rules of practice to be followed by parties litigating administratively assessed civil penalties and revocations or suspensions of permits under certain statutes administered by EPA. These statutes are listed in § 22.01(a) of the consolidated rules. The consolidated rules are designed to accomplish two purposes. The first is the development of a common set of procedural rules for several programs in order to reduce paperwork, inconsistency, and the burden on persons regulated. The second is the improvement of formal administrative adjudicatory procedures through substantive revisions.

DATE: These rules govern all adjudicatory proceedings described in 22.01(a) for which a complaint is filed after April 9, 1980.

FOR FURTHER INFORMATION CONTACT: Steve Leifer (EN-342), Pesticides and Toxic Substances Enforcement Division, Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, 202-755-0970.

SUPPLEMENTARY INFORMATION: These consolidated rules of practice govern all adjudicatory proceedings for the assessment of a civil penalty or for the revocation or suspension of a permit authorized by the statutory provisions listed in § 22.01(a)(1)-(5). The consolidated rules replace existing rules of practice promulgated under section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 40 CFR Part 168, section 211 of the Clean Air Act, 40 CFR Part 80.301-332, and section 105 of the Marine Protection, Research, and Sanctuaries Act (Ocean Dumping Act), 40 CFR Part 226. They are the initial rules of practice promulgated in final form under section 3008 of the Solid Waste Disposal Act (SWDA) as amended by the Resource Conservation and Recovery Act (RCRA) and section 16 of the Toxic Substances Control Act (TSCA).

However, the rules in their final form no longer cover revocation of permits issued under RCRA. This does not reflect any change in EPA's position that a formal evidentiary hearing is required for such revocation. However, since these rules were proposed for comment, EPAhas poposed for comment and is now preparing for final promulgation, consolidated permit regulations under which the permit procedures for four EPA permit programs, including RCRA, will be coordinated as much as possible. One of the permit programs covered, the NPDES program under the Clean Water Act, already provides for revocation of permits through a formal evidentiary hearing.

EPA's current intention is to use the NPDES hearing procedures, with any necessary changes, for revocation of RCRA permits as well. Comments on these regulations will be reconsidered in that context. This will allow all the procedures for changing RCRA permits to be contained in the consolidated permit regulations. In addition, the consolidated permit hearing procedures are more adapted to deal with major policy problems than these regulations, and RCRA revocation proceedings appear likely to raise such issues. EPA will make a final decision on this point when the consolidated permit regulations are promulgated.

RCRA civil penalties will still be assessed through the Part 22 procedures.

The consolidated rules of practice were published in interim and proposed form on August 4, 1978 (43 FR 34730). The rules were interim with regard to TSCA, since there were no rules of practice in place to guide proceedings which were arising under the toxics program. The remaining programs either had rules of practice in place or did not expect to conduct administrative adjudications in the near future. Thus the consolidated rules were proposed with respect to the FIFRA, RCRA, Mobile Sources, and Ocean Dumping programs.

Numerous comments to the August 4 proposal were received from industry, trade associations, and governmental agencies. Responses to the more significant comments are set forth at the end of this preamble.

The consolidated rules are designed to accomplish two purposes. The first is the development of a common set of procedural rules for several programs in order to reduce paperwork, inconsistency, and the burden on persons regulated. The second is the improvement of formal administrative adjudicatory procedures through substantive revisions.

The rules proposed here are similar to the rules which currently guide proceedings under section 14 of FIFRA, section 211(d) of the Clean Air Act, and section 105(a) of the Ocean Dumping Act. The major substantive revision to these rules is a shift in appellate jurisdiction. The responsibility for hearing appeals from initial decisions, default orders, and accelerated decisions has been shifted from the Regional Administrator to the Administrator. This change was made in order to foster consistency in Agency decision-making nationwide. In addition, consolidating appellate responsibility into a single office will facilitate the assembly and publication of civil penalty hearings decisions. The Regional Administrator, however, will retain the authority to issue consent orders finalizing agreements between parties.

Hearings under all but one of the four statutory provisions covered by these rules will be held in conformity with the adjudicatory hearing provisions of the Administrative Procedure Act (APA). The only exception is hearings to assess penalties for violating regulations on fuels or fuel additives under section 211 of the Clean Air Act. The reasons for concluding that the formal APA hearing requirements do not apply to this section were set forth at 40 FR 39963, August 29, 1975, when the original hearing rules under that section were promulgated.

Similarly, the rules providing for a formal hearing in connection with the assessment of penalties for violating FIFRA and for assessing penalties and revoking permits under the Ocean Dumping Act follow the previous EPA position on these questions in 39 FR 27657, July 31, 1974, and 42 FR 60702, November 28, 1977, except that the Ocean Dumping Procedures have been rewritten to conform literally to the APA.

For a further exposition of the reasoning underlying the approach taken in these final rules, see the responses to significant comments below.

Responses to Significant Comments

Qualifications of Office

1. Comment: Several commenters suggested that the Judicial Officer be subject to the same restrictions concerning conflicts of interest as is a Regional Judicial Officer.

Response: The Agency agrees with this comment. Section 22.04(b)(2) has been rewritten to provide that the Judicial Officer and the ten Regional Judicial Officers must all conform to the

Administrative Procedure Act section 554(d) prohibition against blending the prosecutorial and decision-making functions.

[illegible]erated Decisions

[illegible]omment: The grounds for granting a motion for an accelerated decision under § 22.20 are unclear. The section confuses summary judgment and involuntary dismissal situations, and contains the vague criterion of "such other reasons as are just."

Response: The Agency agrees with this comment, and has rewritten the section accordingly, separating an accelerated decision from a decision to dismiss. A party will be entitled to an accelerated decision upon a showing that there exists no genuine issue of material fact and that the party is entitled to judgment as a matter of law. The Presiding Officer may dismiss the complaint on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Official Notice

3. Comment: Several commenters took exception to the provision in § 22.22(f) which authorized the trier of fact to take official notice of facts "within the specialized knowledge and experience of the Agency". The commenters argued th[illegible] consolidated rules should c[illegible] to the more restrictive Federal R[illegible] Evidence definition of judicial notice (Rule 201).

Response: The Agency believes that official notice under the Administrative Procedure Act was intended to be broader than judicial notice. The Attorney General's Manual on the Administrative Procedure Act (1947), citing the legislative history of the APA, states at pages 79–80, that:

> The process of official notice should not be limited to the traditional matters of judicial notice but extends properly to all matters as to which the agency by reason of its functions is presumed to be expert, such as technical or scientific facts within its specialized knowledge.

There are several cases upholding this interpretation of the APA, particularly within the context of Federal Trade Commission proceedings. (*See*, for example, *Brite Manufacturing Co.* v. *FTC*, 347 F.2d 477 (D.C. Cir. 1965)).

Respondents should not be prejudiced by Agency notice of facts within its specialized knowledge since they will be given adequate opportunity to show that such facts are erroneously noticed.

Excluded Evidence

4. Comment: Several commenters objected to the following language in § 22.23(b) of the August 4 Proposal:

> Where the Administrator decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence or, where appropriate, the Administrator may evaluate such evidence in preparing his final order. If the Administrator in the preparation of his final order relies upon any evidence excluded at the hearing by the Presiding Officer, he shall explicitly identify in the final order any such excluded evidence relied upon and his reasons therefor.

The commenters argued that reliance by the Administrator on excluded evidence would violate section 556 of the APA, since (1) a party would not have the opportunity to explore and/or rebut the excluded evidence, and (2) the Administrator would be relying on evidence outside the record.

Response: The Agency accepts this comment. The language in § 22.23(b) following "* * * permit the taking of such evidence * * *" has been deleted.

Standard of Proof

5. Comment: One commenter took issue with the "preponderance of the evidence" standard prescribed for Agency adjudications in § 22.24 of the Consolidated Rules. The commenter offered that the proper standard is the APA section 556(d) requirement that a sanction be supported by "reliable, probative, and substantial evidence."

Response: The Agency disagrees with this comment. The language in section 556(d) quoted above goes to the scope of judicial review rather than to the degree of proof required at the hearing level. (*See Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276 (1966), interpreting similar language in the Immigration and Nationality Act).

The preponderance of the evidence standard is the proper yardstick in most non-criminal proceedings, and indeed, the Agency could require no lesser standard here (such as "substantial evidence"). "* * * in American law a preponderance of the evidence is rock bottom at the factfinding level of civil litigation * * * that the proceeding is administrative rather than judicial does not diminish this wholesome demand." *Charlton* v. *FTC*, 543 F. 2d 903, 907–8 (D.C. Cir. 1976), reviewing an order of the FTC suspending an attorney from practice before the Commission.

Amount of a Civil Penalty

6. Comment: Commenters argued, on ground of due process, that the Presiding Officer should not be allowed to raise a civil penalty from the amount recommended to be assessed in a complaint. Further, the Administrator should not be allowed to raise a penalty from the amount recommended to be assessed by the Presiding Officer.

Response: For the most part, the Agency disagrees with these positions. The Agency does agree, however, that neither the Presiding Officer nor the Administrator should raise any penalty in an action where the respondent has defaulted, and the Consolidated Rules have been modified accordingly.

In a contested civil penalty action, the dollar amounts contained in both the complaint and the initial decision are merely recommendations of penalties to be assessed. After an appeal, only the Administrator has the authority to actually *assess* a penalty.

A respondent

> Does not have any vested right to go to trial on the specific charge mentioned in the citation or to be free from exposure to a penalty in excess of that originally proposed.

Long Manufacturing Co. N.C., Inc. v. *Occupational Safety and Health Review Commission*, 554 F. 2d 903, 907 (8th Cir. 1977).

As long as the penalty imposed by the Administrator is within limits described by the statute and supported by substantial evidence, the penalty may exceed the amount proposed by the Presiding Officer. (*See Nees* v. *SEC*, 414 F. 2d 211, 217 (9th Cir. 1969).)

One commenter suggested that language in several of the statutes covered by the Consolidated Rules authorizing the Administrator to compromise, modify, remit, or mitigate penalties allowed the Administrator to only decrease penalties upon review of an initial decision. The Agency believes, however, that such language was intended to authorize the Administrator to assess a penalty less than the statutory maximum through settlement proceedings. Moreover, other federal agencies (e.g. the FCC and the CAB), have interpreted the mitigation clauses, such as that contained in TSCA section 16(a)(2)(C), to apply only to collection of those penalties which have already been assessed. Thus the Agency sees no legal obstacle barring either the Presiding Officer or the Administrator from raising a penalty recommended to be assessed at a previous stage in the adjudicatory process.

7. Comment: Numerous commenters objected to the requirement, contained in the Solid Waste Disposal Act Supplemental Rules of Practice (§ 22.36(h) of the August 4 proposal), that Presiding Officers must follow any civil penalty assessment guidelines

promulgated by the Administrator. The commenters argued that the amount of a penalty should rest in the discretion of the Presiding Officer. The commenters also felt that the penalty assessment guidelines should be made available before they submit to a provision such as that contained in § 22.36(h).

Response: Section 22.36(h) has been deleted from the final Consolidated Rules. The Agency may, however, resubmit such a provision for comment after penalty assessment guidelines have been published.

Issues on Appeal

8. Comment: Two comments suggested that the language in § 22.30(c) seemed to allow the Administrator to sua sponte order argument on appeal with respect to issues entirely new to the proceeding.

Response: Section 22.30(c) has been rewritten to more accurately reflect the intent of the Agency. Under the final Consolidated Rules, the Administrator, on appeal, may sua sponte order argument only with respect to those issues raised at the hearing. The Administrator will have the authority to remand the case to receive evidence relating to issues new to the proceeding.

Appellate Jurisdiction

9. Comment: Two commenters contested the shift in appellate jurisdiction from the Regional Administrators to the Administrator. They felt that such a change from existing civil penalty procedures would result in delay and would not allow the appellate decision to adequately reflect the needs of the region.

Response: The Agency disagrees with this comment. The change in jurisdiction will:

(1) Foster consistency in agency decision-making,

(2) Centralize appellate responsibility, so that a small number of EPA personnel become proficient in hearing appeals from administrative adjudications. The centralization should result in a net savings of time and effort to all parties, and

(3) Bring a greater degree of separation of functions to the administrative process.

The increased quality and efficiency of the appellate process should outweigh any small delays which may result from this change. Moreover, parties have ample opportunity to bring issues of a regional nature to the attention of the Administrator.

Staying the Final Order

10. Comment: Two commenters argued that a final order should automatically be stayed upon the filing of a motion to reconsider under § 22.32. The commenters envisioned a scenario in which a respondent would be forced to comply with a final order, and then would later prevail on his motion to reconsider.

Response: Although cognizant of the problem raised by the commenters, the Agency has elected not to provide for automatic stays. The Agency is concerned over the possibility that motions to reconsider will be used to bring about unnecessary delay. The Administrator is authorized, however, to order stays in order to avoid any hardship to the respondent which may result from what proves to be premature compliance.

Deadlines and Time Requirements

11. Comment: Several comments were received which objected to the brevity of the time periods prescribed in the Consolidated Rules.

Response: EPA has agreed to expand the deadline, from 15 days to 20 days:

(1) For filing an answer to an amended complaint under § 22.14(d);

(2) For filing an answer to the original complaint under § 22.15(a); and

(3) For notifying the parties of a hearing prior to the date set for the hearing under § 22.21(b).

The times for filing responses to motions under § 22.16(b) (10 days), proposed findings of fact under § 22.28 (20 days) and motions to reconsider the final order under § 22.32 (10 days) have remained unchanged. These time periods have been found to be satisfactory in cases arising under EPA and other federal agencies' rules of practice, and under the Federal Rules of Civil Procedure.

Permit Issuance

12. Comment: Two commenters took issue with language in the August 4 preamble which suggested that formal hearing procedures are not required for initial permit issuance under the Resource Conservation and Recovery Act (RCRA).

Response: A more detailed analysis of the procedural requirements for RCRA permit issuance can be found in the proposed Consolidated Permit Regulations, 44 FR 34244, 34284, June 14, 1979. Comments on the RCRA permit issuance program will be addressed in the final Consolidated Permit Regulations.

Discovery

13. Comment: Several commenters suggested that the Consolidated Rules spell out procedures for obtaining discovery, rather than relying on the broad language contained in § 22.04(c)(5).

Response: The Agency agrees with this comment, and has set forth rules governing discovery in § 22.19(f). The section is taken from the discovery provisions previously operable under the Clean Air Act section 211 regulation of fuels program [40 CFR Part 80.319(f) (1978)].

Miscellaneous

14. Comment and response: The Agency agrees with the following comments and has modified the Consolidated Rules accordingly:

Section 22.03(h). The definition of "final order" should be more specific.

Section 22.05(c)(5). A party submitting a document which is refused for filing should be allowed to amend and resubmit the document. The notice of refusal should set forth the ground therefor.

Section 22.14(d). The complainant should be allowed to amend the complaint as a matter of right only once before the answer is filed.

Section 22.15(c). The respondent should be the only party who is permitted to request a hearing.

Section 22.17. A party should be given an opportunity to show good cause why he or she committed the action which led to default. (see § 22.17(d)).

Section 22.19(b). EPA should clarify whether witnesses or documents can be introduced at trial without a preview of such evidence at the prehearing conference.

Section 22.19(c). Prehearing conferences which relate to settlement should never be transcribed.

Section 22.22(d). Affidavits should only be admissible in lieu of testimony in cases where the witness is unavailable under the applicable criteria set forth in Rule 804(a) of the Federal Rules of Evidence.

Note.—EPA has determined that this document does not contain a major proposal requiring preparation of a Regulatory Analysis under Executive Order No. 12044.

Accordingly, the new Part 22 set forth below is hereby added to 40 CFR under the authority of section 16 of the Toxic Substances Control Act, sections 211 and 301 of the Clean Air Act, sections 14 and 25 of the Federal Insecticide, Fungicide, and Rodenticide Act, sections 105 and 106 of the Marine Protection, Research, and Sanctuaries Act, and sections 2002 and 3008 of the Solid Waste Disposal Act.

Dated: March 17, 1980.

Douglas M. Costle,

Administrator.

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

§ 80.301–80.332 [Subpart D] [Revoked]

PART 166—RULES OF PRACTICE GOVERNING PROCEEDINGS CONDUCTED IN THE ASSESSMENT OF CIVIL PENALTIES UNDER THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, AS AMENDED [REVOKED]

PART 226—ASSESSMENT OF CIVIL PENALTIES AND REVOCATION AND SUSPENSION OF PERMITS UNDER SECTION 105 OF THE ACT [REVOKED]

1. 40 CFR 80.301–80.332 (Subpart D) and 40 CFR Parts 166 and 226 are revoked.

2. 40 CFR Part 22 is added to read as follows:

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

Authority: Sec. 16 of the Toxic Substances Control Act; secs. 211 and 301 of the Clean Air Act; secs. 14 and 25 of the Federal Insecticide, Fungicide, and Rodenticide Act; secs. 105 and 106 of the Marine Protection, Research, and Sanctuaries Act; and secs. 2002 and 3008 of the Solid Waste Disposal Act.

Subpart A—General

§ 22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

(1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a)):

(2) The assessment of any civil penalty conducted under section 211 of the Clean Act Act as amended (42 U.S.C. 7545);

(3) The assessment of any civil penalty or for the revocation or suspension of any permit conducted under section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a));

(4) The issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Solid Waste Disposal Act as amended (42 U.S.C. 6928);

(5) The assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)).

(b) The Supplemental rules of practice set forth in subpart H establish rules governing those aspects of the proceeding in question which are not covered in Subparts A through G, and also specify procedures which supersede any conflicting procedures set forth in those subparts.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

§ 22.02 Use of number and gender.

As used in these rules of practice, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 22.03 Definitions.

(a) The following definitions apply to Part 22:

"Act" means the particular statute authorizing the institution of the proceeding at issue.

"Administrative Law Judge" means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95–251, 92 Stat. 183).

"Administrator" means the Administrator of the United States Environmental Protection Agency or his delegate.

"Agency" means the United States Environmental Protection Agency.

"Complainant" means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be the Judicial Officer, Regional Judicial Officer, or any other person who will participate or advise in the decision.

"Complaint" means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person under §§ 22.13 and 22.14.

"Consent Agreement" means any written document, signed by the parties, containing stipulations or conclusions of

fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

"Final Order" means (a) 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 (b) an initial decision which becomes a final order under § 22.27(c).

"Hearing" means a hearing on the record open to the public and conducted under these rules of practice.

"Hearing Clerk" means the Hearing Clerk, A-110, United States Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

"Initial Decision" means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.

"Judicial Officer" means the person designated by the Administrator under § 22.04(b) to serve as the Judicial Officer.

"Party" means any person that participates in a hearing as complainant, respondent, or intervenor.

"Permit" means a permit issued under Section 102 of the Marine Protection, Research, and Sanctuaries Act.

"Person" includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

"Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer, unless otherwise specified by any Supplemental Rules.

"Regional Administrator" means the Administrator of any Regional Office of the Agency or any officer or employee thereof to whom his authority is duly delegated. Where the Regional Administrator has authorized the Regional Judicial Officer to act, the term "Regional Administrator" shall include the Regional Judicial Officer. In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term "Regional Administrator" as used in these rules shall mean the Administrator.

"Regional Hearing Clerk" means 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—see Appendix). In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term "Regional Hearing Clerk" as used in these rules shall mean the Hearing Clerk.

"Regional Judicial Officer" means a person designated by the Regional Administrator under § 22.04(b) to serve as a Regional Judicial Officer.

"Respondent" means any person proceeded against in the complaint.

(b) Terms defined in the Act and not defined in these rules of practice are used consistent with the meanings given in the Act.

§ 22.04 Powers and duties of the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, and Presiding Officer; disqualification.

(a) *Administrator and Regional Administrator.* The Administrator and the Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(b) *Judicial Officer and Regional Judicial Officer.*—(1) *Office.* One or more Judicial Officers may be designated by the Administrator to perform the functions described below. One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below.

(2) *Qualifications.* A Judicial Officer or a Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Judicial Officer shall not be employed by the Office of Enforcement or by any program office directly associated with the type of violation at issue in the proceeding. Neither the Judicial Officer nor the Regional Judicial Officer shall have performed prosecutorial or investigative functions in connection with any hearing in which he serves as Judicial Officer or any factually related hearing.

(3) *Functions.* The Administrator may delegate to the Judicial Officer, or the Regional Administrator may delegate to the Regional Judicial Officer, all or part of his authority to act in a given proceeding. This delegation does not prevent the Judicial Officer or Regional Judicial Officer from referring any motion or case to the Administrator or Regional Administrator when appropriate. The Judicial Officer and Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:

(1) Conduct administrative hearings under these rules of practice;

(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, 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;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) 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 these rules.

(d) *Disqualification; withdrawal.* (1) The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion made to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator request that the Regional Administrator, Judicial Officer, or Presiding Officer be disqualified or request that the Administrator disqualify himself from the proceeding. The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may at any time withdraw from any proceeding in which they deem

themselves disqualified or unable to act for any reason.

(2) If the Administrator, Regional Administrator, Regional Judicial Officer, Regional Officer, or Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. Assignment of a replacement for the Regional Administrator or Judicial Officer, or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he withdraw or disqualify himself, shall assign the Regional Administrator from the region where the case originated to replace him. If that Regional Administrator would himself be disqualified, the Administrator shall assign a Regional Administrator from another region to replace the Administrator. The Regional Administrator shall assign a new Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.05 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.* (1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Regional Hearing Clerk.

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Regional Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents*—(1) *Service of complaint.* (i) Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or:

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) *Service of documents other than complaint, rulings, orders, and decisions.* All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

(c) *Form of pleadings and documents.* (1) Except as provided herein, or by order of the Presiding Officer or Administrator, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

(5) The Administrator, Regional Administrator, Presiding Officer, or Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

§ 22.06 Filing and service of rulings, orders, and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. All such documents issued by the Administrator or Judicial Officer shall be filed with the Hearing Clerk. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or Presiding Officer, as appropriate.

§ 22.07 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins

to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

§ 22.09 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk or Hearing Clerk, as appropriate.

(b) The cost of duplicating documents filed in any proceeding shall be borne by the person seeking copies of such documents. The Agency may waive this cost in appropriate cases.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention.

(a) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the foregoing sentence and paragraph (c) of this section, within ten (10) days after service of the motion for leave to intervene.

(b) *When filed.* A motion for leave to intervene in a proceeding must ordinarily be filed before the first prehearing conference or, in the absence of a prehearing conference, before the initiation of correspondence under § 22.19(e), or if there is no such correspondence, prior to the setting of a time and place for a hearing. Any motion filed after that time must include, in addition to the information set forth in paragraph (a) of this section, a statement of good cause for the failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding.

(c) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (1) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(d) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) *Severance.* The Presiding Officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act, or regulations promulgated or a permit issued under the Act, he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice. If the complainant has reason to believe that

(a) A permittee violated any term or condition of the permit, or

(b) A permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or

(c) Other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation of a permit in addition to the assessment of a civil penalty.

2.14 Content and amendment of the mplaint.

(a) *Complaint for the assessment of a vil penalty.* Each complaint for the s[illegible]nt of a civil penalty shall

(1) [illegible] statement reciting the section(s) the Act authorizing the issuance of e complaint;

(2) Specific reference to each ovision of the Act and implementing gulations which respondent is alleged have violated;

(3) A concise statement of the factual sis for alleging the violation;

(4) The amount of the civil penalty hich is proposed to be assessed;

(5) A statement explaining the asoning behind the proposed penalty;

(6) Notice of respondent's right to quest a hearing on any material fact ntained in the complaint, or on the ppropriateness of the amount of the oposed penalty.

copy of these rules of practice shall ccompany each complaint served.

(b) *Complaint for the revocation or uspension of a permit.* Each complaint r the revocation or suspension of a ermit shall include:

(1) A statement reciting the section(s) f the Act, regulations, and/or permit uthorizing the issuance of the omplaint;

(2) Specific reference to each term or ondition of the permit which the es[illegible]nt is alleged to have violated, p[illegible]lleged inaccuracy or nis[illegible]esentation in respondent's ermit application, to each fact which he respondent allegedly failed to lisclose in his permit application, or to ther reasons which form the basis for he complaint;

(3) A concise statement of the factual asis for such allegations;

(4) A request for an order to either evoke or suspend the permit and a tatement of the terms and conditions of ny proposed partial suspension or evocation;

(5) A statement indicating the basis lor recommending the revocation, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation or suspension.

A copy of these rules of practice shall accompany each complaint served.

(c) *Derivation of proposed civil penalty.* The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

(d) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

(e) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, 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 complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 22.05(b)(2).

(b) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(c) *Decision.* Except as provided in § 22.04(d)(1) and § 22.28(a), the Regional Administrator shall rule on all motions filed or made before an answer to the complaint is filed. The Administrator shall rule on all motions filed or made after service of the initial decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

§ 22.17 Default order.

(a) *Default.* A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged

defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When Regional Administrator or Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the initial decision, and shall be filed with the Regional Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation or suspension, as appropriate.

(d) For good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order.

§ 22.18 Informal settlement; consent agreement and order.

(a) *Settlement policy.* The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 22.16.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceeding, 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 contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

§ 22.19 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, D.C., unless (1) the Presiding Officer determines that there is good cause to hold it at another location in a region or by telephone, or (2) the Supplemental rules of practice provide otherwise.

(e) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth:

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery

together with the conditions and terms thereof.

(4) When the information sought to be discovered is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or

(ii) The issuance of a default order under § 22.17(a).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is rendered as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 22.21 Scheduling the hearing.

(a) When an answer is filed, the Regional Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign himself or another Administrative Law Judge as Presiding Officer, unless otherwise provided in the Supplemental rules of Practice. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into 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 which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Verified statements.* The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Administrator decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the

complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Administrator.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Administrator within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the initial decision.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Administrator shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Administrator on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Administrator when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Administrator determines that certification was improvidently granted, or if he takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator on interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision, except when the Administrator determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on

s basis of the submissions made by s Presiding Officer. The Administrator ay, however, allow further briefs and al argument.

(c) *Stay of proceedings.* The Presiding Officer may stay the proceedings pending a decision by the Administrator on an order or ruling certified by the Presiding Officer for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Administrator.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Any party may appeal any adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record.

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Hearing Clerk a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Administrator.

(b) *Sua sponte review by the Administrator.* Whenever the Administrator determines sua sponte to review an initial decision, the Hearing Clerk shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* The appeal of the initial decision shall be limited to those issues raised by the parties during the course of the proceeding. If the Administrator determines that issues raised, but not appealed by the parties, should be argued, he shall give counsel for the parties reasonable written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Administrator from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Administrator.* The Administrator may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

Subpart G—Final Order on Appeal

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Administrator issues a notice of intent to conduct review sua sponte, the Administrator shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Administrator shall adopt, modify or set aside the findings and conclusions contained in the decision or order being reviewed, and shall set forth in the final order the reasons for his actions. The Administrator may, in his discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a default order, the Administrator may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall not stay the effective date of the final order unless specifically so ordered by the Administrator.

Subpart H—Supplemental Rules

§ 22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding consolidated rules of practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01–22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the agency.

§ 22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under Section 211 of the Clean Air Act as amended (42 U.S.C. 7445). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01–22.32), these Supplemental rules shall apply.

(b) *Headquarters enforcement.* Where the complainant is the Assistant Administrator for Enforcement or his delegate, the prehearing conference and hearing shall be held in Washington, DC, unless the Presiding Officer determines that there is good cause for it to be held at another location.

(c) *"Presiding Officer".* For purposes of hearings conducted pursuant to § 211

of the Clean Air Act, "Presiding Officer" means the Administrative Law Judge appointed under 5 U.S.C. 3105 (see also P. L. 95-251, 92 Stat. 183) or an attorney who is an employee or authorized representative of the Agency.

(d) *Assignment of a Presiding Officer.* Upon the filing of an answer, the Regional Hearing Clerk or Hearing Clerk, as appropriate, shall forward the complaint, answer, and any other documents filed thus far in the proceeding to the Regional Administrator or Administrator, respectively, who shall assign the Presiding Officer. The Regional Administrator or Administrator may, however, forward the case file to the Chief Administrative Law Judge and request that he assign an Administrative Law Judge as Presiding Officer. If the Chief Administrative Law Judge finds that such an assignment can be made without impairing the ability of his office to timely discharge its other responsibilities, he shall make the assignment. Otherwise, he shall notify the Regional Administrator or Administrator that he is unable to make such an assignment. The Presiding Officer assigned to the proceeding shall obtain the case file from the Chief Administrative Law Judge, Regional Administrator, or Administrator, as appropriate, and notify the parties of his assignment.

(e) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider (1) the gravity of the violation, (2) the size of respondent's business, (3) the respondent's history of compliance with the Act, (4) the action taken by respondent to remedy the specific violation, and (5) the effect of such proposed penalty on respondent's ability to continue in business. The Presiding Officer must also consider any guidelines for the Assessment of Civil Penalties issued under the Act.

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications for the assessment of any civil penalty conducted under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1281(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

(c) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the Federal Register (39 FR 27711), and any amendments or supplements thereto.

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all formal adjudications conducted under Section 105(a) or (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Additional criterion for the issuance of a complaint for the revocation or suspension of a permit.* In addition to the three criteria listed in 40 CFR 22.13 for issuing a complaint for the revocation or suspension of a permit, complaints may be issued on the basis of a person's failure to keep records and notify appropriate officials of dumping activities, as required by 40 CFR 224.1 and 223.2.

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), all proceedings to assess a civil penalty conducted under Section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928) (the "Act"). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01-22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* Whenever, on the basis of any information, the Administrator determines that any person is in violation of (1) any requirement of Subtitle C of the Act, (2) any regulation promulgated pursuant to Subtitle C of the Act, or (3) a term or condition of a permit issued pursuant to Subtitle C of the Act, the Administrator shall issue notice to the alleged violator of his failure to comply with such requirement, regulation or permit.

(c) *Content of notice.* Each notice of violation shall include:

(1) A specific reference to each provision of the Act, regulation, or permit term or condition which the alleged violator is alleged to have violated; and

(2) A concise statement of the factual basis for alleging such violation.

(d) *Service of notice.* Service of notice shall be made in accordance with § 22.05(b)(2) of the Consolidated Rules of Practice.

(e) *Issuance of the complaint.* (1) Except as provided in paragraph (e)(3) of this section, the complainant may issue a complaint whenever he has reason to believe that any violation extends beyond the thirtieth day after service of the notice of violation.

(2) The complaint shall include, in addition to the elements stated in § 22.14 of the Consolidated Rules, an order requiring compliance within a specified time period. The complaint shall be equivalent to the compliance order referred to in Section 3008 of the Act.

(3) Whenever a violation is of a non-continuous or intermittent nature, the Administrator may issue a complaint, without any prior notice to the violator, pursuant to § 22.14 of the Consolidated Rules of Practice which may also require the violator to take any and all measures necessary to offset all adverse effects to health and the environment created, directly or indirectly, as a result of the violation.

(4) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after the filing of the complaint.

(f) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe with specificity the documents sought.

Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

Appendix—Addresses of EPA Regional Offices

Region I—John F. Kennedy Federal Building Boston, Massachusetts 02203
Region II—26 Federal Plaza, New York, New York 10007
Region III—Curtis Building, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106
Region IV—345 Courtland Street, NE. Atlanta, Georgia 30308
Region V—230 South Dearborn Street Chicago, Illinois 60604
Region VI—First International Building, 1201 Elm Street, Dallas, Texas 75270
Region VII—1735 Baltimore Street, Kansas City, Missouri 64108
Region VIII—1860 Lincoln Street, Denver, Colorado 80203
Region IX—215 Fremont Street, San Francisco, California 94105
Region X—1200 6th Avenue, Seattle, Washington 98101

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Part V

Environmental Protection Agency

Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy

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 documents 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

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Act requires the consideration of
named factors in any penalty
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to the violation. Under the penalty
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gravity based penalty (GBP) is
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 violations. The effect on the Agency's ability to implement of 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

[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."

roundwater. But where only temporary ...er *storage* is intended, and ...l is planned, the probability of ... 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 ...e 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.[2] 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.

(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

[2] 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.

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 viclation 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 [illegible] Penalty Policy Panel for [illegible]ency with that policy. In many [illegible]ces, the GBP 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 [illegible]ess, by inserting these two factors [illegible]e 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.

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.[5]

6. *Other factors at 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

[3] Technically, a firm would often be able to pay [illegible] if imposing a penalty would cause it to file for [illegible]ptcy, since a reorganization might still leave [illegible]iness in operation.

[4] [illegible]nceforth "ability to pay" will be used to include "ability to continue in business".

[5] 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 signficant 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 factor 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 for 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 violations;

• 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.

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 [illegible] t pursuant to Section 16 of the [illegible] Substance Control Act (TSCA). [illegible]er 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 [illegible]elopment of individual penalty [illegible]nces for each rule promulgated [illegible] 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 damages):				
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

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 [illegible] matrix to determine a penalty for a [illegible] violation, it is necessary to [illegible]rmine 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 contaiminated 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 durms 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 mimimum 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 more, 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 36 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 230 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) 500–9,000 ppm—50% 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).

Justification for Assignment of Levels of Seriousness 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 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 on 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 capacitors @ 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.
+ 675 kg.
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 transformer 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 transfomer improperly for 30 days would 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 will be computed by use of the proportional penalty calculation. The discretion to assess penalties more or less than the proportional penalty can be exercised under the following circumstances:

- Where substantial actual harm has occurred as a result of the violation;
- Where the unusual circumstances of the violation give rise to extraordinary risks to the environment; or
- Other types of highly 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 calculated 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 attached 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. 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 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.

[FR Doc. 80-27780 Filed 9-9-80; 8:45 am]

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

November 16, 1983

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

TO: Air and Waste Management Division Directors
Environmental Services Division Directors
Toxic Substances Branch Chiefs

SUBJECT: Settlement with Conditions

Attached is a copy of the guidance for the Toxic Substances Control Act Settlement with Conditions. This document has been changed significantly from the draft which was circulated for comment last year. The procedure for executing a Settlement with Conditions is to first sign a routine Consent Agreement and Final Order but to defer payment of the penalty until sixty days after the issuance of a remittance order. A remittance agreement is then negotiated between EPA and the violator. This agreement details the actions which the violator must complete (the Compliance Program and Schedule) as conditions for remittance of all or part of the penalty. When the Agency is satisfied that the conditions have been met, then the Administrator or his delegatee will remit the penalty by signing a remittance order. Under the previous procedure, the Compliance Program and Schedule could not be amended because it was part of a final order signed by the Regional Administrator. There was also some doubt as to whether the final order would be legally final if it contained conditions regarding the collection of the penalty. The new procedure avoids those problems.

Delegation of the authority to remit penalties with conditions will be part of the new delegations manual to be issued in the near future. Under the proposed delegation, the Administrator will delegate his authority in this area to Regional Administrators and the Assistant Administrator for Pesticides and Toxic Substances, who may then delegate

their authority to the division director level. Of course, the delegates will consult with Regional Counsel or the Office of Enforcement and Compliance Monitoring. If a case comes up in your Region before the new delegations manual is ready, contact Headquarters so that the proper interim arrangements can be made.

These procedures should be applied to all appropriate violations of the Asbestos in Schools Rule. This guidance is referenced on page 4 of the Enforcement Response Policy for the Asbestos in Schools Rule where specific criteria for its application to violation of that rule are given.

If you have any questions about this policy or its application, call Pamela Harris of my staff at FTS-382-5567. This guidance document should be used in its present form, but will be revised as experience with it shows the need for refinement.

A. E. Conroy II

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Attachment

cc: Glenn Unterberger
Steve Leifer
Sanford Harvey

November 15, 1983

TOXIC SUBSTANCES CONTROL ACT

SETTLEMENT WITH CONDITIONS

SETTLEMENT WITH CONDITIONS

TABLE OF CONTENTS

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

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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:

- o Significant environmental contamination or health exposure is actually occurring, and the person responsible for creating the problem refuses to take swift corrective action; or
- o The violator refuses to correct a substantial violation; or
- o 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:

- o 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.
- o 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.

- The Respondent may desire not to pay the remitted penalty in addition to expenditures needed to achieve compliance.

- 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.

- The burden is on the Respondent to prove that events requiring the extension or amendment are beyond its control.
- The Respondent must notify the Agency immediately of any need for extension or amendment of the CPS.
- The Respondent should take measures to prevent or minimize the need for amendment or extension of the CPS.
- 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.
- 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.

- 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 nonremittance 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 AND FINAL ORDER
New Orleans, Louisiana 71301	)	
	)	
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

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.

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.

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 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		

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

TECHNICAL GUIDANCE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 7 1979

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Richard J. Denney,
Associate General Counsel
Toxic Substances Division

SUBJECT: Neutral Administrative Inspection Schemes for TSCA Enforcement

Attached for your review are neutral administrative inspection schemes for three TSCA enforcement programs - premanufacture notification (Section 5), inventory (Section 8) and chlorofluorocarbons (Section 6). We request your opinion, pursuant to Joan Bernstein's memorandum of June 28, 1978, as to whether these three schemes meet the requirements for a neutral administrative inspection scheme as described in the Marshall v. Barlow's, Inc. decision of May 1978.

The principal persons who developed these schemes are Jonathan Libber (Section 5), Barbara Paul (Section 8) and Judy Kosovich (CFC). All may be reached at 755-9404.

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

cc: Richard D. Wilson

Attachment

NEUTRAL ADMINISTRATIVE INSPECTION FOR SECTION 5

Introduction to the §5 Neutral Administrative Inspection Scheme

The following are two neutral administrative inspection schemes for use in targeting §5 inspections. This section of TSCA deals with Premanufacture Notification (PMN). The PMN program is in its initial stages and many of the program elements will not become fully operational until some time in the middle of FY 80. Thus the Office of Enforcement (OE) is proposing both an initial scheme to cover this interim period and a final one to become effective when the §5 program is fully operational.

There are seven violation categories in Section 5: 1) noncompliance with a Section 5(e) or Section 5(f) order, rule or injunction, 2) failure to notify EPA of the production of a new substance, 3) manufacture of a new substance prior to the expiration of the premanufacture notice period, 4) using a substance produced in violation of §5 for

commercial purposes, 5) noncompliance with the terms of a test marketing exemption, 6) noncompliance with the terms of a research and development exemption and 7) violation of Significant New Use Rules (SNURS). During the first several months of operation, OE anticipates that the only active violation categories will be: 1) failure to notify, 2) production prior to notice expiration and 3) commercial use of an improperly produced substance. Thus OE's initial efforts will focus on these three categories. When the other categories become active, OE will shift to the final neutral administrative inspection scheme which includes the other violation categories. OE recognizes that the schemes will change as the Agency develops expertise in handling the enforcement of §5.

The schemes presented below list the violation categories and the criterion-defined subcategories. In those categories where less than 100% of the members of a particular category will be inspected, the scheme presents neutral criteria upon which inspection targeting will be based. Thus in all categories but the §5(e) and §5(f) orders, rules and injunctions category, only a percentage of the members of a category will be inspected on the basis of targeting criteria. Each criterion defines a subcategory. For example, there are eight subcategories in the Failure to Notify violation: 1) all members who are the subject of failure to notify tips and/or complaints, 2) all firms that have that have applied unsuccessfully for PMN exemptions, 3) all firms that have initiated but never completed PMN submission, 4) all firms with a history of new chemical development, 5) firms whose PMN submission indicated significant levels of projected production, 6) firms with a history of toxic substance production (Standard Industrial Classification (SIC) codes 2821 - Plastics, Materials, Synthetic

Resins and Non Vulcanable Elastomers, 2865 - Cyclic Crudes and Cyclic Intermediates, Dyes and Organic Pigments, and 2869 - Industrial Chemicals Not Elsewhere Classified, 7) firms who have violated certain Federal environmental and/or safety statutes (FIFRA, RCRA, CAA, FWPCA and OSHA) and 8) a random selection of the chemical firms.

It should be noted that if any of these triggering criteria produce a subcategory that is too large, the selections in that subcategory can be randomized. For example, if there are only enough resources to ispect 50% of the members of a subcategory, OE will select half of the members on a random basis.

OE intends to review the efficacy of these targeting criteria by statistically evaluating the violation rates of each criterion-defined subcategory in comparison with the random subcategory of the same violation category. In this way, OE will determine if there are significant differences between the rate of violation of a particular criterion-defined subcategory and the random selection of the members in that entire violation category. If there is no significant difference, then OE will realize that the criterion in question is useless.

The order of the violation category and of the subcategories indicates the priority among the categories and subcategories.

Interim Scheme

A. Failure to Notify

1. all members who are the subject of improper production tips and/or complaints

2. all firms that applied unsuccessfully for PMN exemptions
3. all firms that have initiated but never completed a PMN submission
4. all firms with a history of new chemical production
5. firms whose PMN submission indicated significant levels of projected production (forfalse and misleading variety)
6. firms with a history of highly toxic substance production (by SIC codes 2821, 2865 and 2869)
7. previous violators of certain federal environmental protection and/or safety statutes
8. random selection of all chemical producers

B. Production Prior to PMN Notice Expiration

1. all category members who are the subject of prior production complaints and/or tips
2. all firms that have been the subject of notice extensions
3. random selection of firms that have not had their notices extended
4. all category members who are violators of federal environmental and/or safety statutes
5. random selection of all firms undergoing PMN

C. Commercial Use Violations

1. all firms listed as recipients of improperly produced chemicals
2. firms listed on SIC codes 2821, 2865 and 2869
3. random selection of all chemical firms

Final Scheme

A. Violations of Section 5(e) or 5(f) Orders, Rules or Injunctions

1. inspect all firms subject to such orders, rules or injunctions

B. Failure to Notify

1. all members who are the subject of improper production tips and/or complaints
2. all firms that applied unsuccessfully for PMN exemptions
3. all firms that have initiated but never completed a PMN submission
4. all firms with a history of new chemical production
5. firms whose PMN submission indicated significant levels of projected production (for false and misleading variety)
6. firms with a history of highly toxic substance production (by SIC codes 2821, 2865 and 2869)
7. previous violators of certain federal environmental protection and/or safety statutues
8. random selection of all chemical producers

C. Production Prior to PMN Notice Expiration

1. all category members who are the subject of prior production complaints and/or tips
2. all firms that have been the subject of notice extensions
3. random selection of firms that have not had their notices extended
4. all category members who are violators of federal environmental and/or safety statutues
5. random selection of all firms undergoing PMN

D. Commercial Use Violations

1. all firms listed as recipients of improperly produced chemicals
2. firms listed on SIC codes 2821, 2865 and 2869
3. random selection of all chemical producers

E. Violations of Test Marketing Restrictions

1. all category members that have been the subject of tips or complaints suggesting test marketing violations.
2. all firms producting highly toxic test marketed items
3. all firms producing test marketed items in high demand
4. all category members who have violated certain federal environmental selection of category members
5. random selection of category members

F. Violations of Research and Development Restrictions

1. all firms that are the subject of tips and/or complaints indicating violation of this exemption
2. random selection of those firms holding themselves out as specialty chemical firms
3. random selection of all chemical producers

G. SNURS - criteria to be later determines

Inventory Reporting Regulations Neutral Administrative Inspection Schemes:

OE will select persons for inspection to monitor compliance with inventory reporting requirements in the following manner:

Violation: Reporting a Substance Excluded Because for Research and Development

Inspection Scheme

OE will select persons for inspection to ensure that they have not reported substances manufactured or imported for research and development based on a combination of the following methods:

- o OE will obtain from the inventory a list of substances manufactured or imported in quantities of less than 1000 lbs/year, reported by known manufacturers of R & D sub stances, and not reported in larger quantities by other persons.

- o OE will compare the inventory with public lists of substances manufactured prior to 1977 to isolate substances appearing on the inventory but not listed elsewhere as having been manufactured prior to 1977.

OE resources may be inadequate to inspect all firms identified. In this case OE will alphabetize firms identified and inspect every nth firm, where n = the number of firms identified divided by the number of inspections which can be performed with the resources available.

Violation: Late Reporting/Failure to Report

Inspection Scheme

EPA will search for manufacturers and importers who failed to report by May 1, 1978 as required and whose substances are being reported by processors during the revised inventory reporting period in the following manner:

- OE will obtain from OTS names of processors reporting for the revised inventory.
- OE will request from each processor a certification that he is not also a manufacturer of the substance.
- If the processor is not a manufacturer of the substance, OE will request a list of the processor's suppliers.
- OE will contact each supplier and ask for certification that he was not required to report for the initial inventory (i.e., substance was not manufactured/imported after January 1, 1975). If OE resources are inadequate to inspect all firms identified, OE will alphabetize suppliers and inspect every nth firm. (n = the number of suppliers identified divided by the number of inspections which can be performed with the available resources.)

Violation: Reporting a Substance Excluded Because Not Manufactured, Processed, or Imported Since January 1, 1975.

Inspection Scheme

EPA will select persons for inspection to ensure that they have not reported substances not manufactured, processed or imported since January 1, 1975 in the following manner:

- o OE will compare substances reported for the inventory with the commercial lists of substances manufactured in 1975, 1976 and 1977.

OE will alphabetize the manufacturers and importers of substances identified by the above comparison and inspect every nth one. (n = the number of manufacturers and importers identified divided by the number of inspections which can be perform with the available resources.

In FY79 and FY80 during the revised inventory reporting period OE will commit its resurces to inspections under these schemes as follows:

Compliance Monitoring to Detect Reported R & D Substances	40%
Compliance Monitoring to Detect Substances not Manufactured or imported after 1975.	30%

The remaining 30% of total OE resources will be used to respond to reports of other violations.

Each Region will not necessarily conduct an equal number of inspections. Inspections will be assigned Regions based on the location of the potential violators as indicated by each inspection scheme.

CFC Rule — Neutral Inspection Scheme

The rule published by EPA on March 17, 1978 (43 FR 11318) bans processing of fully halogenated chlorofluoralkanes (CFCs) for aerosol propellant uses after December 15, 1978, except for certain essential uses. Such processing would be done by businesses known as aerosol fillers.

1. The records of CFC manufacturers will be inspected once a year to determine which aerosol fillers are currently purchasing CFCs.

2. Only aerosol fillers who have purchased CFCs in the year preceding the proposed inspection or who are otherwise known to be in a position to fill aerosols with CFCs will be candidates for inspection. Such fillers will be identified by inspections of the records of CFC manufacturers, by information from the Consumer Products Safety Commission (CPSC), or by other means.

3. Such candidates for inspection will be ranked according to the relative quantity of CFCs estimated to have been received. This ranking will determine the inspection priority. If the amount purchased in unknown, the filler will be assigned a ranking in the middle of the ranked list.

4. A ranked list of candidates for inspection will be sent to each Regional Office. Such lists may later be amended. The total number of aerosol fillers to be inspected in a given fiscal year will be determined. The ranked list will be used to identify the particular fillers to be inspected. The total number to be inspected in each Region will be approximately proportional to the fraction of fillers in that Region subject to this scheme.

5. The sequence shall be rank order of the list, except that this sequence may be adjusted to conserve Agency resources.

6. Inspections of fillers who have never been inspected previously have higher priority, ranked according to quantities purchased, than inspection of fillers who have been inspected previously (not including routine follow-up inspections).

7. If all fillers have been inspected at least once, fillers should be ranked according to their estimated likelyhood of recidivism.

Use of TSCA Section 11(c) Subpoenas

Prepared by:
Pesticides and Toxic Substances
Enforcement Division
December 4, 1979

TABLE OF CONTENTS

I. Introduction

Section 11(c) of the Toxic Substances Control Act (see Appendix A) authorizes the Administrator to issue subpoenas requiring the testimony of witnesses, the production of documents, and answers to questions that he deems necessary to carry out the Act. This paper provides guidance to the Regions on the use of TSCA administrative subpoenas.

The first part of the paper will describe the various situations which warrant the use of section 11 subpoenas as enforcement tools. The document next sets forth the major defenses to subpoenas which may be encountered by regional personnel, and discusses ways to overcome such defenses. Enforcement of subpoenas and their proper form are addressed in the final sections.

II. When Subpoenas Should Be Used

As a general rule, subpoenas can be used whenever the information sought will assist the Administrator in implementing the Act. There are factors, however, which reduce the number of instances where subpoenas are appropriate.

1) Subpoenas must be not be overly broad, vague, or burdensome, and they must be germane to a lawful subject of inquiry. These and other limitations on Agency information requests are discussed below as part of the section on defenses to subpoenas.

2) The Conference Report for TSCA contains the following language:

> The conferees recognize that the Administrator will have access to much information under section 5 and section 8 of the Act. Therefore, the conferees expect that the Administrator will use the subpoena authority only when information otherwise available through voluntary means or other provisions of this Act is inadequate to meet the Administrator's needs under this Act. (page 87)

This language was apparently an attempt to mollify those House members who disagreed with the Senate's view that inclusion of subpoena authority was a prerequisite to the successful implementation of TSCA.

This "last resort" view of TSCA's subpoena authority probably impacts rulemaking procedures more than enforcement activities. The broad-based information gathering which often precedes a choice between regulatory alternatives is best addressed by rulemaking under sections 4, 5, and 8 of TSCA. For the program offices, data gathering through rulemaking is not only an available alternative to subpoenas, it is preferable to situation-by-situation information requests. OE, on the other hand, conducts more focused investigations, usually directed toward a single violation, and when information is needed which has not already been assembled under a rule, subpoenas are generally appropriate.

The section of the Conference Report quoted above expresses a preference for voluntary means of data gathering over more formal information requests. Thus, enforcement personnel should always consider simply asking for the information before drawing up a subpoena. An informal request, however, will be inadequate in many instances. For example, when there is a reasonable suspicion that the evidence sought may be destroyed once it is informally requested, a subpoena should be issued before any other step is taken. Enforcement personnel should also use subpoenas as a first step when they are unsure of the precise nature of the evidence they are seeking, (e.g., internal memoranda relating to a particular corporate decision as opposed to financial information). In situations where EPA is not sure of what information is available or how reliable requested data will be, respondents should be placed under the burden of a formal, judicially enforceable responsibility through the use of TSCA subpoenas. In addition, testimony of witnesses should of course be compelled through the issuance of a subpoena.

Subpoenas will also be particularly useful in two other situations. First, data may often be sought from persons who are not subject to the Act. Although such persons cannot be compelled to keep records or submit information under sections 4, 5, 6, 8, 12, or 13 of the Act, data can be obtained through the issuance of a section 11 subpoena if such data is relevant to a lawful purpose of TSCA (see parts III B and C below).

Second, subpoenas may be used in place of inspections. Where the Agency is interested in reviewing a large volume of material at the Agency rather than on-site, a subpoena may be the more appropriate investigative tool. In addition, subpoenas may be utilized to force respondents to collect and organize relevant material, so that an inspector is not faced with this task at the office or facility itself.

While it is not possible to give an exhaustive list of all situations which warrant the issuance of a subpoena, the above information should aid enforcement personnel in deciding whether to invoke this authority. This decision will primarily be influenced by how crucial the data sought is to the successful prosecution of an alleged violator.

III. Defenses To Subpoenas

A. Generally

The past one hundred years have seen the courts become increasingly receptive to the use of administrative subpoenas. In the late nineteenth century, the federal judiciary took the position that the authority to issue subpoenas was reserved to the courts. It was not until 1894 that the Supreme Court finally confirmed the right of administrative agencies to issue subpoenas in support of agency adjudications.[1] In 1908, the Court extended the permissable scope of subpoenas to include those issued for investigatory purposes.[2] As a prerequisite to the enforcement

1. ICC v. Brimson, 154 U.S. 447 (1894).

2. Harriman v. FCC, 211 U.S. 407 (1908).

of such subpoenas, however, the Court demanded that the agencies first allege specific breaches of their authorizing statutes.

This restrictive approach towards the use of administrative subpoenas prevailed for the next forty years despite repeated Congressional efforts to authorize agencies to utilize investigatory subpoenas even when no specific statutory violation was alleged. The dispute was resolved by the Supreme Court's decisions in Oklahoma Press Publishing Co. v. Walling[3] in 1946 and United States v. Morton Salt[4] in 1950. These two cases obviated the need for agencies to show probable cause that a specific violation had occurred. The Oklahoma Court stated that since there is no actual search and seizure, probable cause is deemed satisfied by a "determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry".[5] In Morton Salt, the Court refined this concept and set forth the still operative test of a subpoena's validity:

> . . . it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant.[6]

The following three subsections will explore the three criteria set forth in this test.

B. The requirement that the subpoena be within the authority of the agency

The requirement that the inquiry be within the authority of the agency is actually composed of two basic elements.

3 327 U.S. 186 (1946).
4 338 U.S. 632 (1950).
5 327 U.S. 186 at 209.
6 338 U.S. 632 at 652.

The first is the need for the investigaton to be based on adequate statutory authority. Since the authorizing language in section 11 of TSCA is so broad, it would require the presence of a most wayward investigation to induce a court to declare a subpoena ultra vires. In addition, it should be noted that the scope of a TSCA subpoena is not limited to those persons over whom the Agency has jurisdiction, such as chemical manufacturers, processors, distributors, and users. Nonregulated third parties may also be reached by subpoena if they possess information relevant to the inquiry. For example, in Link v. NLRB,[7] the Court held that the Board could require a private detective agency to reveal who had hired it to observe a union organizer.

The second element is the need for the inquiry to serve a lawful purpose. While the motive of the investigation may be nothing more than official curiosity,[8] the purpose of the subpoena must be to further the administrtion of the Act. The subpoena cannot be used to harass the respondent.[9] A subpoena also cannot be used solely to aid a proposed or pending criminal prosecution,[10] although the evidence obtained from a subpoena issued in good faith for civil enforcement purposes can subsequently be used in a criminal action. The burden of showing that an ostensibly valid subpoena was issued for unlawful purposes is on the person alleging abuse of process.[11]

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7 330 F.2d 437 (4th cir. 1964).
8 United States v. Morton Salt, 338 U.S. 632, 652 (1950).
9 Shasta Minerals and Chemicals Co. v. SEC, 328 F.2d 285 (10th Cir. 1964).
10 Donaldson v. United States, 400 U.S. 517 (1971).
11 United States v. Powell, 379 U.S. 48 (1964).

Thus each subpoena must contain a brief statement of purpose, clearly setting forth the objective of the inquiry.[12] Courts have been reluctant to halt an administrative investigation on the basis of unlawful purpose, striking down subpoenas "only where the futility of the process to uncover anything legitimate is inevitable or obvious."[13]

C. The requirement of relevancy

Once the purpose of the subpoena has been established, a court will require a showing that the evidence sought is germane to the subject of the inquiry. For many years, evidence was germane if it was "not plainly incompetent or irrelevant to to any lawful purpose" of the investigation.[14] More recently, however, most courts have adopted the standard of "reasonable relevance."[15]

To avoid a successful motion to quash on the grounds of relevancy, the connection between the demands of the subpoena and the purpose of the investigation must be made apparent in the purpose clause of the document. Conclusory allegations of relevance will not be sufficient.[16] While EPA is not required to specify the precise use to which each piece of

12 Montship Lines Limited v. Federal Maritime Board, 295 F.2d 147 (D.C. Cir. 1961); Hellenic Lines Limited v. Federal Maritime Board (companion), 295 F. 2d 138 (D.C. Cir. 1961).

13 Matter of Edge Ho Holding Corp., 256 N.Y. 374, 381-2, 176 NE 537, 539 (1931).

14 Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943).

15 FTC v. Texaco, Inc., 555 F.2d 862, 873-4, n. 23 (D.C. Cir. 1977).

16 United States v. Security Bank and Trust, 473 F.2d 638 (5th Cir. 1973).

evidence will be put, the subpoena must establish a nexus between the evidence sought and the general purpose of the inquiry:

> . . . in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case. Accordingly, the revelance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges.[17]

D. Vague or unduly burdensome subpoenas

Administrative subpoenas which are vague or demand a tremendous amount of information run the risk of being struck down as unduly burdensome. Enforcement personnel must draft their subpoenas as specifically as possible so that significant amounts of irrelevant information are not included within the scope of the requests. While answering a subpoena should not unduly disrupt the normal course of business operations, some burden will be permitted.[18] The courts will generally be reluctant to quash a subpoena since the Agency cannot always know in advance the precise information it is seeking.

The burden of proving that a subpoena is oppressive rests with the objecting party.[19] Even if a subpoena is found to be overly burdensome, courts will often be receptive to proposals

17 FTC v. Texaco, Inc. 555 F.2d 862, 874 (D.C. Cir.), rehearing denied, 434 U.S. 883 (1977).

18 Ibid.

19 United States v. Tivian Laboratories, Inc., 589 F.2d 49 (1st Cir.), cert. denied, 99 S. Ct. 2884 (1978), citing United States v. Powell, supra, n. 11.

which lighten the burden on a subpoenaed party by insuring that compliance will not unduly disrupt his business. For example, a court may allow the subpoenaed party to comply with the request at his actual place of business. A court may also require a file search to be made by Agency attorneys.

E. Privilege

Federal administrative law, like the common law, recognizes instances where an individual is entitled to withhold self-incriminating or privileged information.

Just which of the common law privileges are available to respondents is not entirely clear,[20] since courts have accepted some and rejected other testimonial privileges. The attorney-client privilege, however, stands alone as the one relationship which has consistently been protected by the courts.

In order for information to be exempt from the reach of an administrative subpoena, 1) there must be an attorney-client relationship in place at the time of the communication, 2) any communication must be made in confidence to an attorney in his professional capacity, and 3) the communication must be made for the purpose of obtaining legal advice or assistance.[21] Corporations are entitled to this privilege as well as individuals.[22]

20 Note that the third circuit has said that state-created privileges are not recognized as a matter of federal common law. U.S. v. Cortese, 410 F. Supp. 1380 (E.D. Pa.), aff'd 540 F.2d 640 (3rd Cir. 1976).

21 United States v. Ponder, 475 F.2d 37 (5th Cir. 1973)

22 Bell v. Maryland, 378 U.S. 226 (1964).

The burden of showing the applicability of the attorney-client privilege is on the claimant.

The courts have not looked as favorably upon most other testimonial privileges. While some courts have accepted the privileged status of the doctor-patient relationship, they have tended to reject all other privileges, such as accountant-client and priest-penitent.

Individual respondents to administrative subpoenas may also avail themselves of the fifth amendment's privilege against self-incrimination. Corporations and associations do not have the right to invoke this privilege.[23] In addition, a custodian of corporate records cannot invoke the fifth amendment, even if the records would incriminate him.[24] An individual also is barred from claiming this privilege on behalf of someone who may have documents incriminating the claimant.[25]

An individual cannot, however, be compelled to disclose the contents of his own mind, if doing so would be self-incriminatory. Thus a witness cannot be called upon to explain the contents of corporate records in his possession which incriminate him.[26] [27]

23 United States v. White, 322 U.S. 694 (1944).
24 Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).
25 Couch v. United States, 409 U.S. 322 (1973).
26 Curcio v. United States, 344 U.S. 118 (1957).
27 Note that a corporation cannot purposely select an individual to answer a subpoena who can call upon the fifth amendment privilege in order to shield the corporation from the inquiry. The corporation has an affirmative obligation to find someone who does not fear that he will incriminate himself by his answers. United States v. Kordel, 397 U.S. 1, (1970).

Furthermore, an individual cannot be compelled to relinquish an incriminating document in his possession which is testimonial in nature.[28]

An offer of immunity, of course, will remove the possibility of a respondent incriminating himself, and thus he may be compelled to testify. Offers of immunity must be cleared by the Department of Justice.

IV. Form And Service Of Subpoenas

Attached as Appendix B are sample subpoenas and other auxilliary forms. There are separate forms for compelling testimony and for requiring the production of documents. The separate forms should do away with the need to state in a cover letter to a subpoena duces tecum that the named individual does not have to personally appear before the Agency. Where both testimony and documents are desired, the two forms can be combined. Since firms delivering documents demanded by a subpoena will often ask for a receipt, a Receipt of Subpoena Response form has also been included. Service should be made, where possible by registered mail or by handing the subpoena to the person named therein. However, since the precise manner by which administrative subpoenas should be served is not defined in TSCA and has never been defined by the courts, most traditional forms of service are probably acceptable.

28 Fisner v. United States, 425 U.S. 391 (1976).

Thus the return of service form provides an opportunity to specify the type of service made other than those listed on the form.

When serving a corporation, the phrase "in his (or her) capacity as" should be inserted after the name of the person served on behalf of the company. This practice will prevent the corporation from using the named individual to invoke the privilege against self-incrimination. The subpoena served on any party should be a copy, and the original should be retained by the issuing office. The return of service form, when completed, should be attached to the original subpoena. The person making service should attempt to serve the custodian of the records sought. If more than one person possesses the records, or the custodian is not known, a registered agent or a corporate officer should be served. Reference books are available which list corporate officers. Note that the corporate general counsel is usually not an officer, unless his title reflects a dual role, such as "vice president and general counsel".

The Office of Enforcement will recommend to the Office of General Counsel that the two offices cooperate in drafting Agency-wide rules governing procedural matters relating to subpoenas, such as service, motions to quash, and payment of witness fees. Development of an Agency system for hearing motions to quash may be particularly

important. When EPA has such rules in place, respondents objecting to a subpoena may be required to litigate their motions to quash before the Agency prior to doing so in federal district court.[29] EPA would then have an early opportunity to correct any problems with the subpoena, especially those arising from objections based on vagueness or burdensomeness.

V. Enforcement of Subpoenas

In order to enforce a subpoena against an individual who fails to comply with its demands, enforcement personnel must first contact the Department of Justice. DOJ will represent the Agency in federal district court. The enforcement action may be brought in any district where venue is proper.[30]

The action should take the form of an application for an order requiring compliance with the subpoena. The filing of a complaint, opening the doors to discovery and the other trappings of normal civil suits, is not necessary or desirable.[31] The application should briefly set forth the nature of the investigation, a summary of the subpoena, and a statement of the subpoenaed party's failure to comply with the subpoena. In an accompanying memorandum in support of the application,

29 See Genuine Parts Co. v. FTC, 445 F.2d 1382 (5th Cir. 1971).
30 See 28 U.S.C. §1391(b) and (c).
31 See Goodyear Tire & Rubber Co. v. National Labor Relations Board, 122 F.2d 450, 451 (6th Cir. 1941); E.E.O.C. v. Quick Shop Markets, Inc., 526 F.2d 802 (8th Cir. 1975).

the DOJ and EPA attorneys should provide a more detailed description of the facts, state the basis of the court's jurisdiction, explain how the Morton Salt test of a subpoena's validity is met, and emphasize that the enforcement of administrative compulsory process is a summary proceeding.

APPENDIX A

TSCA Section 11(c)

(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.

APPENDIX B-1

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

TO: (name)
(address)

To further the Environmental Protection Agency's investigation of (e.g., compliance with a statutory provision or regulation, risk posed by a chemical, etc.) _____, you are hereby required to appear before the (RA or AA) in room _____, 401 M St. S.W., Washington, D.C., on (month, day, and year), at (time of day), 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 which 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 CFR Part 2).

Issued under the authority of 15 U.S.C. Section 2610(c), this _____ day of _____, 19__.

United States Environmental
Protection Agency, by

_____
(signature)

RA or AA

APPENDIX B-2

SUBPOENA AD TESTIFICANDUM

UNITED STATES OF AMERICA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

TO: (name)
(address)

To further the Environmental Protection Agency's investigation of _____, you are hereby required to appear before _____ in room _____, 401 M St., S.W., Washington, D.C., on the ___ day of _____, 19__, at _____ o'clock, to testify in the aforementioned matter.

Issued under the authority of 15 U.S.C. Section 2610 (c), this _____ day of _____, 19__.

United States Environmental
Protection Agency, by

_____ (signature) _____

RA or AA

APPENDIX B-3

RETURN 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 or 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)

APPENDIX B-4

RECEIPT OF SUBPOENA RESPONSE

UNITED STATES OF AMERICA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I, _____(type name_____, certify that I received, on behalf of the U.S. Environmental Protection Agency (EPA), the following documents from _____(subpoenaed party)_____ on _____(month, day, and year)_____ in response to the EPA subpoena of _____(month, day, and year)_____.

(describe submittal)

_____(signature)_____

_____(title)_____

12-1. Inspections and Subpoenas

1. AUTHORITY. To designate representatives of the Administrator:

a. To inspect any establishment, facility, or other premises in which chemical substances, mixtures, or articles containing 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. Any such inspection shall be conducted in accordance with the provisions of the Toxic Substances Control Act Section 11(a) and Section 11(b).

b. To require by subpoena the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information in accordance with the Toxic Substances Control Act Section 11(c).

2. TO WHOM DELEGATED. Assistant Administrator for Enforcement, Assistant Administrator for Toxic Substances, and Regional Administrators.

3. LIMITATIONS. The Assistant Administrator for Enforcement and the Assistant Administrator for Toxic Substances must notify the appropriate Regional Administrator prior to taking any action under this delegation.

4. REDELEGATION AUTHORITY. The inspection authority in (a) above may be redelegated; the subpoena authority in (b) above may not be redelegated.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

June 24, 1982

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: Compliance Strategy for the Asbestos in Schools Rule

TO: Air and Hazardous Materials Division Directors
Environmental Services Division Directors
Toxic Substances Branch Chiefs

The final version of the Asbestos in Schools Rule was published in the Federal Register on May 27, 1982 (47 Federal Register 23361). Attached is the Compliance Strategy for this rule. A proposed strategy was circulated in April, 1981, for comment. This document reflects comments on the proposed strategy and the discussion of compliance issues at the Regional Asbestos Update Conference on May 6, 1982, as well as, changes to the proposed rule.

Please note that "Criteria for Satisfactory Participation in the Technical Assistance Program (TAP)", which is mentioned in this strategy and was discussed at the conference is under development. State Programs are briefly discussed in this document. A guidance document specifically for State programs associated with this rule is also under development. Finally, in response to requests made at the conference, training materials will be sent to the Regions for compliance assistance and compliance monitoring.

If you have any questions please contact Pamela Harris (FTS 755-9404) of my staff.

A. E. Conroy II

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

Attachment

cc: Regional Asbestos Coordinators

COMPLIANCE STRATEGY FOR THE FRIABLE ASBESTOS-CONTAINING MATERIALS IN SCHOOLS: IDENTIFICATION AND NOTIFICATION REGULATION

THE PESTICIDES
AND TOXIC SUBSTANCES ENFORCEMENT DIVISION,
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Asbestos in Schools Rule
Compliance Strategy

Overview

The data available on the health effects of inhaled asbestos show that even limited exposure can increase the occurrence of asbestos related illness and cancer in exposed individuals. 1/

In response to the health effects of asbestos the Environmental Protection Agency's Office of Toxic Substances launched in early 1978 a voluntary Technical Assistance Program (TAP) to aid schools in the detection of asbestos in school buildings. As of September, 1980, as many as 40% of the schools in the United States had not been properly inspected and a larger percentage of schools had not followed the recommended surveillance and analysis techniques. In some states no attempt had been made to inspect the schools.

Because of the serious health effects of asbestos and the limited success of the TAP, the Environmental Protection Agency published a rule under Section 6 of the Toxic Substances Control Act (45 Federal Register 23360, May 27, 1982). The rule is intended to identify schools containing asbestos and reduce the risk of exposure to the estimated 3,000,000 students and 250,000 teachers and other staff who use the schools which contain asbestos. All primary and secondary schools in the United States will be affected by the rule.

The rule which applies to Local Education Agencies (LEA's) has five requirements:

1. Inspection
2. Sampling
3. Analysis
4. Warnings and Notification
5. Recordkeeping

Schools built after December 31, 1978, are exempt from the requirements of the rule. A school is exempt from the regulation if it properly performed inspections, sampling and analysis under the voluntary program and found no friable asbestos-containing material or if it can document that no friable asbestos-containing materials were used in building or renovating the school.

1/ See Technical Support Document for the Asbestos in Schools Rule for a detailed discussion of the health risks of exposure to asbestos.

School Type	Number of Non-Public Schools
Catholic	9640
Lutheran	1039
Other church affiliated (e.g., Hebrew, Quaker, Episcopalian, Seventh Day Adventists)	3049
Non-church (e.g., military, handicapped children, Montessori, exceptional children)	2772

The largest number of children attending non-public schools attend the 9,640 Catholic schools. Of these 8,100 are elementary schools and 1,540 are secondary schools. The educational organization consists of 165 dioceses overseeing approximately 10,000 parishes. The diocese, which is headed by a bishop, may or may not have a Board of Education responsible for the financial management of the school system. There are three types of Catholic Schools. Private or independent schools are owned and operated by a religious community (e.g., Jesuits). Parish schools are sponsored by one or several churches and are usually elementary schools. Diocesan schools are subsidized by tuition and central funds and are, for the most part, high schools.

Other non-public schools are generally autonomous private elementary and secondary schools.

State Board of Education

The State Board of Education acts in an accreditation capacity, maintaining certain minimum standards for instruction, curriculum and physical plant specifications of school buildings for both public and private facilities.

Compliance

Objectives

The objective of the compliance program is to encourage compliance with the rule. Activities should be seen in this light rather than as attempts simply to detect violations. In cases where means other than enforcement actions will achieve compliance, these actions should be pursued to conclusion before resorting to enforcement actions.

Types of Violations

Violations are failures to comply with any requirement of the Rule. For each requirement there may be several violations.

- o Recordkeeping Requirement. [Records should be accurate, complete and up to date.] Violations are:

  - Falsified records
  - Failure to keep records
  - Missing elements (incomplete records)
  - Records which are not made available to the public or EPA inspectors.

- o Inspection of Buildings. [All buildings should be inspected to locate friable materials.] Violations are:

  - Failure to inspect all buildings.
  - Failure to follow proper inspection procedures as detailed in the Guidance Documents.

- o Sampling. [Samples should be taken of all friable materials.] Violations are:

  - Failure to sample all areas of friable materials.
  - Failure to sample according to procedures in the Guidance Documents.

- o Analysis. [Samples should be analyzed using polarized light microcopy with X-ray diffraction as a confirmatory technique.] Violations are:

  - Failure to have samples analyzed.
  - Failure to ensure use of the proper analytical technique.

- o Warnings and Notices. [Notices should be posted in schools as required by the Rule. Personnel using the building and the PTA (or parents of the children) should be notified if the school contains friable asbestos materials.] Violations are:

  - Failure to post notices.
  - Failure to send warnings to the proper persons.

- o Use of Exemptions. [TAP activities or building documents indicate that there are not friable asbestos-containing materials in the school building.] Violations are:

  - TAP activities do not support the conclusion that there is no friable asbestos-containing material in the school because those activities were inadequate (see OTS criteria for satisfactory TAP participation).

  - Records which support the exemption claim are inadequate.

Voluntary Compliance

One of the goals of this stategy, as well as of the Asbestos in Schools Rule, is to achieve voluntary compliance.

Since the presence of asbestos in schools is a potential health hazard, particularly for children, it is a problem which causes public concern. This public concern provides a strong motivation for voluntary compliance. To tap this potential the Regions will offer public education programs which include speakers and courses for public and professional organizations. A major source of the speakers and course coordinators is the American Association of Retired Persons through a contract with EPA.

The Regions should encourage public participation in monitoring compliance with the rule. Good rapport between the Regional compliance monitoring staff and interested local groups can greatly increase the effectiveness of the rule.

Since the records are public information, members of the public can inspect them for completeness. Records which are suspected of being incomplete or unreliable (see "triggers" in Compliance Monitoring Section) should be reported to the Regional Office. The Regional Office should encourage such inspection and publicize the following information:

- The name of Regional Enforcement Contact person;
- What sort of information should be reported to this person; and
- How to contact the person.

Several citizens groups which have expressed an interest in this progam could assist the implementation of this rule at the local level. For instance, the League of Women Voters in Illinois participated in the TAP by inspecting all schools in the state outside of Chicago. Similar assistance by public groups could be helpful to LEA's as well as to EPA. Interested groups are:

- Parent Teachers Association
- League of Women Voters
- Education Associations
  - National Education Association
  - American Federation of Teachers
- American Association of Retired Persons.

The training programs can prepare members of these groups to support compliance with the Rule in the following ways:

- Enhance public awareness by publicizing the purpose and goals of the program.
- Perform routine screening of school records.
- Assist the LEA's in complying with the Rule.

All of these activities should increase the level of voluntary compliance. Requests for training should be directed to the Regional Office which will determine how best to respond to the requests. The contractors from the American Association for Retired Persons would be the best choice for providing this training.

PTSED and OTS will develop a Compliance Assistance Guidance Document. This document will provide step-by-step instructions for complying with each requirement of the rule. Regional personnel should use this document as the basis of the training programs which they provide.

Compilance Monitoring Strategy

Compliance Monitoring Priorities

In areas where the lack of public participation or State programs necessitate a Federal presence to monitor compliance with the rule, the primary method of compliance monitoring will be inspection of LEA and school records. Inspection of records will detect recordkeeping violations as well as other types of violations. So that the LEA can be sure that all of its compliance activites are reflected in its records, the inspector should notifiy the governing official of the LEA at least one week before any planned inspection. Sampling and analysis may be performed to confirm the results obtained by the LEA.

Compliance Monitoring Activities

Compliance monitoring shall be both affirmative and responsive. Responsive actions will be triggered by complaints from the community. Affirmative compliance will consist of visiting Local Education Agencies to determine the actual level of compliance.

The limited resources available for compliance monitoring must be utilized so that two criteria are met:

- LEA's used by the largest number of children are inspected for verification of compliance.
- The maximum degree of response to suspected violations is possible.

The 100 largest public school districts in the United State educate approximately 25% of the country's children. In the two years following the publication of this Rule the level of compliance for all of these districts will be determined (these districts are listed in the Appendix).

Other resources will be allocated so that evidence of noncompliance is investigated.

Inspection Scheme

Inspections by EPA personnel are necessary to the successful enforcement of the Rule. Such inspections put the regulated community on notice that compliance is considered an important

issue by the Agency and that violations will be detected and pursued. Even if surveillance cannot be total, it can serve as a spur to compliance. Inspection visits are also a means of responding to public complaints of noncompliance by an LEA.

Two criteria will be used to select the LEA's for inspection visits:

- o LEA's for which complaints have been received or which the Asbestos Coordinator has reason to believe are not in compliance.

- o LEA's which have been chosen using a neutral scheme.

The allocation of resources between thes two types of inspections will depend on the number of complaints received by the Region and the level of compliance for the LEAs. The success of Regional personnel at resolving complaints without the necessity of inspection visits is also a factor. However, at least 25 percent of available resources should be reserved for the neutral inspections.

Neutral Administrative Inspection Scheme (NAIS)

The following criteria will be applied to select LEA's to be inspected under the NAIS:

- ° LEA's which are in the top 100 in student population (see Appendix) in the United States, but did not satisfactorily comply with the TAP.

- ° Checks of other LEA's - remaining NAIS resources.

To target NAIS inspection of LEA's which are not in the top 100 and did not participate in the technical assistance program use the following procedure.

1. Consider all LEA's with buildings constructed or removated between 1940 and 1978 which have not already been targeted for inspection.

2. Divide resources between public and private LEA's. Allot to the private schools a percentage of the resources equal to the percent of the school ppopulation in private schools plus ten to fifteen percent. The rest of the resources will be used to inspect the public schools.

3. Rank the public and private LEA's separately by size. Determine the number of schools on each list. This number is "A".

4. Determine the number of inspections available for each type of LEA. This number is "B".

5. Divide A by B. A/B = C. Choose every Cth school on each list for inspection. Determine A, B, and C separately for public and private LEA's.

For example if there are 100 private LEA's in a Region and resources are available to inspect 5 private schools.

A = 100 there are 100 LEA's

B = 5 there are resources for five inspections

C = 100/5 = 20 inspect every 20th school in the list ranked by population.

If population figures are not available, list the schools in alphabetical order.

These LEA's have now been targeted without any consideration of their compliance or voluntary activities or whether or not they claim to be exempt from the requirements of the rule for any reason other than the date of construction.

The inspector will visit these schools and determine if the inspection, analysis and sampling - whether performed under the TAP or after the effective date of the rule - is satisfactory. He will also determine if the LEA has complied with the record-keeping and notification requirements of the rule. If an LEA claims that it is exempt from the rule, the inspector will inspect the documents which support that claim. The inspector should inspect the buildings and take samples for analysis in cases where the inspector question the documents supporting the exemption claim.

Inspection Procedures

The inspector will go to the central office of the LEA selected and review the files. Depending on the time available, he will choose 1-5 schools to visit for a records review and possible inspection and sample analysis. Triggers for choosing a school are listed below.

- Records are too consistent, especially where a large school system has schools built or renovated during the relevant period.

- Records indicate a lack of friable material.
- Lack of cooperation on part of school officials.
- Significant gaps or uneven detail in required records.
- Lack of response to local weather events such as severe storms or floods that may have led to water damage.
- Other suspicious conditions, including information available to the Asbestos Coordinator that indicates possible non-compliance.

If none of the above triggers is relevant, the largest school, the oldest school and the school used for the most nonschool activities shall be visited.

Records in the schools will be inspected. If the records indicate that inspection sampling and analysis were performed but that no asbestos was discovered, the inspector may wish to inspect and take samples for analysis to confirm the records.

State Programs for Compliance Monitoring

There are many reasons why State programs could perform compliance assistance and monitoring functons for this Rule more effectively than the Federal government. A State-run program could be integrated into an existing program such as a building safety program. Also State organizations, such as public health departments usually have a State wide network with offices in counties and major cities. This means that State organizations are in a better position to establish rapport with the community on this issue. The States may also have options available to encourage compliance through the use of State regulations which would be more effective than the use of Federal authority.

Some States have done an excellent job of implementing the voluntary Technical Assistant Program described in the Introduction of this document. The EPA will review the status of TAP in the States which participated and determine if a federal presence in the State is desirable. Detailed criteria for evaluation of successful participation in the TAP are available from headquarters. Other States which did not participate fully in the TAP will establish comprehensive programs during the twelve month compliance period following the effective date of the rule. EPA will evaluate these programs also, to determine if a federal presence is necessary. Evaluation criteria include technical expertise of the personnel, proposed scheme for monitoring compliance, the goals of the State Agency implementing the program (since ensuring public health is the principal concern of the rule, a State health or environmental agency would be the preferred agency) and the quality assurance program.

The EPA will make technical training materials available to states which wish to run their own program. These materials should provide adequate technical background for personnel involved in the program. At the end of the first year of implementation, personnel from EPA will evaluate the effectiveness of the state program.

States which choose to implement their own program can still refer cases to Regional EPA offices for enforcement response, if the state agency deems this action advisable.

States may wish to participate only partially in the program. For instance, a State may collect information from LEA's concerning the activities in response to the rule or State universities may be willing to analyse samples for asbestos. State programs may vary widely. The compliance monitoring activities which are not performed by the State must be performed by the Federal government.

The Federal government would continue to play a role in States unwilling to implement their own programs.

In general the Regions should encourage the States to implement their own programs under cooperative agreements with EPA. Headquarters will provide further guidance for the management of State cooperative agreements for this program.

Administrative Responsibilities

Program Management

PTSED will coordinate responses to problems which affect more than one Region or which may require special expertise (for example, a problem dealing with laboratory analysis). Problems that require coordination with OTS will also be handled through PTSED.

Any policy issues will be handled by Headquarters. If any policy issues arise which are not covered by this document, the Region should contact PTSED. The issue and its resolution will then be shared with all the Regions.

The Responsibilities of Headquarters are outlined below:

- Provide technical information.
- Liaison with OTS.
- Policy and program guidance.
- Advisory role in case development.
- Liaison with Department of Justice should an injunction be requested.

The responsibilities of the Regional offices are as follows:

- o Target inspections based on criteria and information provided by headquarters.
- o Liaison with State Programs.
- o Inspect schools.
- o Gather information.
- o Case development.
- o Notices of Noncompliance and initial selection of cases to be referred to Department of Justice through Headquarters.

Program Integration

Some States may have their own plans for asbestos in schools, (for example, updating building codes). Liaison with state asbestos programs will be handled by Regional Offices.

OTS will develop crieria for evaluating the effectiveness of LEAs' activities under the TAP. PTSED and OTS will develop Compliance Assistance Guidance for training persons in how to comply with the rule. PTSED will develop State Program Guidance which will include Compliance Monitoring Guidance for State personnel performing compliance monitoring activities.

This Rule triggers the export notice provisions of Section 12 of TSCA. This section states that chemicals regulated by a proposed or final Rule under Section 6 of TSCA may be exported only after the exporter has notified the Administrator of EPA. For further information concerning Section 12 and this rule see "Export Notification Clarification Statement" 45 FR 37608, July 21, 1981.

dix: 100 MOST POPULOUS LOCAL EDUCATION AGENCIES

ANK	MEMBERSHIP	NAME OF UNIT	LOCATION
1	962,963	New York City Sch Dist	Brooklyn, NY
2	721,419	Puerto Rico Sch Dist	Hato Rey, PR
3	550,606	Los Angeles Unif Sch Dist	Los Angeles, CA
4	477,339	City of Chicago Sch Dist	Chicago, IL
5	232,328	Philadelphia City Sch Dist	Philadelphia, PA
6	223,740	Dade County Sch Dist	Miami, FL
7	220,046	Detroit City Sch Dist	Detroit, MI
8	193,907	Houston ISD	Houston, MI
9	187,764	Archdiocese of Chicago	Chicago, IL
0	172,152	Archdiocese of Philadelphia	Philadelphia, PA
1	168,660	Hawaii Dept of Education	Honolulu, HI
2	136,634	Archdiocese of New York	New York, NY
3	136,187	Baltimore City Sch Dist	Baltimore, MD
4	135,313	Broward County Sch Dist	Ft. Lauderdale, FL
5	130,357	Dallas ISD	Dallas, TX
6	128,411	Fairfax Co Sch Dist	Fairfax, VA
7	127,529	Prince Georges Co Sch Dist	Upper Marlboro, MD
8	118,722	Diocese of Brooklyn	Brooklyn, NY
9	113,606	Memphis City Sch Dist	Memphis, TN
0	111,922	San Diego City Unif Sch Dist	San Diego, CA

RANK	MEMBERSHIP	NAME OF UNIT	LOCATION
21	111,889	Hillsborough County Sch Dist	Tampa, FL
22	110,601	Archdiocese of Los Angeles	Los Angeles, CA
23	106,156	D.C. Public Schools	Washington, DC
24	104,867	Jefferson County Sch Dist	Louisville, KY
25	102,633	Montgomery County Sch Dist	Rockville, MD
26	102,329	Baltimore County Sch Dist	Towson, MD
27	102,163	Duval County Sch Dist	Jacksonville, FL
28	92,558	Cleveland Sch Dist	Cleveland, OH
29	91,944	Milwaukee Sch Dist	Milwaukee, WI
30	88,388	Pinellas County Sch Dist	Clearwater, FL
31	87,425	Clark County Sch Dist	Las Vegas, NV
32	86,783	Orleans Parish Sch Dist	New Orleans, LA
33	83,533	Archdiocese of Detroit	Detroit, MI
34	83,487	Diocese of Cleveland	Cleveland, OH
35	83,090	Archdiocese of Newark	Newark, NJ
36	82,235	Orange County Sch Dist	Orlando, FL
37	82,086	Dekalb County Sch Dist	Decatur, GA
38	80,982	Albuquerque Sch Dist	Albuquerque, NM
39	79,190	Jefferson County Sch Dist	Lakewood, CO
40	77,799	Columbus Sch Dist	Columbus, OH

RANK	MEMBERSHIP	NAME OF UNIT	LOCATION
41	76,121	Mecklenburg Charlotte Sch Dist	Charlotte, NC
42	74,560	Atlanta City Sch Dist	Atlanta, GA
43	71,989	Anne Arundel Sch Dist	Annapolis, MD
44	71,504	Nashville-Davidson Co Sch Dist	Nashville, TN
45	70,963	Palm Beach County Sch Dist	W Palm Beach, FL
46	70,738	Archdiocese of Boston	Boston, MA
47	69,735	Indianapolis Pub Schs	Indianapolis, IN
48	68,964	Saint Louis City Sch Dist	St. Louis, MO
49	68,951	Boston Sch Dist	Boston, MA
50	67,698	Archdiocese of St. Louis	St. Louis, MO
51	66,821	Fort Worth ISD	Fort Worth, TX
52	65,908	E Baton Rouge Parish Sch Dist	Baton Rouge, LA
[illegible]	65,128	Denver Sch Dist	Denver, CO
54	61,816	San Antonio ISD	San Antonio, TX
55	61,707	El Paso ISD	El Paso, TX
56	61,534	Jefferson Parish Sch Dist	Gretna, LA
57	61,438	Newark Sch Dist	Newark, NJ
58	61,099	Archdiocese of New Orleans	New Orleans, LA
59	60,966	Mobile County Sch Dist	Mobile, AL
60	60,311	Archdiocese of Cincinnati	Cincinnati, OH
61	59,878	Granite Sch Dist	Salt Lake City, UT
62	58,912	Polk County Sch Dist	Bartow, FL

RANK	MEMBERSHIP	NAME OF UNIT	LOCATION
[illegible]	58,459	New Castle Co Sch Dist	Wilmington, DE
64	57,265	San Francisco Unif Sch Dist	San Francisco, CA
65	57,082	Austin ISD	Austin, TX
66	56,561	Tucson Unified Sch Dist 001	Tucson, AZ
67	56,199	Archdiocese of Milwaukee	Milwaukee, WI
68	56,118	Diocese of Trenton	Trenton, NJ
69	55,979	Cincinnati Sch Dist	Cincinnati, OH
70	55,830	Virginia Beach City Sch Dist	Virginia Bch, VA
71	55,323	Long Beach Unif Sch Dist	Long Beach, CA
72	55,081	Cobb County Sch Dist	Marietta GA
73	54,709	Wake County Sch Dist	Raleigh, NC
74	53,856	Portland Sch Dist 01J	Portland, OR
[illegible]	53,540	Greenville County Sch Dist	Greenville, SC
76	52,592	Tulsa City Sch Dist	Tulsa, OK
77	50,577	Diocese of Rockville Centre	Rockville Centre, NY
78	50,371	Seattle Sch Dist	Seattle, WA
79	50,080	Diocese of Pittsburgh	Pittsburgh, PA
80	49,328	Jefferson County Sch Dist	Birmingham, AL
81	48,729	Buffalo City Sch Dist	Buffalo, NY
82	48,632	Pittsburgh City Sch Dist	Pittsburgh, PA
83	48,612	Brevard County Sch Dist	Rockledge, FL
84	48,466	Oakland Unif Sch Dist	Oakland, CA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 21 1982

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

SUBJECT: Model Asbestos in Schools; Cooperative Compliance Program

TO: Regional Asbestos Coordinators

Introduction

As you know, on May 28, 1982, the Agency issued a final rule, "Friable Asbestos-Containing Materials in Schools; Identification and Notification," under Section 6 of the Toxic Substances Control Act (TSCA). This rule requires local education agencies (LEAs) to comply with its requirements by June 28, 1983. In FY83 only limited Federal resources will be available to monitor compliance with this rule. We anticipate, however, that the States will also have a major interest in determining the level of asbestos contamination in the schools under their jurisdiction. In fact, we are aware that the Regions have worked with the States to varying degrees in the Technical Assistance Program (TAP) for voluntary inspection of schools for asbestos. In many States, this cooperation resulted in the inspection of most public and some private school buildings for friable asbestos containing materials, however, not all buildings in all States were inspected. Therefore, we encourage the Regions to continue or expand their cooperative programs with the States for monitoring compliance with this rule and to develop such programs where they do not exist.

Program Substance

In seeking cooperation from the States, the Regions should try to establish the most comprehensive complementary program possible. No matter what the degree of State participation, the Regions will want to establish a comprehensive tracking and implementation system for the compliance monitoring program which identifies the following for each State:

1) public schools
2) private schools
3) number with friable material
4) number with asbestos
5) number where corrective action has been taken

States can participate to varying degrees in the planning and implementation phases of a cooperative program.

Information Sharing

A State may agree to supply the information regarding its schools to help the Region better target planned inspections. This information could include information about the age and population of schools and, if available, the status of any activities involving asbestos in schools in that State.

Partial Compliance Monitoring Responsibility

The State may agree to divide compliance monitoring responsibility for the asbestos in school rule. For instance, a State may decide to undertake compliance monitoring activities in public schools, while EPA would monitor compliance in private schools. Other possible divisions of responsibility could be according to geographic areas in a state, or rural vs. urban areas.

Under such a program the State and the Region would pool information resulting from the inspections for inclusion in the Federal program tracking system.

Laboratory Support

A State may also offer laboratory analytical support for analysis of Federal samples collected during compliance inspections for the asbestos in schools rule.

Total Compliance Monitoring Responsibility

The Region and the State could pool their data from the Technical Assistance Program. Based on this data, each State could develop its own program of targetting, and conducting inspections and supply EPA with quarterly reports on accomplishments.

Program Form

A cooperative compliance monitoring program can be implemented by means of either formal or informal agreements.

Formal Agreements

For those Regions and States interested in the formal approach, we have attached a model Memorandum of Agreement which describes the most comprehensive cooperative program which EPA and the States could undertake. This model, however, is only suggested as a guide. Regions may use the model or modify it as deemed appropriate for any formal agreement reached with the State.

There are two major advantages of entering into a formal written agreement with a State. First a written agreement would embody a comprehensive plan for the compliance monitoring program with a clear indication to both parties of their specific commitments to one another. Secondly, a formal agreement would allow EPA to designate participating State inspectors as representatives of EPA, thus allowing them access to private schools which they might otherwise have no authority to enter.

Informal Agreements

We realize, that some States, although willing to participate in a cooperative program, may be reluctant to enter into a formal written agreement with EPA. In this case, Regions should pursue informal agreements with States. However, in such circumstances each Region should develop its own written plan indicating what activities will be performed by the State. However, under such an informal arrangement, EPA will not be able to designate the State officials as Agency representatives, which may limit State activities.

All programs, formal and informal, should be reviewed at least annually by the Regional Asbestos Coordinator.

If there are any comments or questions regarding the model Memorandum of Agreement for asbestos in schools compliance monitoring, contact David Hannemann at 755-9152. Other questions regarding the Asbestos in Schools Program should be addressed to Pamela Harris at 382-5567.

A. E. Conroy II

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

Attachment

DRAFT

8 JUL 1982

MODEL NON-FUNDED COOPERATIVE AGREEMENT
ASBESTOS IN SCHOOLS

MEMORANDUM OF AGREEMENT

BETWEEN

THE U.S. ENVIRONMENTAL PROTECTION AGENCY

AND

STATE OF _____ ADMINISTRATIVE AGENCY
(Public Health Department or Board of Education)

I. PREAMBLE

This memorandum of agreement supports a comprehensive program for monitoring compliance with the laws enacted by the United States of America and the State of _____ to protect human health and the environment from the hazards of exposure to asbestos-containing materials in schools. Both agencies agree that cooperating to obtain compliance with State and Federal rules governing friable asbestos-containing materials in schools is necessary and desirable to minimize duplication of efforts and to respond to mutual concerns for human safety.

AUTHORITY

The U.S. Environmental Protection Agency (EPA) is responsible for administering and enforcing the Toxic Substances Control Act (TSCA) [15 USC 2601 et seq.] Under TSCA, EPA has the authority to protect man and the environment from any unreasonable risks to health from toxic substances. As part of this mandate, EPA has promulgated regulations requiring public and private schools through the secondary level to identify friable asbestos-containing building materials and notify the employees and Parent Teacher Associations if friable asbestos-containing materials are found (40 CFR Part 763, 47 Federal Register 23360, May 27, 1982). Under the authority of TSCA sections 10 and 28 EPA may enter into cooperative agreements with States to monitor compliance with the requirements of TSCA.

The State of _____ is responsible for administering and enforcing the _____ Law.[Statutory citation] Under that law, the Director/Administrator of the _____ is empowered to (Brief summery of State Law).

The above listed statute(s) provide the State of _____ Administrative Agency authority for the following activities:

(Entry into a Memorandum of Agreement)

Identification of Friable Materials

Inspection of Public School Buildings

Inspection of Private School Buildings

Other (response to complaints)

Sample Collection

Sample Analysis

Inspection of Records (recordkeeping & notification)

III. RESPONSIBILITIES

The State of _____ Administrative Agency and EPA propose to provide a level of compliance monitoring within the State of _____ to assure that all school are inspected for friable asbestos-containing materials and are in compliance with applicable Federal and State laws. The State of _____ Administrative Agency and EPA will exchange information, coordinate activities and assist each other to eliminate duplication of efforts. The State of _____ Administrative Agency and EPA will meet at a minimum of twice a year to coordinate mutual planning and implementation elements of their respective Asbestos in Schools programs. To accomplish this goal, the State of Administrative Agency _____ and EPA agree to undertake the responsibilities set forth in this agreement.

A. STATE RESPONSIBILITIES

The State of _____ Administrative Agency agrees to develop an inspection program consisting of one or more of the following elememts for identifying friable asbestos-containing materials and reviewing LEA's recordkeeping and notification files.

Program Planning Elements

1. Designate an individual to serve as a contact person with EPA Region ___ on all matters relating to this memorandum of agreement.

2. Identify to EPA Region ___ all schools in the State, by Local Educational Agency (LEA).

3. Notify EPA Region ___ of all schools that have been inspected for friable asbestos-containing materials under the technical assistance program (TAP).

4. Develop an inspection profile identifying friable asbestos-containing materials for schools in the State:
   a. not inspected under the TAP or;
   b. inspected but meeting the standards for satisfactory participation in the (TAP).

5. Identify all LEA central record offices for EPA.

6. Develop a neutral inspection scheme for conducting recordkeeping and notification inspections at the State LEA's.

Program Implementation Elements

1. Continue current State program identifying and sampling all friable materials in schools for asbestos fibers until all school buildings are in compliance with 40 CFR Part 763 and State asbestos in schools laws.

2. Conduct recordkeeping and reporting inspections based on a neutral inspection scheme to:
   a. Identify school buildings with friable asbestos-containing materials and the locations of the asbestos.
   b. Determine if the required records are being maintained and,
   c. Determine if the proper individuals or groups were notified regarding the findings of the inspection.

3. Encourage compliance with the State/Federal Asbestos in Schools law/rule and take appropriate enforcement actions when there is no other alternative.

4. Report violations of the Federal asbestos in schools identification and notification rule to EPA Region ___.

B. EPA RESPONSIBILITIES

The U.S. Environmental Protection Agency (EPA) agrees to develop an inspection program for friable asbestos-containing materials and reviewing LEA's recordkeeping and notification files that will compliment the State asbestos in schools program. The EPA will also provide technical assistance, training and analytical support as well as perform other activities that will compliment the State program. .

Program Planning Elements

1. Designate an individual to serve as the contact person with the State of _____ Administrative Agency on matters relating to this memorandum of agreement.

2. Assist the State of _____ Administrative Agency in developing its inspection profiles.

3. Evaluate the status of the TAP and develop standards for satisfactory participation. LEA's which have satisfied the standards will be given a low priority for compliance monitoring inspections.

4. Develop a neutral inspection scheme for the 100 largest LEA's in the country for recordkeeping and notification inspections.

Program Implementation Elements

1. Provide compliance assistance and training for State inspectors or other interested groups involved in inspecting school buildings for friable asbestos containing materials. This training will occur in the State of _____ and/or at the EPA Region ___ office or elsewhere as determined by the parties.

2. Issue Federal inspector credentials to all trained and qualified State personnel.

3. Provide sample analysis assistance, as needed, to the State for friable materials. EPA will also provide a list of laboratories which participate in its quality assurance program.

4. Conduct Federal inspections for identification of friable asbestos-containing materials in schools referred to EPA by the State.

5. Conduct Federal recordkeeping and notification inspections at LEA's using EPA's neutral inspection scheme and data on LEA's the State will inspect.

6. Conduct follow-up inspections for violations and complaints regarding friable asbestos-containing materials in schools.

IV. STATEMENT OF WORK

A. The State of _____ Administrative Agency agrees to:

1. Enumerate State employees involved in the Asbestos in Schools compliance monitoring program as follows:

	Number in Program	Work years in Program
Director/Administrator	___	___
Program Manager	___	___

	Number in Program	Work years in Program
Inspector	___	___
Chemists/Lab Technicians	___	___
Clerical	___	___
Consultants	___	___
Legal	___	___

1. Identification Inspections.

   The ____State____ or local orgainzation will inspect (number) school buildings for friable materials. Friable materials are those which can be crumbled using hand pressure.

2. Collection of friable material samples.

   The ____State____ agrees to collect samples of all friable materials in school buildings (3 samples from each homogeneous area of friable material). Sample locations must be plotted on a diagram of the school building.

3. Analysis of Samples.

   The State agrees to analyze all samples of friable materials collected under the friable asbestos-containing materials in schools program. Sample analysis must employ polarized light microscopy (PLM) with X-ray diffraction (XRD) used only as a confirmation technique.

4. Recordkeeping and Notification Inspections.

   The ____State____ agrees to perform (number) recordkeeping and notification inspections at LEA's central record offices and will conduct follow-up inspections at a minimum of (3) three schools to verify records.

   Sample collection and analysis conducted in connection with recordkeeping and notification inspections will follow the procedures outlined in items 2 and 3 above.

SUMMARY - Projected Outputs Under the Agreement

Activity	Quarter 1st	2nd	3rd	4th	Total
Identification Inspections	___	___	___	___	___
Samples	___	___	___	___	___
Analyzes	___	___	___	___	___
Recordkeeping & notification Inspections	___	___	___	___	___
Samples	___	___	___	___	___
Analyzes	___	___	___	___	___

B. The Environmental Protection Agency agrees to:

1. Identification Inspections.

   The EPA will inspect (number) school buildings for friable materials. Friable materials are those which can be crumbled using hand pressure.

2. Collection of friable material samples.

   The EPA agrees to collect samples of all friable materials in school buildings (3 samples from each homogeneous area of friable material). Sample locations must be plotted on a diagram of the school building.

3. Analysis of Samples.

   The EPA agrees to analyze all samples of friable materials collected under the friable asbestos-containing materials in schools program. Sample analysis must employ polarized light microscopy (PLM) with X-ray diffraction (XRD) used only as a confirmation technique.

4. Recordkeeping and Notification Inspections.

   The EPA agrees to perform (number) record-keeping and notification inspections at LEA's central record offices and will conduct follow-up inspections at a minimum of three (3) schools to verify records.

   Sample collection and analysis conducted in connection with recordkeeping and notification inspections will follow the procedures outlined in items 2 and 3 above.

SUMMARY - Projected Outputs Under the Agreement

Activity	Quarter 1st	2nd	3rd	4th	Total
Identification Inspections	___	___	___	___	___
Samples	___	___	___	___	___
Analyzes	___	___	___	___	___
Recordkeeping & notification Inspections	___	___	___	___	___
Samples	___	___	___	___	___
Analyzes	___	___	___	___	___

MODIFICATION, SUSPENSION OR TERMINATION OF THIS AGREEMENT

This Memorandum of Agreement, when accepted by both parties, shall continue in effect unless modifed by the mutual written consent of both parties or be terminated by either party upon a thirty (30) day advance written notice to the other. The specific output commitments set forth in this original agreement shall be for the period of _____ to _____. Mutual agency outputs shall be negotiated annually.

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Date _____ Approved _____

Regional Administrator, Region ___

U.S. Environmental Protection Agency

FOR THE STATE OF _____ ADMINSTRATIVE AGENCY

Date _____ Approved _____

Title _____

State Administrative Agency

ASBESTOS IN SCHOOLS - MEMORANDUM OF AGREEMENT

The TSCA rule "Asbestos: Friable Asbestos-Containing Materials in Schools: Identification and Notification," which became effective on June 28, 1982 will be enforceable on June 28, 1983. Only limited Federal resources will be available to monitor compliance with this rule. Therefore, in FY 83, EPA wishes to enter into non-funded cooperative agreements with the States to supplement Federal resources for monitoring compliance with the requirements of the asbestos in schools rule.

Attached is a model memorandum of agreement which describes the most comprehensive cooperative program which EPA and the States could undertake. We hope that the States will be willing to assume as many of the outlined responsibilities as are appropriate and feasible based on their own level of resources and prior compliance monitoring activities in this area. Since these agreements will be non-funded, we recognize that the level of each Regional program will be based on the level of responsibility which each State voluntarily assumes. Any level of responsibility which the State is willing to assume is welcome and should be accepted by the Regions.

Please review this draft memorandum of agreement and be prepared to discuss implementation of the program at the National Meeting.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 15 1982

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

TO: John A. Todhunter, Ph.D.
Assistant Administrator
for Pesticides and Toxic Substances (TS-788)

SUBJECT: Compliance Assistance Guidelines for the Asbestos-In-Schools Rule

Attached for your approval is a document entitled "Compliance Assistance Guidelines: Friable Asbestos-Containing Materials in Schools; Identification and Notification Rule." The document was developed by the Chemical Control Division in conjunction with the Pesticides and Toxic Substances Enforcement Division in order to provide clear, concise guidance to States and local education agencies (LEAs) on how to comply with the rule. The guidance will be applicable to LEAs in all stages of rule compliance. It provides information to assist both LEAs that have participated to some degree in the Agency's voluntary program, but question whether their activities were sufficient to satisfy the rule's requirements, as well as LEAs that did not participate in the voluntary program and are now beginning their asbestos program by complying with the rule.

The document has been reviewed by the Regional Asbestos Coordinators and their comments have been incorporated. I recommend that you approve this document so that we may begin to circulate it to the LEAs.

Don R. Clay, Director
Office of Toxic Substances

Attachment

Approve D R Clay for JAT

Disapprove _____

Date 12/29/82

Compliance Assistance Guidelines: Friable Asbestos-Containing Materials in Schools; Identification and Notification Rule

I. Who must comply

A. Local education agencies (LEA) must inspect each school building built prior to December 31, 1978, which they lease, own, or otherwise use as a school building, to locate all friable material.

B. School means any public or private day or residential school which provides elementary or secondary education for grade 12 or under as determined under State law, or any school of any Agency of the United States (20 U.S.C. 2854).

> Note: State law will determine whether kindergartens, nursery schools, or day-care centers are considered elementary schools for purposes of this rule.

II. Inspections

A. LEAs must inspect all areas within the school building including:

Ceilings and walls in hallways, classrooms, gymnasiums, swimming pools, auditoriums, cafeterias, machinery and storage rooms, steel support beams and columns, and pipes and boiler areas.

B. Inspection shall include looking for and touching all suspect friable materials, including surfaces behind suspended ceilings and non-permanent concealed areas which may be entered during normal maintenance and repairs. (e.g., access panel for utilities).

C. Friable material means any material applied onto ceilings, walls, structural members, piping, ductwork, or any other part of the building structure, which when dry may be crumbled, pulverized or reduced to a powder by hand pressure.

> Note: A key phrase is "applied onto". This does not include ceiling tile.

D. The key point to be noted is that material must be friable. An example to note is pipe insulation. If upon inspection one finds pipe insulation to be exposed or pipe lagging to be deteriorating and the insulation material is friable, adequate steps should be taken to sample and analyze the material to determine if it is asbestos. Undamaged pipe lagging and boiler wrapping should not be disturbed.

E. Local education authorities that have not inspected schools for possible friable materials on pipe, ductwork, or boilers, must do so according to this rule.

III. Sampling

A. If friable materials are found in a school building, at least 3 samples from locations distributed throughout the sampling area must be taken for each distinct type of material found. Each sample must be identified with an identification (ID) number unique to the sampling location and building. The location of each sample should be documented and added to the school's records. (For additional information on how to take samples, see Appendix A.)

> Note: Additions to buildings should be inspected carefully for similarities to older parts of the buildings. Often building materials may appear to be the same when they are actually of different composition. It is important to inspect all areas of the building, rather than considering an entire building to be one sampling area.

B. Sampling area means any area, whether contiguous or not, within a school building which contains friable material that is homogenous in texture and appearance. If two areas differ in appearance, the rule requires that 3 samples be taken from each area.

C. The requirement that 3 samples be taken in each area supersedes the recommendation made in Asbestos-Containing Materials in School Buildings: A Guidance Document Part I to take one sample per 5000 square feet of friable material.

D. In schools where only 1 or 2 samples were originally obtained, additional samples must be taken to meet the rule requirement of 3 samples for each distinct type of friable material found.

Note: Schools which determine that asbestos was present based on analysis of less than 3 samples may certify that all friable materials will be treated as asbestos containing. In this case, additional samples will not need to be taken; however, recordkeeping and notification requirements will still apply. If schools wish to make the case that no asbestos is present, then 3 samples are required.

E. Friable materials on piping and boilers are a unique situation. Often only a portion of piping and boiler lagging is friable. When friable materials are present, schools may choose from one of the following approaches:

1. Take 3 samples of the material for analysis.

2. Certify that the materials contain asbestos (§763.117(c)) and comply with the rest of the Rule.

3. Take one sample of the friable material and have it analyzed. If asbestos is present, then treat the pipe and boiler lagging as if it contains asbestos. If one sample shows no asbestos is present, take 2 more samples to comply with the Rule.

F. Sampling locations should be randomly distributed within the sampling areas. Locations should not be selected for convenience or ease of reaching the sample or because the sampler judges the location to be representative (e.g., all samples in a single area).

G. Friable materials on pipes and boilers should be considered as distinct areas.

IV. Analysis

A. LEAs shall have all samples of friable material analyzed for asbestos using Polarized Light Microscopy (PLM), supplemented where necessary by X-Ray Diffraction in accordance with "Interim Method for the Determination of Asbestiform Minerals in Bulk Insulation Samples."

Note: Use of electron microscopy will not qualify the school for compliance after June 28, 1982.

B. A list of laboratories which participate in EPA's quality assurance program for analysis of bulk asbestos samples may be obtained by calling Research Triangle Institute. (1-800-334-8571)

C. Schools should keep records of all written correspondence with laboratories (laboratory reports and interpretations of these reports).

Note: The following information should be included in a laboratory report: (schools should ask the lab to include this information).

1. The sample ID number.
2. A statement that the sample was analyzed using PLM supplemented by X-ray diffraction where necessary.
3. Percent of each type of asbestos present.
4. Comments on any other materials present.

V. Warnings and Notifications (only when asbestos is present)

In schools where friable asbestos-containing materials are present, the following notification requirements shall be met:

A. Notice to School Employees (Posting Requirement).

1. Notice to School Employees (EPA form 7730-3) shall be posted in the primary administrative and custodial offices and in the faculty common rooms of each school.

2. Content must be identical to EPA Form 7730-3. Copies may be obtained through the Industry Assistance Office (IAO) EPA Headquarters 800-424-9065 or from Regional Offices.

3. Notice shall remain posted indefinitely in any school which has friable asbestos-containing material.

B. Guide for Reducing Asbestos Exposure.

A copy of the "Guide for Reducing Asbestos Exposure", (EPA Form 7730-2), shall be distributed to all custodial or maintenance employees. Copies may be obtained from IAO, EPA Headquarters, or from Regional Offices.

C. Written notice of location of friable asbestos materials to all building employees.

Local education authorities must provide all persons employed in the school a written notice of the location, by room or building area, of all friable asbestos-containing material in the school.

D. Notice to Parent-Teacher Associations (PTA).

Local education authorities shall provide notice of the results of inspections and analyses to the PTA of that school. If there is no PTA for the school, the local education authority must directly notify the parents of its pupils. EPA recommends that the notification include the following statement: "It is important to note that not all friable asbestos-containing material need be removed from schools. Once such material has been identified, a program can be implemented to ensure that the material is maintained in good condition and that appropriate precautions are followed when the material is disturbed for any reason."

E. The format of the notices in items C and D are at the discretion of the local education authority. A copy of the notifications, a list of addressees, and the date of notifications should be kept in the school's records.

VI. Recordkeeping

No forms are to be submitted to EPA. These are recordkeeping requirements which must be made publicly available upon request.

A. Records in Each School: LEAs shall compile and maintain in the administrative offices of each school under their authority a record which includes:

1. Name and address of the school.

2. List of all school buildings associated with the school, an indication the inspection has been completed, and which buildings contain friable materials. This should include space that is leased, owned or otherwise used as a school building.

3. Documentation for schools which contain friable materials:

   a. A blueprint, diagram, or written description of the building which indicates the location and area in square feet of each sampling area of such material(s), the location samples were taken, and the identification number of each sample, and which describes whether each sampling area of friable material contains asbestos, including an estimate of its asbestos content.

b. Copies of all laboratory reports. (See III(C) for content of reports).

c. Copies of the Notice to school employees.

d. Copies of the "Guide for Reducing Asbestos Exposure," and one copy of Parts 1 and 2 of the Guidance Document "Asbestos-Containing Materials in School Buildings." These documents can be obtained either through the IAO, EPA Headquarters or from Regional Offices.

4. A statement that the requirements of the rule have been satisfied, signed by the person responsible for compliance with the rule. The person responsible for compliance should be an official of the LEA.

B. Records at the LEA.

1. A list of all schools under its authority, indicating whether schools were inspected and which schools contain friable asbestos.

2. A record of the friable materials in schools which were sampled and analyzed, indicating which materials contain asbestos.

3. For each school which contains friable asbestos materials, the total area of such materials in square feet and the number of school employees who regularly work in the school.

4. EPA Form 7730-1, "Inspections for Friable Asbestos-Containing Materials."

a. Each LEA shall complete and retain in the administrative office of the LEA EPA Form 7730-1, "Inspections for Friable Asbestos-Containing Materials."

b. Copies of this form may be obtained through the IAO, EPA Headquarters, or from Regional Offices.

VII. Exemptions

A. Exempt from all Provisions of the Rule.

1. Schools built after December 31, 1978.

2. Schools in which all friable asbestos-containing materials have been eliminated by removal.

   NOTE: For the purpose of this exemption the use of air-tight enclosures which are constructed between the asbestos material and the building environment will be considered a step equal to removal. To be considered satisfactory, an enclosure must completely restrict access to the friable asbestos material, be completely air-tight, and contain no air plenum. Suspended ceilings with removable ceiling tiles are <u>not</u> adequate to meet this exemption.

3. Schools in which an abatement program has resulted in the elimination of all friable asbestos-containing material by satisfactory encapsulation.

   a. Satisfactory encapsulation means that the material is completely encapsulated, no longer exposed, no longer capable of releasing fibers, and not friable.

   Note: Encapsulated material should be visually inspected to be sure there are no holes or voids in the membrane. The membrane should not be cracked (if membrane is flexible it will not crack under normal building settling or impact).

   b. In many cases sprayed on friable asbestos-containing material cannot be satisfactorily encapsulated, especially material which appears fluffy or similar to cotton candy.

B. Exempt from Inspection, Sampling, and Analysis. Schools are exempt from §§ 763.105, 763.107, and 763.109 if they:

1. Visually inspected <u>all</u> areas of the school for friable material prior to the effective date of the rule.

2. Sampled each distinct type of friable material according to the rule requirement of taking 3 samples per distinct area are exempt from sampling requirements. (See item III (D)).

3. Had the samples analyzed using PLM supplemented by X-Ray Diffraction where necessary, or by Electron Microscopy.

   If a school building was found to contain friable asbestos-containing materials, then the recordkeeping and notification requirements of the Rule shall apply to the LEA.

   The inspection, sampling, and analysis requirements of this rule shall not apply to schools certifying that all friable materials shall be treated as asbestos-containing. The record shall also include information on the location of these materials.

C. Certification Requirement

1. If a school inspected, sampled, and analyzed for friable asbestos-containing materials prior to the effective date of the Rule and found none, the school is exempt from the recordkeeping and notification requirements of the Rule. However, schools which have friable material present shall retain a copy of all laboratory reports and all correspondence with laboratories concerning the analyses of samples taken and maintain in the record a certifying statement that the building contains no friable asbestos materials. The required certifying statement can be found in §763.117(a)(3) of the Rule.

2. Schools which can document that no friable asbestos-containing building materials were used in construction, modification, or renovation are exempt from the Rule. Documentation must clearly show that any friable material used did not contain asbestos. A certifying statement to this effect must be maintained in the school's record. The required certifying statement can be found in §763.117(b)(2) of the Rule.

Appendix A - How to take a sample

- Use a small container such as a plastic 35mm film canister, a small, wide-mouthed glass jar with a screw-on lid or a prescription medicine bottle. The container should be dry and clean.

- Gently twist the open end of the container into the material. A core of the material should fall into the container. A sample can also be taken by using a knife to cut out or scrape off a small piece of material and then placing it into the container.

  Note: Be sure to penetrate any paint or protective coating and all the layers of the material. If the sample container cannot penetrate the material, consider whether the material is really friable or not.

- Tightly close the sample container. Wipe the exterior of the container with a damp cloth to remove any material which may have adhered to it during sampling.

- Tape the container lid to prevent the accidental opening of the container during shipment or handling.

- Label the sample container. This label should identify the school date the sample was taken, sample (ID) number and the collector's name.

- Make a record of each sample by noting the date the sample was taken, location of material sampled, the area of room sampled, and the sample ID number.

- Send the sample to an analytical laboratory for analysis. (For names of laboratories which participated in the Agency's Quality Assurance (QA) Program, call (800) 334-8571).

- To avoid causing unnecessary exposure to asbestos fibers, the following precautions should be taken during sampling.

  - The material should be sampled when the area is not in use.

  - Only those persons needed for the sampling should be present.

  - The sample container should be held away from the face during actual sampling.

- Do not disturb the material any more than necessary.

- The material can be sprayed with a light mist of water to prevent fiber release during sampling.

- If a large number of samples are taken, NIOSH recommends that the sampler wear an approved respirator. Contact the NIOSH Regional Offices listed in Appendix E of Guidance Document 1 for information on approved respirators.

- If pieces of material break off during sampling, wet mop the floors and areas where they have fallen.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

8 JUL 1983

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

TO: Regional Toxic Branch Chiefs
Air and Hazardous Materials Division Directors
Environmental Services Division Directors

SUBJECT: Asbestos in Schools Enforcement Response Policy

Attached is a final copy of the Enforcement Response Policy for the Asbestos in Schools Rule. The compliance date for this rule is June 28, 1983. Evidence of noncompliance after this date is a violation of the rule and as such is subject to enforcement actions as discribed in this policy.

If you have any questions, call Pamela Harris of my staff (FTS 382-5567).

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Attachment

cc: Marcia Williams, OTS
Edward Klein, CCD
Ted Firetog, OLEC

July 6, 1983

ENFORCEMENT RESPONSE POLICY FOR THE FRIABLE ASBESTOS-CONTAINING MATERIALS IN SCHOOLS: IDENTIFICATION AND NOTIFICATION REGULATION

COMPLIANCE MONITORING STAFF
OFFICE OF PESTICIDES AND TOXIC SUBSTANCES
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

Asbestos in Schools Enforcement Response Policy

CONTENTS

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:

- Notice of Noncompliance
- Civil Complaint
- Injunctive Action
- 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

- o Falsification of notices to staff and PTA's or parents
- o 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

- o Failure to create and keep accurate records (including certification statement for exemptions)
- o Failure to inspect
- o Failure to sample
- o Failure to analyze samples
- o 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

1. 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.

DIOXIN CONTAMINATED WASTE
COMPLIANCE STRATEGY

THE PESTICIDES AND TOXIC SUBSTANCES
ENFORCEMENT DIVISION,
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

STRATEGY FOR THE ENFORCEMENT OF THE TSCA-SECTION 6 RULE ON TETRACHLORODIBENZO-P-DIOXIN (2,3,7,8-TCDD)

OVERVIEW

The Agency published an immediately effective proposed §6 rule under the Toxic Substances Control Act (TSCA) on the disposal of wastes contaminated with 2,3,7,8-Tetrachlorodibenzo-p-dioxin (TCDD) on March 11, 1980. The Agency issued the final §6 rule on May 19, 1980. The rule:

- Poses restrictions on Vertac, Inc., Jacksonville, Arkansas, regarding the removal for disposal of wastes containing TCDD.
- Requires Vertac to post notices at its facility at the principal access point to the storage area stating that dioxin wastes are stored on site and that removal for disposal is prohibited.
- Requires Vertac to test certain wastes.
- Requires Vertac to notify the Agency one week prior to shipment of waste material
- Requires that any person disposing of wastes containing TCDD notify EPA at least 60 days prior to disposal.

The dioxin in question is an impurity formed in the process of manufacturing 2,4,5-Trichlorophenol (2,4,5-TCP). 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 such as 2,4,5-Trichlorophenoxy acetic acid (2,4,5-T), 2-(2,4,5)-Trichlorophenoxy propionic acid (2,4,5-TP Silvex), Erbon, Ronnel and Hexachlorophene. All of these are contaminated to some degree with TCDD. In some cases pesticide producers manufacture 2,4-D immediately after making 2,4,5-TCP. Thus the residues of 2,4,5-TCP which were contaminated with TCDD could also contaminate to some degree, the 2,4-D. The level of contamination should, of course, be lower than would be found in 2,4,5-TCP, and over the course of production, the concentration of TCDD should decrease.

This §6 rule focuses on wastes because the dioxin contamination is more highly concentrated in the wastes associated with the production of these substances than in the final product. In fact the disposal of these substances themselves, i.e., the pesticides, is not covered by the §6 rule.

REQUIREMENTS OF THE RULE

The rule:

- Prohibits Vertac, Inc. or any person who disposes of chemicals for commercial purposes from removing for disposal any of the wastes containing TCDD produced before May 12, 1980, located at its Jacksonville, Arkansas, site.

- Requires Vertac to post the Jacksonville facility at the principal access point to the storage area(s) stating that dioxin wastes are stored on site and that removal for disposal is prohibited.

- Requires Vertac to dispose of all waste material containing TCDD produced at the Jacksonville facility after May 12, 1980, at facilities which comply with 761.41(b) (PCB Regulations) until 775.190(a)(3) is completed.

- Requires Vertac to notify the Assistant Administrator for Pesticides and Toxic Substances at least one week prior to shipment of dioxin waste material.

- Requires Vertac to test wastes produced after May 12, 1980, at the Jacksonville facility and provide the Assistant Administrator (OPTS) with results within two weeks of analyses. If the wastes contain no detectable TCDD, the disposal notification requirement is withdrawn.

- Requires any person who disposes of chemicals for commercial purposes to notify the Assistant Administrator by certified letter with a copy to the appropriate EPA Regional Administrator at least 60 days before the firm intends to dispose of any wastes containing TCDD.

Note: Waste material or wastes containing TCDD means any waste material or waste(s) resulting from the manufacture or processing of 2,4,5-Trichlorophenol (TCP) or its pesticide derivatives or any waste(s) resulting from manufacturing processes using equipment that was at some time used in the manufacture of 2,4,5-TCP or its pesticide derivatives.

REGULATED INDUSTRY

The regulated community is composed of those persons who dispose of the wastes addressed by this regulation. This would include potentially all those firms who have been and/or are still producing 2,4,5-TCP, 2,4,5-T, Silvex, Ronnel, Erbon, Hexachlorophene or those substances produced on equipment used to manufacture the above six substances (e.g., 2,4-D). The regulation focuses on the disposal of wastes. Thus even a firm that has not produced any of the above substances in several years would still fall within the ambit of this regulation if they now disposed of any of the regulated wastes.

The firms that produce(d) wastes subject to this regulation are divided into two classes: producers of manufacturing-use products and formulated/end-use products. In the process of making these substances, the manufacturing-use grade manufacturers remove much of the TCDD contaminant. As a result, the wastes of these firms may contain significant amounts of the contaminant TCDD. The formulators use the refined manufacturing-use grade to manufacture pesticides. This difference is taken into account in establishing inspection priorities. The following chart is a preliminary breakdown of plant sites associated with the generation of wastes which may be contaminated with TCDD. The chart only includes those firms who were producing these pesticides in the years 1977-1979. The Agency is also concerned about the location of wastes generated in the production of Agent Orange, a 50-50 mixture of 2,4,5-T and 2,4-D. (Information about the number and location of these sites is being developed.)

It should be noted that the actual number of inspections will be less than the "Total" listed as many plant sites produce more than one of these seven substances. Thus about 200 plant sites produce 290 formulations and 7 plant sites produce 14 manufacturing-use grade products. (One of these 7 is Vertac and would be inspected anyway.)

Pesticide	No. Manufacturing-Use Products	No. Formulations
2,4,5-TCP	1	19
2,4,5-T	3	60
Silvex	4	60
Erbon	0	4
Ronnel	2	79
Hexachlorophene	0	38
2,4-D	4	30
Total	14	290

*Manufacturing-use grade was referred to as technical grade in previous years. The term manufacturing-use refers to the grade which is used to manufacture pesticide formulations. It is the term used in the current Pesticide Registration Guidelines.

ENFORCEMENT

OBJECTIVES

The major objective of this strategy is to insure that no wastes regulated under this §6 rule are disposed of in violation of the rule. The ultimate goal of the rule is to prevent the improper disposal of dioxin, the one of the most toxic synthetic substance known.

A secondary objective unrelated to enforcing the rule is to identify any sites where the wastes were disposed prior to the effective date of the rule. Since the inspectors will be involved in determining what a company has done with its waste in order to assure that the firm has not violated the regulations, information on such sites may be available during the inspection. These sites will be added to the Office of Waste Programs Enforcement's (OWPE) tracking system. The Task Force might consider an enforcement action under RCRA or another relevant statute should the wastes pose a threat to health or the environment. It will be helpful to the Agency to locate these sites for monitoring purposes.

OUTREACH

Due to Agency concern over the degree to which the regulated industry is aware of the regulation, an outreach program to remind industry of the rule's requirements should be implemented. OPTSE will send a letter describing the requirements of the rule to companies which have produced or are currently producing 2,4,5-TCP, 2,4,5-T, Silvex, Ronnel, Erbon, or Hexachlorophene. The letter will be sent by certified mail return receipt requested. The OPTSE will be able to obtain a list of these pesticide registrants from the Establishment Registration Support System.

Failure to include all the information required by the rule is a violation of the rule. However, the Agency recognizes that not all such deletions are deliberate. When a notice arrives with obviously missing information, OPTSE will telephone the company and request the information. If the information is supplied by the company in writing within ten business days of the telephone call, the notice will be considered complete.

VIOLATIONS

There is only one possible specific violation of this rule (as it applies to Vertac), and there are four possible general violations of this regulation.

- Failure by Vertac to Comply with the Terms of the Rule
  Vertac violates the rule if it either:

  a) Moves any of its pre-May 12, 1980, TCDD wastes without EPA approval.

  b) Disposes of its TCDD contaminated 2,4-D wastes in an inappropriate landfill.

  c) Fails to notify EPA prior to disposal of any wastes generated in the resumption of the production of 2,4,5-TCP or its pesticide derivatives. (Note: In such a case, Vertac would be treated like any other dioxin waste holder subject to the rule. The other four general violations would apply.)

  d) Fails to test wastes generated after May 12, 1980, and/or fails to provide the AA of OPTS with results within two weeks of analysis.

  e) Fails to post the Jacksonville facility at the principal access point as required.

- Failure to Notify EPA Prior to Moving Dioxin Wastes
  This §6(d) rule requires a firm to submit a notice to the Assistant Administrator for Pesticides and Toxic Substances prior to moving dioxin wastes. Should a firm move these wastes without notice or if they are moved prior to the expiration of the 60 day notice period, the firm has violated both TSCA §15(1)(C) and §15(3)(B).

- Withholding Material Information from a Dioxin Notice If a firm withholds information essential to an Agency decision concerning the movement of dioxin wastes, the firm has violated §15(1)(C) and §15(3)(B) of TSCA. The notice would be invalid at the time of submission. If the firm then moves the dioxin contaminated wastes, it also commits a failure to notify violation.

- Submission of False or Misleading Information on a Dioxin Notice A firm submitting false or misleading information violates §15(1)(C) and §15(3)(B) of TSCA. The notice is therefore invalid at the time it is submitted. If the firm then moves the dioxin contaminated waste, it also commits a failure to notify violation.

° False Claim of No Detectable Levels of TCDD A firm is excluded from the §6(d) rule if it can show that its wastes contain no detectable levels of TCDD. Should the Agency determine that a firm's claim of non-detectability is false, then the firm has violated TSCA §15(1)(C).

INSPECTION SCHEME

The basis of the compliance monitoring for this rule will be a neutral administrative inspection scheme that will both comport with the Supreme Court's holding in Marshall v. Barlow's Inc. and establish priorities for targeting inspections. The first priority will be monitoring the Vertac site. This will be handled directly by OWPE. The rest of the firms can be broken down into three categories:

1) producers of the manufacturing-use grade 2,4,5-TCP, 2,4,5-T, Silvex, Ronnel, Erbon and Hexachlorophene,

2) formulators of any of these six substances,

3) producers of other products (e.g., 2,4-D) produced on the same equipment that was used to make any of the six substances mentioned in category 1.

While categories 1 and 3 will be small (10 to 20 sites), category 2 will contain about 200 sites. In addition, the wastes from category 1 firms probably contain significantly more TCDD than the other categories. After Vertac, the firms in category 1 should receive the highest priority in targeting inspections. Formulators are of less concern as their wastes will probably contain substantially less TCDD. The same holds for the substances produced on "contaminated equipment." Those firms in categories 2 and 3 would be inspected only after those in category 1.

The Agency should inspect all the manufacturing-use grade producers but does not have enough resources to inspect all the formulators. Therefore, it should select firms to inspect based on a Neutral Administrative Inspection Scheme from the sites in the Agency's records.

NEUTRAL ADMINISTRATIVE INSPECTION SCHEME

In order to select facilities to inspect without prejudice, the Agency will consider several factors. The population from which the selection will be made is composed of the approximately 200 plant sites that produce(d) pesticide formulations which could result in dioxin contaminated waste.

The seven plant sites which produce(d) the manufacturing use grade products are not included in the population. They will be inspected once every year and at least twice per year if violations are found.

To determine which formulation plant sites are to be inspected, the following criteria should be applied by each region:

Amount of Subject Pesticide Produced	Total Dioxin Waste Inspections*
Top third	50%
Middle third	30%
Lower third	20%

If a plant has been inspected once, it can be removed from the selection population for two years unless violations are found. Violations will trigger follow-up inspections and will keep the site in the selection population.

In addition, other sites at which violations are found in response to complaints or from information obtained during production site inspections (e.g., waste disposal sites) may be added to the population for future inspection.

*Does not include inspections of technical producers.

ADMINISTRATIVE CONSIDERATIONS

PROGRAM MANAGEMENT AND ALLOCATION OF RESPONSIBILITIES

OPTSE will:

- Coordinate with other offices in OPTS in reviewing Notices of Disposal and any resulting restrictions and keep the regions informed on these.
- Telephone companies submitting incomplete notifications to obtain omitted information.
- Target inspections and provide the regions information needed to conduct the inspections.

- Coordinate between the regions and the National Enforcement Investigations Center (NEIC) in Denver for inspections requiring sampling, physical inspection of a disposal site, or other areas of NEIC expertise.

- Coordinate with the OWPE regarding inspections of chemical waste disposal sites involving dioxin, and casework where action may be taken under either TSCA or RCRA or both.

- Review Concurrence Requests from the regions to issue a Civil Complaint under TSCA for violations of the §6 dioxin disposal rule.

- Participate in any criminal cases arising from violations of the §6 rule.

The regions will:

- Perform inspections and gather evidence for the case file.

- Prepare and issue Civil Complaints under TSCA (requires concurrence from headquarters) and handle any resulting litigation.

- Participate in filing criminal actions under TSCA.

NEIC's role:

- Inspections: Participates in inspections when sampling may be required. Sampling dioxin contaminated waste is dangerous and highly complex and requires special equipment and training.

- Analysis: NEIC will analyze dioxin waste samples. The rule requires that in order for a waste to be considered excluded from the regulatory requirements, there can be no detectable level of TCDD using capillary column gas chromatography interfaced with high resolution mass spectrometry (GC/HRMS). The GC/HRMS methodology detects dioxin down to about 3 parts per trillion. Consequently, accurate sample analysis is of the utmost importance. Due to the complex nature of dioxin sample analysis, the samples will probably be split, allowing more than one laboratory to analyze each sample. Other laboratories may be specified later.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

8 JUL 1983

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

MEMORANDUM

TO: Regional Toxic Branch Chiefs
Air and Hazardous Materials Division Directors
Environmental Services Division Directors

SUBJECT: 2,3,7,8-TCDD (Dioxin) Disposal Rule

Attached is a final copy of the Enforcement Response Policy for the 2,3,7,8-TCDD (Dioxin) Disposal Rule. This is a refinement of the document that was used to process the recent round of cases and incorporates the experience from those cases. If you have any questions, feel free to call Pamela Harris of my staff (FTS 382-5567).

A. E. Conroy II, Director
Compliance Monitoring Staff
Office of Pesticides and Toxic Substances

Attachment

cc: Marcia Williams, OTS
Edward Klein, CCD
Ted Firetog, OLEC

July 6, 1983

DIOXIN CONTAMINATED WASTE
ENFORCEMENT RESPONSE POLICY

COMPLIANCE MONITORING STAFF
OFFICE OF PESTICIDES AND TOXIC SUBSTANCES
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

ENFORCEMENT RESPONSE POLICY FOR THE DIOXIN CONTAMINATED WASTE RULE

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 deriviatives	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.")

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 Councel (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 <u>not</u> 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: (Levels 1 & 2) Noncompliance with prohibitions

Medium Range: (Levels 3 & 4) Marking violations

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:

- o A separate citation charge for the violation is found in this penalty policy.
- o 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.

United States
Environmental Protection
Agency

Pesticides and
Toxic Substances
Enforcement Division

EPA

Enforcement Facts and Strategy

Chlorofluorocarbons (CFCs)

Overview

Chlorofluorocarbons (CFCs) have been found to produce a risk to human health and the environment by causing depletion of the ozone layer which shields the Earth's surface from ultraviolet radiation. Although the effects of ozone depletion are difficult to quantify, increased exposure to ultraviolet radiation leads to a statistically significant increase in skin cancer. Some negative effects on plants and animals are also likely. There are some predictions of adverse effects because of an increase in the Earth's temperature ("greenhouse effect") and changes in climate.

On March 17, 1978, the Environmental Protection Agency published a rule which prohibits almost all of the manufacture, processing, and distribution in commerce of fully halogenated chlorofluoroalkanes (also known as chlorofluorocarbons or CFCs) for aerosol propellant uses subject to the Toxic Substances Control Act. In a related action, the Food and Drug Administration banned CFC aerosol propellants in most food, drug, and cosmetic products.

The intent of these rules is to reduce emissions of chlorofluorocarbons to the atmosphere, and thereby reducing the environmental risks caused by depletion of the ozone layer.

In 1975, approximately one-half of the CFCs produced in the United States were used as aerosol propellants. Since that time, this figure has dropped considerably. Alternative propellants or nonaerosol alternatives for most uses are available. When no alternative exists for an essential use, an exemption from the regulation may be granted.

Regulated Industries

Any manufacturer, bulk distributor, bulk importer, or processor (filler) of chlorofluorocarbons is subject to the rule, as are importers and exporters of aerosol products.

There are five CFC manufacturers and approximately 800 aerosol fillers in the United States. Together, they are responsible for nearly all of the CFC activity regulated by the ban; the other industry categories perform only a small percentage of regulated activity.

Requirements under the CFC Rule

Ban of Aerosol Propellant Uses*

The following activities are banned by EPA in connection with aerosol propellant uses of CFCs as of the dates indicated:

October 15, 1978	Manufacturing (except for export)
December 15, 1978	Processing, importing in bulk, importing finished aerosol articles, and distributing in bulk (exceprt for export

The following activities are banned by the related FDA rule:

December 15, 1978	Manufacturing and filling
April 15, 1979	Introducting finished products into interstate commerce

*The term "aerosol propellant" includes the substance which expels the active ingredients in a product and any other substance used to modify the expelling force or to achieve delivery of the active ingredients. In general, anything which is not an active ingredient is a propellant.

Essential Use Exemptions

The following uses have been found to be essential, and therefore are not banned:

EPA-regulated products:

- mercaptan stench mine warning devices
- release agents for molds in plastic and elastomeric production
- flying insect pesticides for use in non-residential food-handling areas and for space-spraying of aircraft
- diamond grit spray
- nonconsumer articles used as cleaner-solvents, lubricants, or coatings for electrical or electronics equipment
- articles necessary for the safe maintenance and operation of aircraft
- uses essential for military preparedness as determined by the Administrator and Secretary of Defense, and
- inkless fingerprinting systems (until August 1, 1981)

FDA-regulated products:

- metered-dose steroid human drugs for nasal inhalation
- metered-dose steroid human drugs for oral inhalation
- metered-dose adrenergic bronchodialator human drugs for oral inhalation
- contraceptic vaginal foams for human use
- metered-dose ergotamine tartrate drug products administered by oral inhalation for use in humans
- foamed or sprayed food products which contain chloropentafluroethane (F-115) as an aerating agent

When an exemption is granted for an essential use, it must only be used for that essential use. If a product can reasonably be expected to be used for nonessential uses, the filler may not represent the product as having other uses. If the product has an established market which includes many nonessential uses, the filler must make it clear, in labeling or advertising, the use is limited to the essential use exemption.

Certification

Purchasers of CFCs for any use must submit a certification to the manufacturer specifying whether the CFCs will be used for aerosol or other uses prior to shipment of the substance. This requirement applies to all CFCs manufactured after October 15, 1978.

Reporting

Manufacturers and processors of CFCs are required to file annual reports with EPA. The reports are mailed to the Pesticides and Toxic Substances Enforcement Division by March 31 of 1980, 1981, and 1982.

The 1980 manufacturers' reports will cover the period from October 16, 1978, through December 31, 1979; the 1980 processors' reports will cover the period December 16, 1978 through December 31, 1979. For the first report, each group has been asked to provide 1978 and 1979 data separately. Subsequent reports will cover the preceeding calendar year.

Record-keeping is not required by the rule, but will be necessary for compiling the annual report.

- The manufacturer's annual report includes a list of all purchasers of CFCs and the total quantities shipped, as well as a breakdown of quantities shipped for aerosol and other uses.

- Processors must submit a report showing from whom they purchased CFCs and the quantities purchased. They must also submit an itemized list of quantitices processed for the various EPA essential uses, total FDA essential uses, and non-propellant uses.

- Importers are subject to the same reporting requirements as manufacturers but do not need to file an annual report if none of their customers buy for EPA-regulated aerosol propellant uses.

Enforcement

Objective

The objective of the CFC enforcement program will be to ensure that activities banned by the regulation have not taken place and that required reports are properly prepared and filed.

Types of Violations

- o Processing of CFCs for banned aerosol uses after December 31, 1978
  Reference: 40 CFR 762.12(a)
- o Manufacturing CFCs for nonexempt aerosol propellant uses after December 15, 1978
  Reference: 40 CFR 762.11(a)
- o Recordkeeping and reporting violations, including submission of a false annual report, failure to submit an annual report, failure to obtain certification from a CFC purchaser, and submission of a late annnual report
  Reference: Certification 40 CFR 762.11(c); manufacturer annual report 40 CFR 712.3 (a) submission, (b) format; processor annual report 40 CFR 712.3 (a) submission, (b) format; willful falsification 18 USC 1001.
- o Collusion between the manufacturer and processor in submitting false annual reports
  Reference: 40 CFR 712.3 and 712.4
- o Abuse of an essential use exemption
  Reference: 40 CFR 762.12(a)
- o Distributing CFCs in bulk for banned aerosol propellant uses after December 15, 1978
  Reference: 40 CFR 762.13
- o Importing bulk CFCs for nonexempt aerosol propellant uses after December 15, 1978
  Reference: 40 CFR 762.11(b)
- o Importing nonexempt CFC-propelled aerosol articles after December 15, 1978
  Reference: 40 CFR 762.11(b)

Violation Detection

A program of aerosol filler inspections will be conducted based on information obtained from a combination of the following sources:

- o Analysis of annual reports of processors and manufacturers
- o Marketplace sampling
- o Referrals from the Pesticides Registration and Pesticides Inspection programs
- o Cooperation with the Food and Drug Administration and the Consumer Product Safety Commission
- o Tips from competitors and the general public
- o Cooperation with U.S. Customs Service
- o Inspections of manufacturers' records

In addition, non-targeted inspections wil be conducted based on a neutral administrative scheme.

Outreach

As part of its effort to achieve voluntary compliance with the CFC rule, EPA will continue its program to inform the regulated community about the requirements and any interpretations or clarifications developed by the Agency.

Remedies

Under the Toxic Substances Control Act, the following enforcement actions may be taken against violators of its provisions or rules promulgated under the Act:

- o Notice of noncompliance
- o Administrative penalty of up to $25,000 per violation per day
- o Civil action including injunctive relief and seizure
- o Criminal penalties of up to $25,000 and/or one year of imprisonment per violation

Summary of Enforcement Strategy

Enforcement efforts will focus on accounting for CFCs purchased by fillers. The Agency will try to make sure that all CFCs purchased for aerosol propellant uses are being employed in exempt products, and that the exemptions given are not being abused.

Inspections will be limited to those fillers currently buying CFCs. Violations by manufacturers and distributors can only occur if there are associated filling (processing) violations. Therefore, these activities will be investigated only where there has been a filling violation.

CFC ENFORCEMENT FACTS AND STRATEGY

PART II

CFC Enforcement Prirorities

Potential violations of the CFC ban rule have been ranked for enforcement priority based on the estimated likelihood of the violation occurring, the degree of harm to the environment, and the ease of detection. The categories of possible violations appear below in order of decreasing priority along with the considerations leading to the ranking decisions.

Each of the violations below would be a violation of §15(1) of TSCA. In addition, a commercial distributor or user of a banned finished product would be violating §15(2) if they knew or had reason to know that the product was manufactured illegally (and distributed or used it). Distributors or users of CFCs will not be pursued except in conjunction with a filling violation. Section 15(3) would be violated if an exporter failed to five the Administrator notice under §12.

(1) Processing of CFCs for banned aerosol uses after December 15, 1978

This category is the most important for a number of reasons:

- Many of the other catgories of violations cannot be committed if there is no related filling violation.
- It is the filling violation that makes the increment of environmental harm possible.
- This type of violation is the easiest to detect and often is the only reasonable way to find other types of violations.

Economic incentives to violate arise from:

- The cost of R & D necessary for reformulation of the product
- The cost of changing the labels, advertising, or pesticide registration, as necessary
- The cost of changing the filling line and the associated facilities (especially great if the filler installs equipment which allows filling with hydrocarbons which require costly changes to prevent explosions and fire.

Since CFCs are more expensive than hydrocarbons, where hydrocarbon filling capability already exists, the economic incentive to violate is relatively small.

(2) Abuse of an essential use exemption

Violations in this category have environmental effects and economic incentives very similar to those of category (1), but these violations are much more difficult to detect.

(3) Collusion between the manufacturer and processor in submitting false annual reports

This type of violation is serious because it frustrates the purpose of the annual reports as a complinace monitoring tool. Such a violation makes cross-checking of manufacturers' and processors' reports meaningless, and makes it much less likely that violations will be discovered. Because of these considerations, a collusion violation increases the amount of environmental harm likely to occur before other violations are detected.

(4) Manufacturing CFCs for nonexempt aerosol propellant uses after October 15, 1978

This act is a physically necessary complement to a filling violation, but unless there is an associated certification violation or collusion between the manufacturer and filler, a violation does not exist.

(5) Importing bulk CFCs for nonexempt aerosol propellant uses after December 15, 1978

This violation is analogous to category (4), but the quantities potentially involved are much less.

(6) Distributing CFCs in bulk for banned aerosol propellant uses after December 15, 1978

This act, like categories (4) and (5), is physically necessary for a filling violation to occur. However, it is even more difficult to prove than the manufacturing violations because the CFC rule does not require distributors to obtain certifications from their customers.

(7) Importing nonexempt CFC-Propelled aerosol articles after December 15, 1978

This violation is analogous to category (1), but the quantities involved are expected to be much less, and detection is much more difficult.

(8-11) Recordkeeping and reporting violations.

These violations include: (8) submission of a false annual report;
(9) failure to submit an annual report;
(10) failure to obtain certification from a CFC purchaser; and
(11) submission of a late annual report.

Violations in these categories have a low priority in the absence of associated filing violations. No environmental harm results; their only harm is that they may trigger an unnecessary inspection. The economic incentive to violate is small because the cost of compliance is low.

When these violations are used to cover up violations which result in environmental harm, they are important because they may cause a delay in the detection of serious violations, and therefore result in an increment of environmental harm.

Administrative Considerations for CFC Enforcement

Compliance Monitoring Tools

Several tools will be employed to target inspections of CFC fillers. These tools and the way in which they will indicate facilities warranting inspection are described below.

1. Analysis of Annual Reports

The annual reportw which manufacturers and processors must submit to EPA in March of 1980, 1981, and 1982 will have two functions in the enforcement program:

- They will enable EPA to discover likely violations through discrepancies between manufacturers' reports and processors' reports.

- They will also easy comparison between the quantities reported for essential uses and the quantities projected for essential uses in the hearings and economic reports. This use will be important as a clue to possible abuses of limited exemptions (i.e., pesticides for nonresidential food handling areas).

Manufacturers must report the total quantity manufactured and the quantities sold within a given year to aerosol propellant customers for aerosol propellant and other uses. Processors must report the quantities purchased from the various manufacturers as well as the quantities processed in a given year, broken down into (1)the specific EPA essential use categories; (2) total FDA essential uses; and (3) "other," defined in a letter to processors as any nonpropellant uses.

Reports will be analyzed by outside contractors through EPA Headquarters. Suspicious results will be sent to the Regions for evaluation and follow-up (i.e., inspection or an informal request for an explanation). The contractor will be hired under TSCA contracts set up by the TSCA Policy and Strategy Management Unit of the Toxic Substances Branch, PTSED.

- Processors' reports can be checked for internal consistency. The total quantity purchased can be compared to the total quantity processed. If the difference between the two totals is greater than their estimated storage capacity plus expected losses, an inspection of the processor is indicated. On the other hand, agreement that is too good could reflect manipulation of data or a misunderstanding of what is required.

- Manufacturers' and processors' reports can be cross-checked to see that the totals bought and sold agree. If there is a discrepancy, inspection of the processor is indicated.

- Totals for each essential use can be compared with their anticipated use (to be determined from the hearings, essential use determinations, economic impact reports, and letters to EPA) in the hope of discovering a cover-up of an illicit use, abuse of a limited exemption, or a use for which the exemption should be reconsidered because the use is greater than expected.

2. Marketplace Sampling

A marketplace sampling program will be used to detect possible filling violations and abuses of essential use exemptions. Marketplace sampling will be used to help set filler inspection priorities, and will not be used to trace a product to its source to prove every step of the distribution process.

The program will be small to avoid duplication, with one or two cities sampled per year. Less than 300 samples will be collected and of these, less than 100 will be analyzed. Total contractor hours to aid in the program is estimated at less than 300 hours.

3. Referrals from the Pesticide Program

The pesticides program is the EPA program which overlaps most with the CFC rule. CFCs were the propellant for well over 1,000 registered products at one time (registrations by more than 400 companies). Three of the essential use exemption categories cover CFC-propelled pesticides (nonresidential food handling areas, space spraying of aircraft, and products necessary for military preparedness).

Despite the overlap between FIFRA and TSCA in this area, the ability of the pesticides program to enhance CFC compliance will be limited by the following factors:

- Pesticide inspections are currently done by state governments; therefore, it is impractical for Headquarters to set up a referral program. Regions and states who are able to set up a referral program themselves are encouraged to do so (keeping in mind the limitations on information which ay be exchanged between States and the Federal government).

- Although registrations of products containing CFCs would be useful for targeting inspections, it was found during the mailing to processors that many registrations are for companies which have either gone out of business, moved and left no forwarding address, or stopped filling the registered product without cancelling their registration. In addition, many registrations are in the names of the marketers of the products in addition to or instead of the fillers.

4. Tips and Outreach

Tips from outside sources are an important part of any enforcement program. Any companies turned in through unsolicited tips will be given very high priority for inspection.

Competitors will be in the best position to provide information about possible violations. Members of the general public will be unable to detect most violations of the EPA rule.

5. Cooperation with FDA and CPSC

Since the CFC rule was developed and promulgated in cooperation with the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC) and the programs overlap to a considerable extent, it seems reasonable to coordinate the enforcement efforts. In order for EPA to be able to share all TSCA information with FDA and CPSC, the agencies must set up procedures to protect TSCA Confidential Business Information which are acceptable to EPA.

- FDA has chosen not to set up TSCA confidentiality procedures.

  —If any FDA vilations are discovered during the course of an EPA inspection and it would not be a violation of TSCA Confidential Business Information procedures to do so, the violation should be reported to the FDA area office.

  —FDA is not likely to discover any EPA violations because their enforcement program in this area is very small; FDA's CFC inspections will be done as part of their routine inspections.

- CPSC is currently setting up confidentiality procedures which are designed to meet TSCA Confidential Business Information requirements and a Memorandum of Understanding will eventually be written. Some cooperation has already taken place:

  —CPSC gave EPA a list of all fillers who had been filling with CFCs shortly before the ban went into effect (information obtained through reports required by CPSC).

  —EPA's CFC Filler Inspection Manual will include a section on referrals to CPSC for possible labeling violations.

  —There are a few products which are covered by CPSC's labeling requirement and not by the EPA ban: products for unclogging drains using vapor pressure, glass chillers, boat horns, and the essential use exemption diamond grit spray. In addition, some EPA filling violations may involve CPSC labeling violations. Marketplace sampling results will also be referred to CPSC.

6. Cooperation with U.S. Customs Service

Under the CFC rule, CFC-propelled aerosol articles may not be imported (commercially) after December 15, 1978. Since §13 of TSCA is designed to cover imports banned under §6 of TSCA, and since §13 will be implemented soon by the U.S. Customs Service, an independent program for CFCs will not be set up unless imports prove to be a problem.

The number of products affected by the ban is believed to be extremely small, with only one product known thus far.

7. Manufacturers Records Inspection

Manufacturers certification and sales records will be inspected by Headquarters with contractor assistance. A list of processors will be compiled from the information which is obtained.

Although anyone with CFCs in stock after the ban takes effect is a potential violator, chronic violators would have to purchase their CFCs on a continuing basis. Those capable of chronic violations will have a much higher priority for inspections than those who may simply use up their remaining stocks.

It will be relatively simple to find all of the aerosol fillers who are purchasing CFCs, and not just those who are claiming essential aerosol propellant uses, but examining manufacturers records.

- CFC purchasers will eventually need to have a letter(s) of certification on file with the manufacturer(s).

- Manufacturers have indicated that they organize their customer files (all) and certifications (all except for Allied) according to the type of business.

Application of Compliance Monitoring Tools to Violations

The table below lists the primary targeting and detection methods for each category of CFC violation.

Violation	Targeting	Detection Methods
(1) Filling for a banned use	marketplace sampling analysis of annual reports manufacturer inspection referrals outreach	filler inspection
(2) abuse of essential use exemption	marketplace sampling analysis of annual reports manufacturer inspection referrals outreach	filler inspection (product labels, advertising, distribution)
(3) collusion in falsifying annual reports	analysis of annual reports filler inspection	filler's and manufacturer's records inspections
(4) manufacturing CFCs for banned uses	filling violation	manufacturer inspection and filler inspection
(5) importing bulk CFCs	filling violation analysis of annual reports referrals from Customs outreach	importer's records inspection
(6) distributing bulk CFCs	filling violation	filler inspection (shipping records) distributor's records inspection
(7) importing banned articles	referral from Customs marketplace sampling	importer's records inspection
(8) submission of a false annual report	analysis of annual reports filling violation	filler inspection
(9) failure to submit an annual report	analysis of annual reports manufacturer inspection	filler inspection
(10) failure to obtain a certification		manufacturer inspection
(11) late submission of annual report		late submission of annual report

Neutral Administrative Inspection of Fillers

A portion of the filler inspections will be based on neutral administrative criteria; not all filler inspections will be targeted.

- Routine inspections during the first year of the ban will be based on the relative quantity of CFCs purchased in a three month period. This information is obtained through the manufacturers records inspection.

  —Fillers are ranked according to the quantity purchased.

  —If there are no targeted inspections pending, this ranked list will be used to set inspection priorities, with highest priority given to those purachsing the largest quantities.

  —See Appendix for a detailed description of the selection process.

- After the first year of the ban, new CFC purchasers will be given a higher inspection priority, ranked according to the quantity purchased. Fillers who were not inspected previously but have been on the filler list before will also be inspected when, because of their location, it if efficient to do so. Any additional inspections will be based on a random selection.

- CFCs are more expensive than hydrocarbons. Once a product has been reformulated with hydrocarbons as the propellant, there is little economic incentive to change back to CFCs. Consequently, once a filler has been inspected and found to have made changes to hydrocarbons, no further inspections will be done unless it is a follow-up inspection or a targeted inspection.

Allocation of Responsibilities

The following table summarizes the responsibilities of Headquarters, the Regions, and contractors as described in this strategy.

Activity	Headquarters	Regions	Contractor
Outreach/voluntary compliance	X		
Analyzing annual reports	x		X
Marketplace sampling	x		X
Setting up referral systems	X	X	
Manufacturer inspections	X	x	
Targeting filler inspections	X	x	
Targeting based on filler inspections	x	X	
Filler inspections		X	
Case preparation	x	X	

X denotes major responsibility for carrying out the activity
x denotes participation in planning, execution, or analysis

Characteriziation of the Regulated Industry

Manufacturers

There are five CFC manufacturers in the U.S. They are: Du Pont; Allied Chemical Corp.; Pennwalt Corp.; Kaiser Aluminum; and Racon, Inc.

Bulk Distributors

The number of bulk distirbutors is unknown. According to CFC manufacturers, a small fraction of CFCs made for aerosol propellant uses is sold to bulk distributors. Distributors who purchase CFCs, as opposed to those who merely ship under contract, are required to procvide a certification (as to the intended use of the CFCs) to the manufacturer. Fillers who purchase from distributors are not required to provide certifications and the distributor is not required to obtain one. However, if a bulk distributor has obtained certification from his customers, he will not be considered in violation of the ban on distribution unless there is evidence of a conspiracy.

Bulk Importers

ICI Noth America is the only known bulk importer. They have claimed that none of their customers are fillers.

Processors (Fillers)

There are approximately 800 aerosol fillers. ("Filler" is the term used in the trade; "processors" is the term used in the rule and in TSCA.) About one quarter of them have purchased CFCs since the ban or have provided manufacturers with a certification. About half of all fillers are custom fillers, i.e., they fill for other under contract. Many fillers are small businesses.

Importers

The number of importers is large and poorly defined, but the number of importers affected by the ban is believed to be very small. Very few aerosol articles are imported. The ban on imcorting is more easily enforce under §13 of TSCA.

Exporters

Exports are controlled by controlling processing. Thus, exporters need not be characterized separately from fillers.

General Inspection Procedures for Fillers

Filler inspections will be based on an accounting of CFC use. This will be accomplished by either of two methods: a mass balance or a scan of formulation records. The choice will depend on a number of factors, such as: which can be done more quickly; which would be more reliable; which one the plant manager is willing to consent to (unless a warrant has been obtained); and which is possible given the method of recordkeeping. (Recordkeeping methods and inventory practices vary widely among fillers.)

The mass balance method will focus on CFCs received during a certain time interval, e.g., three months. Once the quantity received has been established from shipping or inventory records, an accounting will be done for all CFC uses during that time period (from filling or "batching" records). If all CFCs can be accounted for in essential or non-propellant uses (allowing for losses), the CFCs can be considered to be accounted for.

The scan of formulation records focuses on the ingredient records for all aerosol products filled at the plant. If the only products formulated with CFCs fall in essential use exemptionss, the CFCs used can be considered to be accounted for. If any non-exempt products are found, then the inspector must determine whether the product was filled after December 15, 1978 (from "batching" or filling record).

The labels of all products which are exempt from the ban should be examined to make ssure that the instructions do not encourage uses outside of the exemption. The inspector should also ask to see the advertising for the product, e.g., catalogs, brochures, etc. If the labeling or advertising is ambiguous, the existence of a violation will turn on whether the product can reasonably be expected to be applied to a non-essential use.

Very little information can be derived from inspecting equipment. The filling equipment and plant facilities must be modified in order to be able to fill with hydrocarbons, but the modifications involve fire prevention; the equipment can be used to fill with CFCs once it has been modified.

A records inspection, rather than in inspection that emphasizes product sampling, is preferable because potential violations can be detected immediately (rather than waiting for an anlysis of the samples) and because products filled in violation may no longer be on the premises.

If the inspection has been targeted for a particular product (for instance, as a result of the marketplace sampling), the targeted product should be emphasized, but a general inspection should be done as well.

Many custom and in-house fillers will be handling FDA-regulated items. EPA does not have the authority to inspect for FDA violations. However, if an FDA violation is in plain view during an inspection for EPA violations, it should be noted and referred to FDA.

Specific Elements of Annual Reports

Reporting Requirements for Manufacturers

Every person who manufactures fully halogenated chlorofluoroalkanes after October 15, 1978 for aerosol propellant uses subject to TSCA must submit an annual report to Headquarters.

Page one of the report must contain:

(i) name of the business,

(ii) business address,

(iii) chief executive officer,

(iv) addresses of all facilities at which fully halogenated chlorofluorocarbons are manufactured,

(v) name, business address, and telephone number of the individual most knowledgeable of the contents of the report. The following

The following statement must also be included:

"This report covers manufacture of fully halogenated chlorofluoroalkanes for aerosol propellant uses from (date to date).

Page two and subsequent pages (if necessary) will contain a list of the purchasers for aerosol propellant uses, their shipping addresses, the total quantity purchased, the quantity for aerosol propellant uses, and the quantity for other uses. The total quantity manufactured for all uses during this time period must also be stated.

The following statement and certification (by the chief executive officer) must appear at the bottom of the last page:

"I understand that I may assert a claim of business confidentiality by marking any part or all of this information as "TSCA Confidential Business Information" and that information so marked will not be disclosed except in accordance with the procedures set forth in 40 CFR Part 2. I further understand that if I do not mark this information as confidential, EPA may disclose it publicly without providing me notice or an opportunity to object.

I certify that to the best of my knowledge the contents of this report are accurate and complete."

Date

Signed

Position Title

Reporting Requirements for Processors

Every person who processes fully halogenated chlorofluoroalkanes for aerosol propellant uses subject to TSCA after December 15, 1978 must submit an annual report. A separate report must be submitted for each processing facility.

Page one and the statement and certification at the end are identical to the manufacturers' reports except that processors' reports contain "the facility address" (iv) and the statement:

> "This report covers purchases and processing of fully halogenated chlorofluoroalkanes for aerosol propellant uses from (date to date).

On page 2 and subsequent pages, the processors must list who they purchased from, their business address, and the quantity purchased. They must also list the quantities processed for the various exempted EPA uses (itemized), total FDA uses, and non-propellant uses during that time period. The report ends with the statement concerning business confidentiality (quota supra) and certification by the highest official of the processing facility.

EPA

Enforcement Facts and Strategy

Polychlorinated Biphenyls (PCBs)

Contents

Summary of Enforcement Strategy

The Pesticides and Toxic Substances Enforcement Division (PTSED) of the Office of Enforcement, U.S. Environmental Protection Agency, has developed a strategy to enforce the rule governing manufacture, processing, distribution in commerce, and use of polychlorinated biphenyls (PCBs) contained at 40 CFR 761. The rule includes marking, storage, and disposal requirements.

The objective of the encforcement strategy is to ensure, through an effective enforcement presence, that PCBs are properly disposed of and that the risk of spills is reduced so that release of PCBs to the environment will be limited to the greatest extent possible. There are two main components of the strategy--inspections and awareness.

The greatest enforcement effort will be spent in inspections. While some effort will be devoted to inspections in response to complaints, crises, or special situations, major efforts will be devoted to inspections of facilities in target groups which have been identified as having significant numbers of PCB equipment. Scheduling of inspections will be based on a neutral selection strategy which places inspectors in the facilities in those target groups where the greatest response to inspection efforts can be expected.

During the inspections, facility records on PCB equipment, especially transformers and large capacitors, will be examined and verified. In addition, compliance with storage and marking requirements will be monitored. Because of the potential release of PCBs from uncontrolled discharges, special attention will be given during the inspections to examination of PCB equipment and the areas where they are located for evidence of leaks or spills.

Facility records will be used both to establish a working inventory of PCB equipment and to provide a check on any discrepancies in storage and disposal accounts of such equipment. Evidence of discrepancies in the year-to-year inventories, between the user's and disposer's records, or between a physical inventory and the records will be gathered through examination of records combined with a physical verification of randomly-selected equipment.

The enforcement strategy also includes an awareness component designed to encourage good stewardship practices by the regulated community and voluntary compliance with the PCB rule. The awareness effort will consist of ensuring that members of all industries with high numbers of PCB equipment are aware of the regulations and compliance requirements. The serious view which EPA places on PCB violations, giving particular emphasis to the Agency's vigilance and sanctions against violators, will be publicized. EPA's willingness to help companies solve their disposal problems will also be communicated.

Background of the PCB Regulation

Polychlorinated biphenyls (PCBs) have been used in the United States since 1929. One of the most stable organic compounds known, their properties make them useful as dielectric and heat transfer fluids. They 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 acknowledged to be a general threat to the environment. They have been found in significant concentrations in waterways and sediments throughout the world. They are widely spread contaminants of fish and wildlife resources. Recently, they have been identified in the milk of nursing mothers throughout the United States.

Extensive research has shown a link between PCBs and various health effects including the formation of malignant and benign tumors, fetal deaths, reproductive abnormalities, and mutations. In addition, experiments have shown that PCBs attack the immunological system and cause unwanted effects on the body's production of enzymes.

In recognition of the risks associated with PCBs and their spread throughout the environment, Congress mandated in the Toxic Substances Control Act that the processing, distribution in commerce, use, and disposal of PCBs be regulated and that PCBs be marked with clear and adequate warnings.

A rule governing the disposal and marking of PCBs became effective April 17, 1978. A second rule, which incorporates the first, imposes a ban on PCB manufacturing, processing, distribution in commerce, and use; it became effective July 23, 1979. The regulation can be found at 40 CFR 761.

Regulated Industries

At the present time, there are over 500 million pounds of PCBs in regulated uses throughout the economy. Almost all of these PCBs are in use in equipment which contains the chemical in an enclosed manner, with the vast majority of PCBs contained in transformers and large capacitors installed in the years between 1945 and 1975. The primary manufacturer of PCBs ceased production of the chemical in 1975.

Over the next several decades, virtually all of this equipment will be removed from service as it wears out or fails. At this point, the PCBs and PCB-contaminated equipment will require disposal in a way that prevents contamination of the environment.

Although improper final disposal of PCB transformers and capacitors poses the greatest threat of extensive environmental exposure, PCBs from in-service equipment and drums and tanks of PCB liquid now in storage for disposal may present an immediate risk since the PCBs could be released to the environment through leaks and spills. Such uncontrolled dischrages constitute improper disposal also and require containment and proper cleanup.

As stated earlier, the vast majority of PCBs are contained in transformers and capacitors. Four major economic sectors control approximately 90 percent of the 140,000 PCB transformers and 2.9 million capacitors now in service. Estimates for each kind of PCB equipment by economic sector follow.

Industrial:	51,000 transformers .8 million large capacitors (PCB equipment is divided among industry categories in the following order of estimated numbers: metals; chemical; paper and lumber; mining; automobile; food; textile; and stone, clay, and glass.)
Utilities:	38,000 transformers 1.3 million large capacitors
Commercial Buildings:	34,000 transformers 1.3 million large capacitors
Railroads:	1,000 transformers no capacitors

Since PCB transformers and large capacitors, which contain the vast majority of PCBs now in service, are so concentrated among these sectors, they are the logical focus for enforcement activities designed to encourage proper disposal of PCBs.

Summary of Regulatory Requirements

Following is a summary of the major requirements of the PCB regulation. The full text of the regulation is found at 40 CFR 761.

PCB Ban Provisions (Reference: Section 761.30)

The following activities are prohibited:

- o Distribution in commerce of PCBs and PCB items above 50 ppm without an authorization or exemption.
- o Processing of PCBs or PCB items without an authorization or exemption.
- o Manufacture of PCBs without an exemption.
- o Use of PCBs or PCB items without an authorization.
- o Servicing of PCB transformers which requires removal of the transformer coil.

Recordkeeping Requirements (Reference: Section 761.45)

Use of PCBs. Facilities that keep PCB transformers or capacitors must maintain annual records which show the following items:

- o Weights of PCBs in containers and transformers.
- o Number of transformers and capacitors.
- o Dates PCBs transferred.
- o Quantities of certain PCBs and PCB items remaining in service.

Disposal of PCBs. PCB disposal and storage facilities must keep annual records of:

- o PCBs and PCB items (number and type) received, including address received from.
- o PCBs and PCB items (by type) stored, transferred, or disposed of showing dates and weights.
- o Operations of the disposal facility.

Marking Requirements (Reference: Section 761.20)

The following items must be marked as containing PCBs:

- o PCBs and PCB items containing greater than 50 ppm PCBs, except PCB-contaminated transformers.
- o Transport vehicles carrying more than 45 kg. of PCB liquids over 50 ppm or with one or more PCB transformer.

Storage Requirements (Reference: Section 761.20)

Stored for Disposal. PCB articles and PCB containers stored for disposal must be stored in accordance with Annex III of 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 specifications and time periods for temporary storage.

Disposal Requirements (Reference: Section 761.10)

Above 500 ppm PCBs. PCB liquids and PCB items containing liquids above 500 ppm PCBs must be disposed in:

- o An EPA approved incinerator, or by
- o Other disposal methods approved by the EPA Regional Administrator.

Between 50 and 500 ppm PCBs. PCB liquids and PCB items containing between 50 and 500 ppm PCBs must be disposed in:

- o An EPA approved landfill,
- o An EPA approved high-efficiency boiler,
- o An EPA approved incinerator, or by
- o Other methods approved by the EPA Regional Administrator.

Uncontrolled Discharges. Any spill, leak, or other uncontrolled discharge of PCBs constitutes improper disposal.

Violation Categories

Ban Provisions. This violation category includes any manufacturing, processing, or use of PCBs of PCB items without an appropriate exemption or authorization. Also included are manufacturing, processing, distribution, or use of PCBs not complying with the terms of an authorization or exemption.

Recordkeeping. Violations of recordkeeping requirements include failure to keep required records at all, keeping records on only some of the PCB items subject to the requirements, keeping records that contain incomplete information, keeping inaccurate records, failure to initiate and maintain records in the required timeframes, and falsification of records.

Marking. Violations of marking requirements include failure to mark all or some of the PCB items subject to the requirement and marking PCB items with a mark not meeting the required specifications.

Storage. Violations in this category include storing the subject PCB items in areas meeting none or only some of the specifications for storage areas, storing items in containers not meeting specifications, failure to date items placed in storage, and maintaining items in temporary storage beyond the allowed time period.

Disposal. This category includes any disposal of PCBs not done in accordance with the disposal requirements. Also included in this category is improper disposal caused by uncontrolled discharges from PCB items, such as from leaks or spills from in-service or stored PCB items.

Enforcement Objectives

Priorities in the PCB enforcement strategy are the logical outgrowth of the overall objective, which is to minimize the release of PCBs into the environment, and thus the risk to human health and the environment. In the strategy, inspections are scheduled among the industry categories which control the vast majority of PCBs and in response to crisis or emergency situations. The penalties assessed against facilities found in violation will be in direct relation to the degree of environmental hazard posed by the condition. Together, the inspection strategy and enforcement policy will establish the "enforcement presence" necessary to foster compliance throughout the regulated community.

PCBs can be released to the environment in two ways: (1) by improper disposal of PCB items and liquids when they are no longer in use; and (2) by uncontrolled discharge caused by leaks and spills from in-service, stored, or transported items. Both kinds of improper disposal have the highest priority in the enforcement strategy. Related, but of lesser priority, are those violations which increase the likelihood of improper disposal, such as recordkeeping, marking, and storage violations.

The potential for release of the largest quantities of PCB occurs when a PCB transformer or large capacitor fails or is otherwise taken out of service. When this happens, the plant or facility operator must decide whether to repair (transformers only) or to dispose of the equipment. In either case, the PCB materials must be disposed of.

When this disposal decision arises, one possible solution is illegal disposal, which would allow a significant quantity of PCBs to enter the environment. It is at this point, then, that the most critical violation may occur. An "enforcement presence" must exist at this point to prevent such a violation from occurring.

It is difficult, however, to schedule enforcement activities so that such disposal violations can be caught at the moment of occurrance. To solve this difficulty, the enforcement strategy emphasizes records

of PCB use, storage, and disposal as an indicator of compliance. The requirement to establish and maintain records, and the possibility of their inspection and verification, will establish the enforcement presence necessary to achieve proper ultimate disposal of the PCBs.

PCBs may also be released to the environment as a result of leaks and spills from in-service, stored, or transported PCB items. Such uncontrolled discharges constitute improper disposal and can pose a significant risk to the environment if not contained and properly cleaned up. Consequently, during the inspections, the condition of PCB items and the areas where they are located will be examined for evidence of uncontrolled discharge. If violations are found, the company may be subject to civil penalty assessment, and will be required to undertake cleanup measures which could be very costly, particularly if water or large surface areas have been contaminated with PCBs.

Since civil penalties and cleanup costs are directly related to the potential for environmental damage, the inspection strategy and enforcement policy should encourage companies to contain and properly clean up spills at the time they occur and to take preventive steps to minimize their liability in the event of an uncontrolled discharge. Such preventive measures could include instituting regular equipment condition inspections; training personnel in careful handling PCBs to reduce the risk of accidents; and installing dikes or barriers around PCB items, where appropriate, to contain possible PCB spills.

PCB storage areas will receive an additional check to ensure that they meet the specifications in Annex III of the regulations which were designed to minimize the potential for environmental hazard from such areas. Also during the inspection, compliance with PCB marking requirements will be monitored. Unmarked PCB items pose a risk to the environment because the potential for improper ultimate disposal is significantly increased in the absence of a PCB warning label. Further, a spill from an unmarked PCB item is more likely to be cleaned up in a manner which actually spreads the contamination or exposes workers unnecessarily to the hazards of PCBs.

Inspections

The principal goal of the PCB enforcement strategy is to influence the regulated community into making proper decisions regarding the disposal of PCB items and liquids no longer in use and to take steps to minimize the potential for uncontrolled discharge from in-service, stored, or transported PCB items and to contain and properly clean up spills if they occur. The chief means for accomplishing this goal is the scheduling of compliance inspections among the industry categories which control the vast majority of PCBs so that an enforcement presence is established.

During the inspections, compliance with requirements for marking, storage, and use of PCBs will be examined while ensuring the accuracy of PCB records by verifying the existence of and proper disposal of PCB equipment and liquids. Inspectors will also examine the condition of PCB items and the areas where they are located for evidence of uncontrolled discharge.

The inspection scheduling technique described in the next section is the neutral administrative inspection scheme for PCB enforcement. A summary of PCB inspection procedures follows.

Inspection Scheduling

The general scheduling technique, which selects facilities that should be inspected, relies on both the forecasted occurrence of upcoming disposal decisions and measures of enforcement effectiveness. These two elements determine where inspections will be scheduled.

The steps in the scheduling technique are described below:

- Population

  The base population of PCB equipment currently in service, by industry, is defined. Such equipment includes transformers and large capacitors.

- Disposal Decisions

  The timing and location, by industry, of rebuild/retrofit and disposal decisions concerning the PCB equipment are forecasted. This step is based on projections of the equipment installation over time, equipment age, and the average length of service. The result identifies possible target groups, and where and when an enforcement presence is needed.

- Resource Allocation

  Inspection resources are allocated among target groups in various industries. The allocation assigns inspection resources to target groups where they will be most effective in ensuring compliance with the PCB regulations. Relative effectiveness measures are based on a number of considerations including industry structure characteristics, such as concentration and compliance likelihood; costs of compliance; and level of awareness of the PCB requirements by each sector.

The final product of the scheduling technique is a distribution of inspections throughout target groups within the economic sectors and industries which use the vast majority of PCB equipment. The technique ensures that inspections are allocated in the most efficient possible manner; that is, it maximizes the pounds of PCBs properly disposed of. Within each target group, individual inspections will be performed at plants and facilities that have been randomly selected.

The industries or sectors identified through the application of this technique, and the percentage of inspection resources allocated to each, are as follows:

- o Railroads.....20%
- o Complaints, Crises, and Special Situations*.....16%
- o Metals.....14%
- o Chemicals.....13%
- o Utilities.....12%
- o Food and Feed.....10%
- o Paper and Lumber.....10%
- o Commercial Buildings..... 8%
- o Stone, Clay and Glass..... 5%
- o Textiles..... 5%
- o Mining..... 3%
- o Automobile..... 1%

* Approximately 16 percent of available inspections are reserved for response to complaints, crises, or special situations which may involve conducting inspections or spot checks outside of the target groups. The determination that a special inspection effort is needed will be based on the potential for human health or environmental hazard posed by the situation. If required, appropriate downward or upward adjustments will be made to the overall allocations to cover unanticipated greater or lesser numbers of special situations.

Inspection Procedures

Inspections are intended to detect marking, storage, and use violations while ensuring the accuracy of PCB records by verifying the existence of and proper disposal of PCB equipment and liquids.

o General Inspection Activities

Inspectors will be alert for violations such as improper marking and storage and for evidence of uncontrolled discharges from leaks or spills. Possible violations will be documented by taking physical samples, photographs, and/or other means as necessary.

Inspectors will also collect data on the PCB equipment population, including total number and type of equipment at the facility, the stated quantities of PCBS in each, and other data as needed.

o Record Audits

In all inspections, the inspector will examine the facility's PCB records. Records of total PCB quantities on site and their disposition will be of primary interest. The inspector will evaluate the records for compliance, for accuracy, and for completeness. Any suspicious entries, or any missing entries, will be explored further.

The inspector will also make a comparative evaluation. When historical records are available, they will be used in conjunction with the present records to determine that a complete audit trail exists for all PCB equipment.

In addition, the inspector will compare the facility record statements on number and size of equipment against estimates that state what is expected. These estimates are based on analysis which, given any specific industry and plant configuration, can indicate the number of PCB transformers and capacitors that can be expected to be present. The inspector will match the recorded equipment inventory to the estimate; any significant deviation will be cause for further inquiry.

o Physical Inventory Audits

A certain proportion of the records will be verified by a physical check. Using the inventory of PCB equipment shown in the records, the inspector will select and then physically inspect a certain number of transformers and large capacitors.

Summary of PCB Penalty Policy

TSCA Civil Penalty System

Section 16 of the Toxic Substances Control Act authorizes the assessment of administrative civil penalties against violators of the law and its regulations. The law requires that in the determination of the penalty amount, the Agency take into account the nature, circumstances, extent, and gravity of the violation or violations. Other factors with regard to the violator, such as ability to pay, history of prior such violations, degree of culpability, are also to be considered. To implement this statutory requirement, the Agency has adopted a TSCA Civil Penalty System which establishes standardized definitions and applications of these factors. Specific penalty policies are developed under the system for each TSCA regulation.

Under the system, penalties are determined in two stages: (1) Determination of a "gravity based penalty" (GBP), and (2) adjustments to the gravity based penalty. In determining the gravity based penalty, the following factors affecting a violation's gravity are considered:

- o The "nature" of the violation.
- o The "extent" of environmental harm that could result from a given violation, and
- o The "circumstances" of the violation.

Following is a summary of the penalty policy developd for the PCB regulation. The full text of the TSCA Civil Penalty System and the PCB penalty policy was published in the Federal Register on September 10, 1980.

PCB Penalty Policy

The gravity based penalty, based on the nature, extent, and circumstances of the violation, is found on the following matrix:

			Extent of Potential Damage		
			A Major	B Significant	C Minor
Circumstances (Probability of damages)	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

Following is a brief discussion of how the extent and circumstances categories are defined; the full text of the PCB penalty policy should be consulted for a complete explanation.

o Extent

The extent is determined by the amount and concentration of the PCB material involved. Weight is determined after concentration reductions defined in the policy.

Major..... 5000 kg. or more
Significant.... 1000 kg. or more, but less than 5000 kg.
Minor..... less than 1000 kg.

If weight is not available, alternative measures are used as defined in the policy. They are based on numbers of gallons, numbers of items, or size of area contaminated.

Any PCB disposal which results in contamination of surface or ground water or food or feeds is always major in extent.

o Circumstances

Circumstances are determined by the category of the violation; the ranges are based on the probability of environmental harm occurring from the violation.

High Range	Level 1	Improper disposal Manufacturing
	Level 2	Processing Distribution Improper use
Medium Range	Level 3	Major storage violations Major recordkeeping violations, disposal facilities Major marking violations
	Level 4	Major recordkeeping violations, use and storage facilities

Low Range	Level 5	Failure to date PCB items placed in storage Minor storage violations Minor marking violations
	Level 6	Minor recordkeeping violations Failure to use "No PCBs" label as required

To determine the gravity based penalty for a violation, the extent and circumstances are defined using the criteria described above, and the appropriate amount found on the penalty matrix. After the gravity based penalty has been determined, the adjustment factors (culpability, history of such violations, ability to pay, ability to continue in business, and such other matters as justice may require) are considered and appropriate upward or downward adjustments made.

Voluntary Compliance/Awareness Effort

A key objective of the PCB enforcement strategy is to maximize voluntary compliance; that is, to encourage that compliance be undertaken at a plant or facility in the absence of any active enforcement effort there. To accomplish this goal, it is necessary for the regulated community to be both aware of the PCB requirements and of the possible enforcement consequences of noncompliance.

An awareness effort will be undertaken aimed at encouraging compliance in two kinds of circumstances:

- When noncompliance is due to ignorance of the regulations themselves or their requirements, or
- When noncompliance is due to a low perceived risk of violation discovery, and subsequent punishment.

In addition, the awareness effort will encourage the adoption of good stewardship practices to reduce the risk of uncontrolled discharge of PCBs.

The first part of the awareness effort will consist of ensuring that the members of all industries which have high numbers of PCB equipment are aware of the regulations and compliance requirements. These efforts will include communication with company headquarters and plants, emphasizing the following points:

- The health hazards of exposure to PCBs.
- The disposal, marking, and recordkeeping regulations.
- An interpretation of the actions required by the regulations.
- A discussion of the sanctions available to the Agency.

The second part of the awareness effort directly supports the inspection program and is aimed toward the target groups for which inspections have been randomly scheduled. The serious view which EPA places on PCB violations will be publicized, with special emphasis on the Agency's vigilance and sanctions. Through this effort, members of a priority target group will be given increased incentive to comply voluntarily as they become aware that the risk of inspection is significant.

In addition to the two primary awareness activities, facilities will be instructed in how to contact EPA when questions arise about the PCB program, and they will be informed of EPA's willingness to help companies solve their disposal problems. PCB users will also be kept informed of their legal disposal options. Some options, such as the opening of new approved incinerators or storage facilities, may lower the costs of compliance and thus further voluntary compliance.

Particular attention in the awareness efforts will be given to those industries whose private industry communication channels are not extensive enough to spread information to all industry members and to those whose current knowledge of PCBs as a hazardous substances and of the PCB regulations is poor. The priority industries for the first part of the continuing awareness effort include: textiles; stone, clay, and glass; railroads; non-ferrous metals; food; and commercial buildings.

Special Programs

In addition to regularly scheduled inspections, specialized programs will be required for two sectors--railroads and commercial buildings.

- Railroads

  PCB equipment used by railroads is coming out of service far more quickly than in the other industries. As a result of the immediacy of the problem, all railroads with PCB equipment will be inspected to ensure that the equipment is being disposed of properly.

- Commercial Buildings

  A significant proportion of PCB transformers are located in commercial buildings. However, the transformer population is so dispersed through a multitude of buildings that building inspections are not an effective tool. A public awareness program will be directed at building owners and maintenance services, as well as to associations of such enterprises as hospitals and schools, to inform them about the PCB requirements.

Other inspections will be scheduled in response to complaints, crises, and special situations. The determination that a special inspection effort is needed will be based on the potential for environmental harm posed by the situation. Special inspection efforts may involve performing inspections outside the target groups identified in the strategy.

Allocation of Responsibilities

Following is a summary of the allocation of responsibilities between the Pesticides and Toxic Substances Enforcement Division (PTSED) and EPA Regional Offices.

PTSED	Regions
1. Inspection Scheduling	**1. Inspection Scheduling**
o The enforcement strategy identifies the economic sectors and industries to be inspected and allocates the percentage of inspection resources to be spent on each on a national basis. This will be further refined to allocate the percentage of inspections in each category by Region, based on how the number of industry facilities are distributed geographically.	o Regions will develop a neutral administrative inspection scheme for random selection of facilities in each category in accordance with the percentages assigned by PTSED.
2. Inspections	**2. Inspections**
o PTSED will issue a final PCB Inspection Manual detailing procedures for conducting PCB inspections.	o Regional personnel will conduct PCB inspections in accordance with the manual and the neutral administrative inspection scheme. o Regions will respond to complaints, emergencies, and special situations as needed.
3. Case Development	**3. Case Development**
o PTSED will have lead responsibility only in PCB cases "of national significance." o PTSED has issued a PCB penalty policy and concurrence procedures to be followed by Regions in PCB cases. o PTSED will provide policy guidance and rule interpretations as needed.	o Regions will have lead responsibility for all PCB cases except those "of national significance." o Regions will seek concurrence for PCB actions in accordance with concurrence procedures.
4. Evaluation	**4. Evaluation**
o PTSED will review compliance rates and other information to determine the appropriateness of inspection allocations and make adjustments as needed.	o Regions will provide information on violations found in each of the target groups.

EPA

Enforcement Facts and Strategy

Polychlorinated Biphenyls (PCBs)

Supporting Documents

Contents

Note on Supporting Documents

The materials in Sections II-V are extracted from a report prepared by Putnam, Hayes, and Bartlett under a contract with the Pesticides and Toxic Substances Enforcement Division. They discuss the methodology used in developing the statistical and analytical foundation for directing the inspection and awareness efforts in the PCB enforcement strategy.

The final strategy reflects the findings of the contractor study, with adjustments made to reflect the practical experience already gained by the Agency in implementing a PCB enforcement program.

The materials are offered here only to demonstrate the theoretical foundation of the strategy. Some of the report's conclusions have been rejected in the final strategy, and some matters addressed in the strategy were outside the scope of the contractor study.

I Allocation of Inspection Resources

Inspections of target groups have been scheduled based on both the estimated quantities of PCBs coming up for a disposal decision and the effectiveness of inspection activities in that target group.

Inspections were allocated to target groups in such a way as to maximize the total pounds of PCBs that receive proper disposal.

The method for determining the optimal inspection allocation is complex and is explained in detail in the supporting documents. The inspection allocation is shown below in percentage of total inspections for a given year on a national basis. The number of actual inspections will be determined through the annual budgeting process. Because the geographic distribution of facilities in the industry categories varies, a further refinement of the percentages may be needed on a Region-by-Region basis. This refinement will also take place during the budget process.

Table II-1

Allocated Inspections by Sector or Industry
(per year, shown in percentage of total number of inspections)

Sector/Industry	Percentage of Inspections
Railroads	20 %
Complaints, Crises, Special Situations	16 %
Metals	14 %
Chemicals	13 %
Utilities	12 %
Food and Feed	10 %
Paper and Lumber	10 %
Commercial Buildings	8 %
Stone, Clay, and Glass	5 %
Textiles	5 %
Mining	3 %
Automobile	1 %

Approximately 16 percent of the inspection resources has been reserved for response to complaints, crises, and special situations. If there is an unexpected higher or lower number of such situations, the percentages may be adjusted evenly across categories.

In addition, the inspections in each category should be performed at facilities owned by companies of varying sizes. When possible, approximately 50 percent of the inspections should be performed at facilities owned by companies in the top 20 in size; 25 percent in the next 30 in size; and 25 percent in the remaining companies. The following table shows estimates of the numbers of facilities nationally, arranged by size of company.

Estimated Number of Facilities Arranged by Size of Company

Sector/Industry	Facilities
UTILITIES	
Top 4 Companies	360
Next 4 Companies	216
Next 12 Companies	446
Next 30 Companies	571
Remaining Companies	943
TOTAL	2,536
AUTOMOBILE	
Top 4 Companies	58
Next 4 Companies	11
Remaining Companies	163
TOTAL	232
CHEMICALS	
Top 4 Companies	495
Next 4 Companies	258
Next 12 Companies	311
Next 30 Companies	466
Remaining Companies	1,401
TOTAL	2,469
FOOD	
Top 4 Companies	787
Next 4 Companies	393
Next 12 Companies	548
Next 30 Companies	759
Remaining Companies	11,562
TOTAL	14,049
METALS	
Top 4 Companies	398
Next 4 Companies	137
Next 12 Companies	277
Next 30 Companies	327
Remaining Companies	2,201
TOTAL	3,340
MINING	
Top 4 Companies	1,620
Next 4 Companies	660
Next 12 Companies	720
Next 30 Companies	3,000
Remaining Companies	--
TOTAL	6,000

Sector/Industry	Facilities
PAPER AND LUMBER	
Top 4 Companies	452
Next 4 Companies	316
Next 12 Companies	509
Next 30 Companies	588
Remaining Companies	9,436
TOTAL	11,301
STONE, CLAY, AND GLASS	
Top 4 Companies	366
Next 4 Companies	169
Next 12 Companies	237
Next 30 Companies	316
Remaining Companies	1,404
TOTAL	2,492
TEXTILES	
Top 4 Companies	236
Next 4 Companies	149
Next 12 Companies	249
Next 30 Companies	419
Remaining Companies	2,054
TOTAL	3,107

Inspection Scheduling

The neutral administrative inspection scheme identifies the individual sectors to be inspected, and targets a proportion of inspections in each sector to companies of varying sizes. Although facilities selected for routine inspection should be part of a targeted segment, the Regions may apply other neutral criteria, such as geographic considerations, before making the random selections.

From time to time, a special, more intensive inspection effort may needed in a target or non-target group, such as in response to new information regarding potentially widespread contamination from a particular source. In such cases, PTSED wil provide sufficient information to the Regions about the target group and any special instructions required so that the special inspection program can be implemented.

The Agency also receives numerous tips and complaints regarding possible PCB violations. The priority given to responding to these situations is to be based on the severity of the environmental hazard posed by the condition, to the extent that it can be determined without on-site investigation. In some cases, an immediate inspection will be indicated. The response to less severe problems may range from contacting the facility by telephone or correspondence to scheduling of a compliance monitoring inspection as part of the Region's routine inspection plan.

When required, the percentages of resources allocated may be adjusted evenly across the target groups to meet unanticipated increases or decreases in the number of inspections needed for special situations.

The materials on the following pages are extracted from:

TSCA/PCB ENFORCEMENT STRATEGY

Prepared by

Putnam, Hayes and Bartlett, Inc.
Boston, Massachusetts
December, 1979

Under a contract with

Pesticides and Toxic Substances Enforcement Division
Office of Enforcement
U.S. Environmental Protection Agency

The majority of the PCB's currently in service are contained in transformers and large capacitors installed between the years 1945 and 1975.[1] While small quantities of PCB's are in service in other uses, the disposal of these PCB's is not regulated due to their small quantities and/or low concentrations. The enforcement strategy must, therefore, concentrate on the proper disposal of PCB's in transformers and large capacitors.[2]

In order to develop an enforcement strategy that insures the proper disposal of PCB's contained in transformers and capacitors, EPA must know where the transformers and capacitors are located and when PCB's contained in the equipment will require a disposal decision. Since EPA does not have detailed information in these areas, it was necessary to estimate where this equipment is likely to be located and when it will be removed from service. PHB has developed such projections for 47 target groups.

For the purposes of this analysis, a target group is defined as a subsegment of industrial firms, utilities, railroads or commercial buildings. Exhibit II-1 illustrates the target groups used by PHB. As shown in Exhibit II-1, each industry in the industrial sector and the utility sector is divided into five target groups based on size of firm. The commercial and railroad sectors are each treated as a single target group.

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[1] After 1975, Monsanto, the primary manufacturer of PCB's, ceased production of these compounds.

[2] Small capacitors may be disposed of as municipal solid waste and hence, are not considered in the enforcement strategy. All further reference to capacitors in this report refers to large high and low voltage capacitors.

The remainder of this chapter presents:

- PHB estimates of the number of PCB transformers and capacitors by target group in service in 1979,
- PHB estimates of the pounds of PCB's requiring disposal decisions each year by sector, and
- the methodology used by PHB to derive these estimates.

TRANSFORMERS AND CAPACITORS BY TARGET GROUP

For each target group, the number of PCB transformers and capacitors in service in 1979 is presented in Exhibits II-2 and II-3, respectively. As can be seen in these exhibits, 31 percent of all PCB transformers and 45 percent of all capacitors in service in 1979 are owned by utilities. Other major users of PCB equipment include the entire industrial sector and commercial buildings. Within the industrial sector, the majority of PCB equipment is owned by the metals, chemicals, and paper and lumber industries.

For some industries, the ownership of PCB equipment is highly concentrated. For example, it is estimated that 93 percent of all of the PCB transformers and capacitors in the automobile industry are owned by the four largest firms in the industry. However, for some industries, such as food, a much smaller portion of the industry's PCB equipment is concentrated in the four largest firms.

Since EPA's enforcement strategy must impact decisions made at the plant level, it is also useful to project the number of transformers and capacitors per plant in each target group.

These estimates are presented in Exhibits II-4 and II-5. As is illustrated in these figures, the number of transformers per plant ranges from 0.1 to 39.9 for the different target groups.[1] The number of capacitors per plant ranges from 1.6 to 673.5.

REQUIRED DISPOSAL
DECISIONS BY YEAR

Exhibit II-6 presents estimates of the number of pounds of PCB's requiring disposal decisions each year for each sector. These projections were developed to determine if significant differences in timing existed among sectors which might allow enforcement activities to be concentrated in certain areas at specific times. With the exception of railroads, however, significant quantities of PCB's are coming up for disposal decisions each year for the next two decades. Thus, enforcement activities must begin immediately and must continue over the long term.

The PCB regulations essentially prohibit the use of PCB's in railroads after 1 January 1982. As illustrated in Exhibit II-6, 3.6 million pounds of PCB's will be removed from service over the 1979 to 1981 period. It is, therefore, necessary to quickly implement enforcement activities in the railroad sector. Resources so allocated, however, will be available for other uses after 1981.

The pounds of PCB's requiring disposal decisions in utilities and commercial buildings rises steadily from 1979 to a peak of 8 million pounds in 1992 and 6.5 million pounds in 1990, respectively. This suggests that the EPA should plan a long term enforcement program for the utility and commercial sectors.

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[1]As discussed below, the railroad and commercial building sectors present unique enforcement problems. For this reason, these sectors are excluded from this plant-specific analysis.

However, there are still significant amounts of PCB's being released prior to the peak, and hence, the start of the enforcement program should not be delayed.

The industrial sector poses the most immediate threat of improper disposal of PCB's. It is, therefore, crucial to promptly implement the enforcement strategy for the industrial target groups.

METHODOLOGY FOR DERIVING ESTIMATES BY TARGET GROUPS

There currently exist no records of PCB transformer and capacitor installations by target group. It was therefore necessary to estimate for each target group the number of transformers and capacitors installed each year, the number of transformers and capacitors which were still in service at the end of 1979 and, finally, when each of these transformers and capacitors would be removed from service. The methodology for doing this is described briefly below.[1]

Transformers are used to step up or step down the voltage level of a current of electricity. Capacitors are used to regulate the flow of electric current. Since both transformers and capacitors are used to conduct or regulate the flow of electricity, it was assumed that the installation of transformers and capacitors within each sector and industry would be proportional to that sector or industry's use of electricity. Thus, estimates of total existing PCB transformers and capacitors from previous work by Versar, Inc., were allocated to sectors and industries based on electricity use.

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[1] A more detailed discussion is presented in Appendix A.

Once the total existing PCB capacitor and transformer installations were determined for each industry, the number of installations each year over the period from 1945 to 1975 was determined. These years were selected since they represent the period in which PCB-containing equipment was manufactured and sold. The number of installations in each year of this period was estimated using the pattern of the sector or industry's capital expenditures. A computer simulation program then was used to project the year in which the equipment would be removed from service given the initial installation date, an average failure rate and an average lifetime.[1] Note that no specific adjustment was made for possible early removal motivated by EPA regulations or other factors.

Due to the large number of firms within each industry and the diversity of firm sizes, PHB next allocated the number of PCB transformers and capacitors existing in 1979 to target groups within each industry. To define the target groups of interest within each industry, two steps were taken:[2]

1. Subsegments of the industry which represent the ten largest users[3] of electricity within each industry were selected.

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[1]In the case of transformers, the lifetime may be extended by several years by rebuilding the transformer at the end of its initial service life. If the transformer was rebuilt prior to 1975, it was assumed that the PCB fluid was replaced in kind. After 1975, it was assumed that the replacement fluid did not contain PCB's. If the transformer is rebuilt, the PCB's initially in the transformer are removed from service at that time.

[2]See Appendix A for a more detailed explanation of this procedure.

[3]Users are defined here by four-digit Standard Industrial Classification code (SIC).

2. The plants within these ten largest electricity users were divided into the five target groups defined in Exhibit II-1.

It was assumed that the subsegments selected within the industry would have all of the PCB transformers and capacitors within that industry. Further, across the five target groups the number of PCB transformers and capacitors was assumed to be proportional to output.[1] For example, if the four largest firms (the first target group) accounted for twenty percent of the output of all five target groups, twenty percent of the PCB transformers and capacitors are assumed to be in plants owned by these four firms.

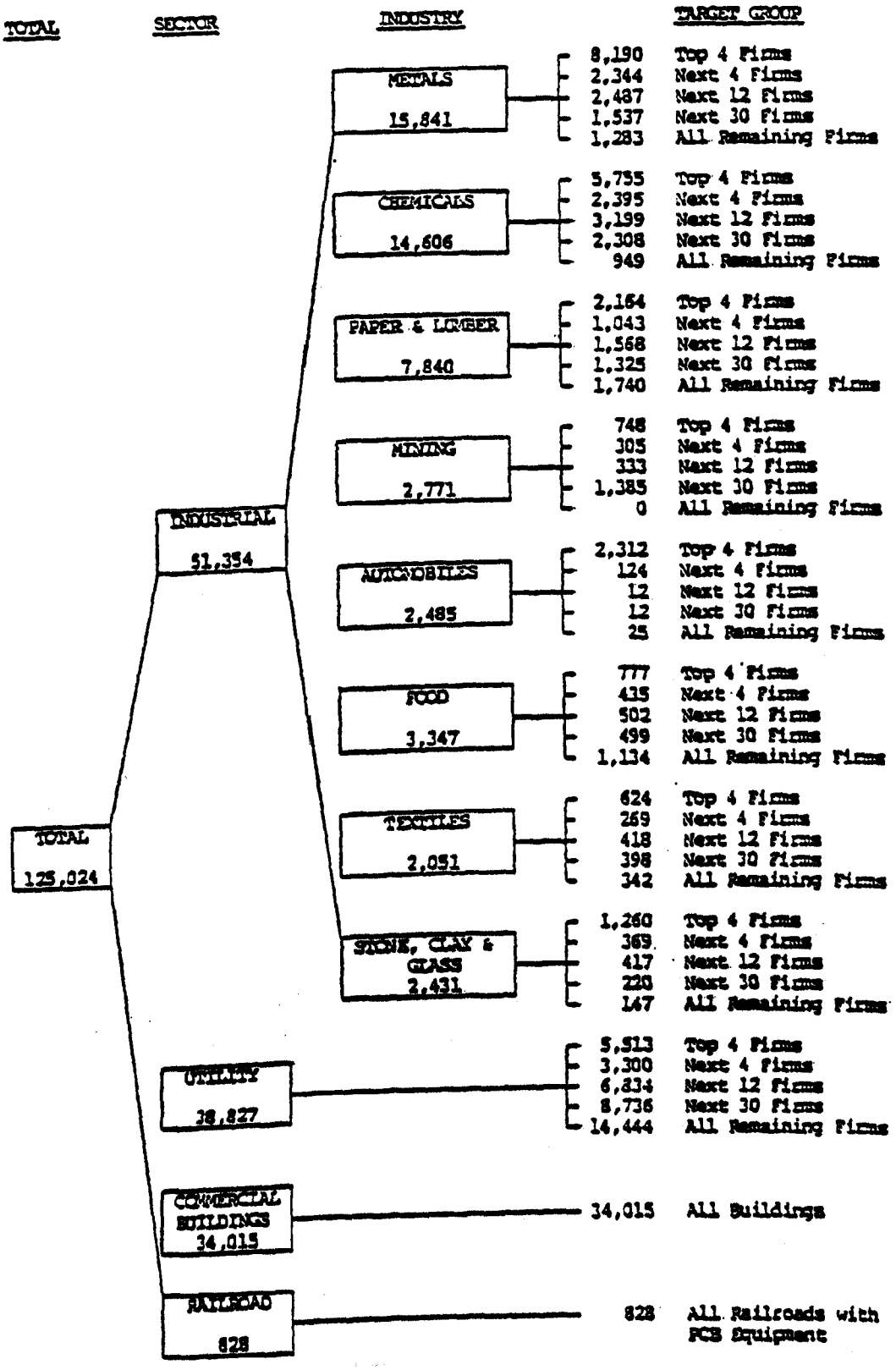
The utility sector was also divided into five target groups in the manner described above, while the commercial and railroad sectors were each defined as a single target group. The time pattern of PCB disposal decisions was assumed to be the same for each target group within an industry or sector.

[1]Dollar value of shipments is a widely accepted measure of output and was used for each target group.

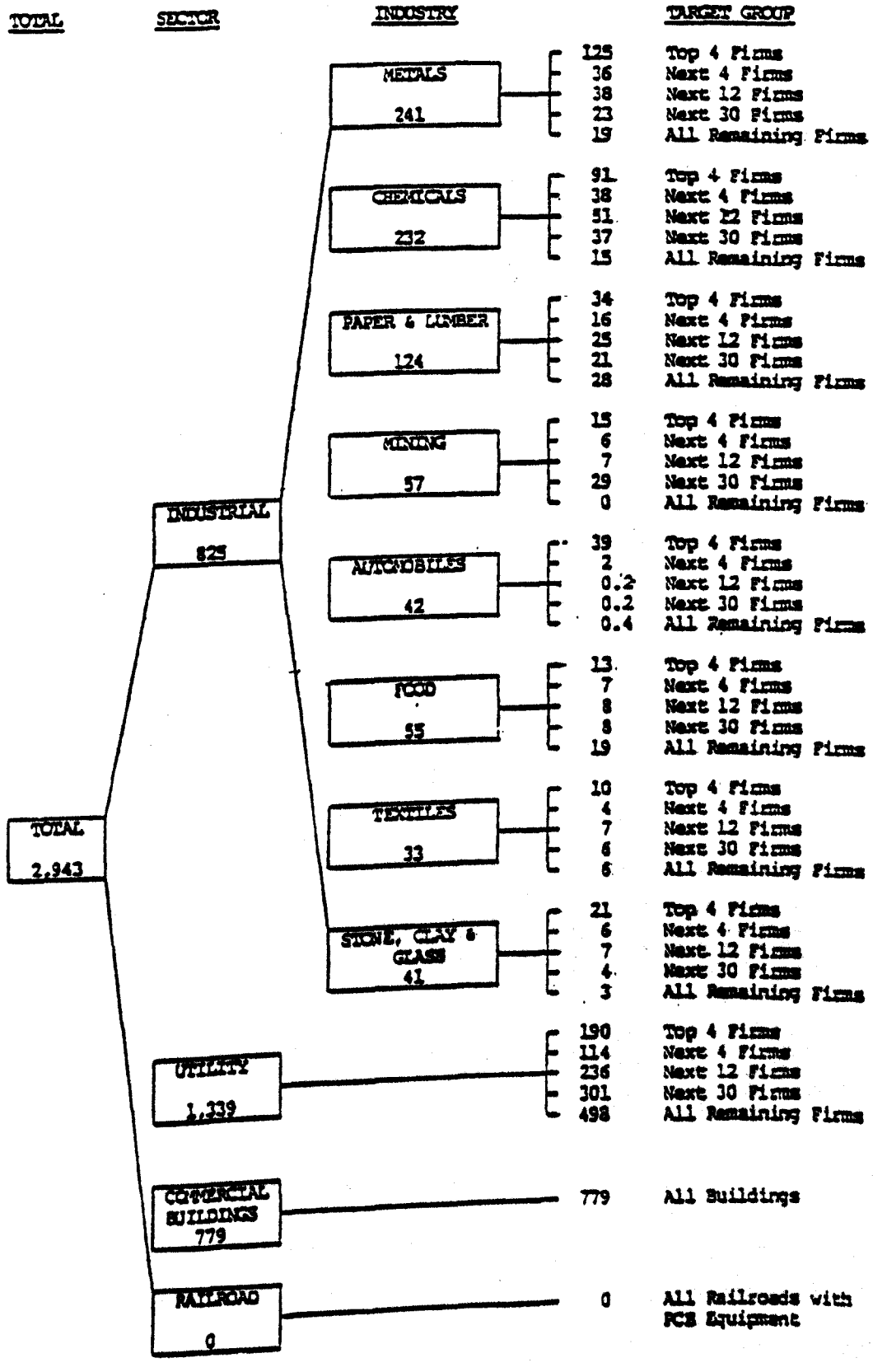
TARGET GROUPS FOR TSCA/PCB ENFORCEMENT STRATEGY

SECTOR	INDUSTRY	TARGET GROUP
INDUSTRIAL	Stone, Clay and Glass Food Mining Textiles Paper and Lumber Metals Chemicals Automobiles	1. Four largest companies within an industry. 2. Next four companies within an industry. 3. Next twelve companies within an industry. 4. Next thirty companies within an industry. 5. Remaining companies within an industry.
UTILITIES		1. Four largest utilities within an industry. 2. Next four utilities within an industry. 3. Next twelve utilities within an industry. 4. Next thirty utilities within an industry. 5. Remaining utilities within an industry.
COMMERCIAL BUILDINGS		COMMERCIAL BUILDINGS
RAILROADS		RAILROADS

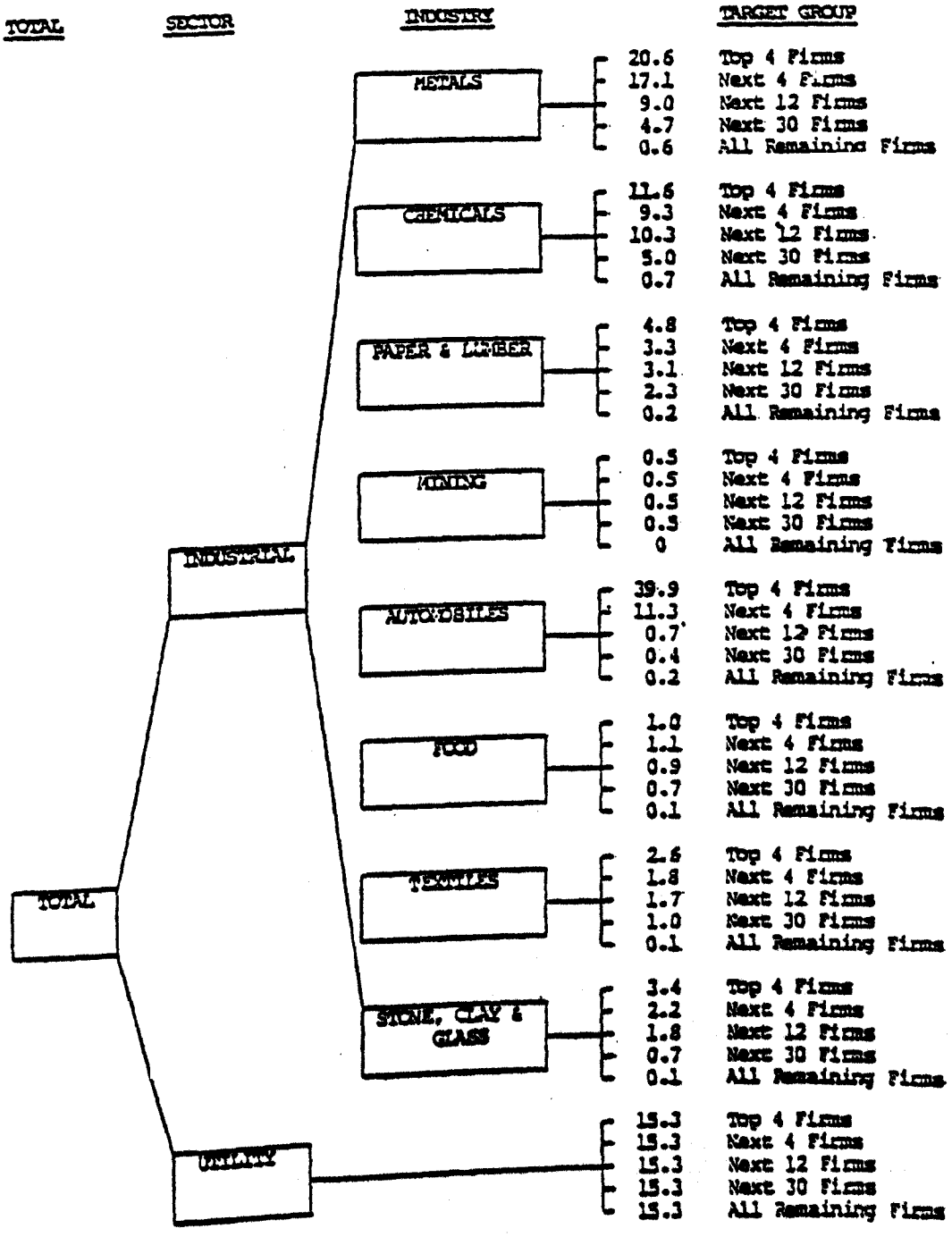
TRANSFORMERS IN SERVICE BY TARGET GROUP - 1979



CAPACITORS IN SERVICE BY TARGET GROUP - 1979
(thousands of units)



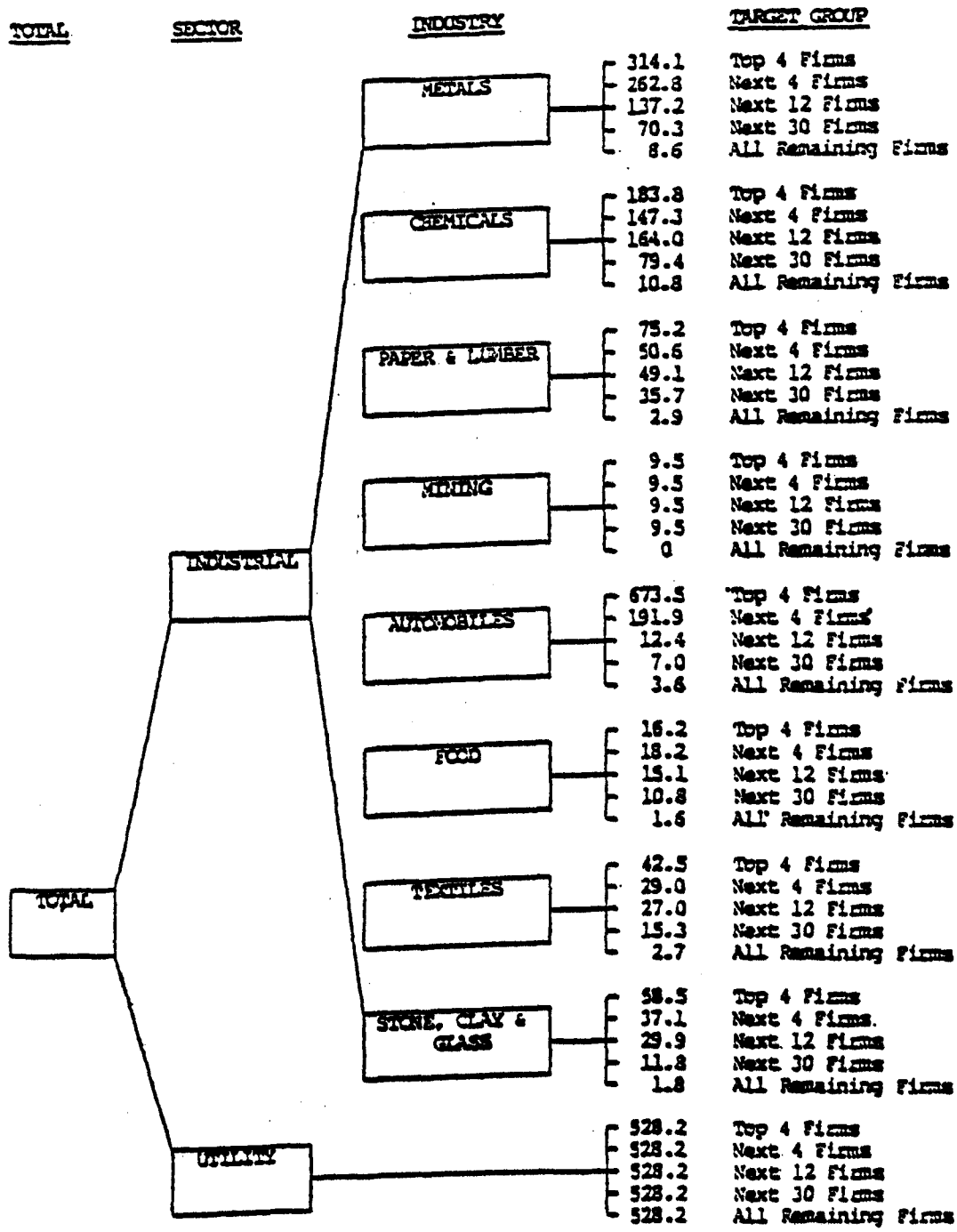
AVERAGE NUMBER OF TRANSFORMERS/PLANT[1]
BY TARGET GROUP - 1979



Note: Transformers per site for commercial buildings and railroads have not been estimated.

[1]Transformers per plant by target group is computed by dividing the data in Exhibit II-2 by the number of plants in each target group. See Appendix A for a detailed discussion.

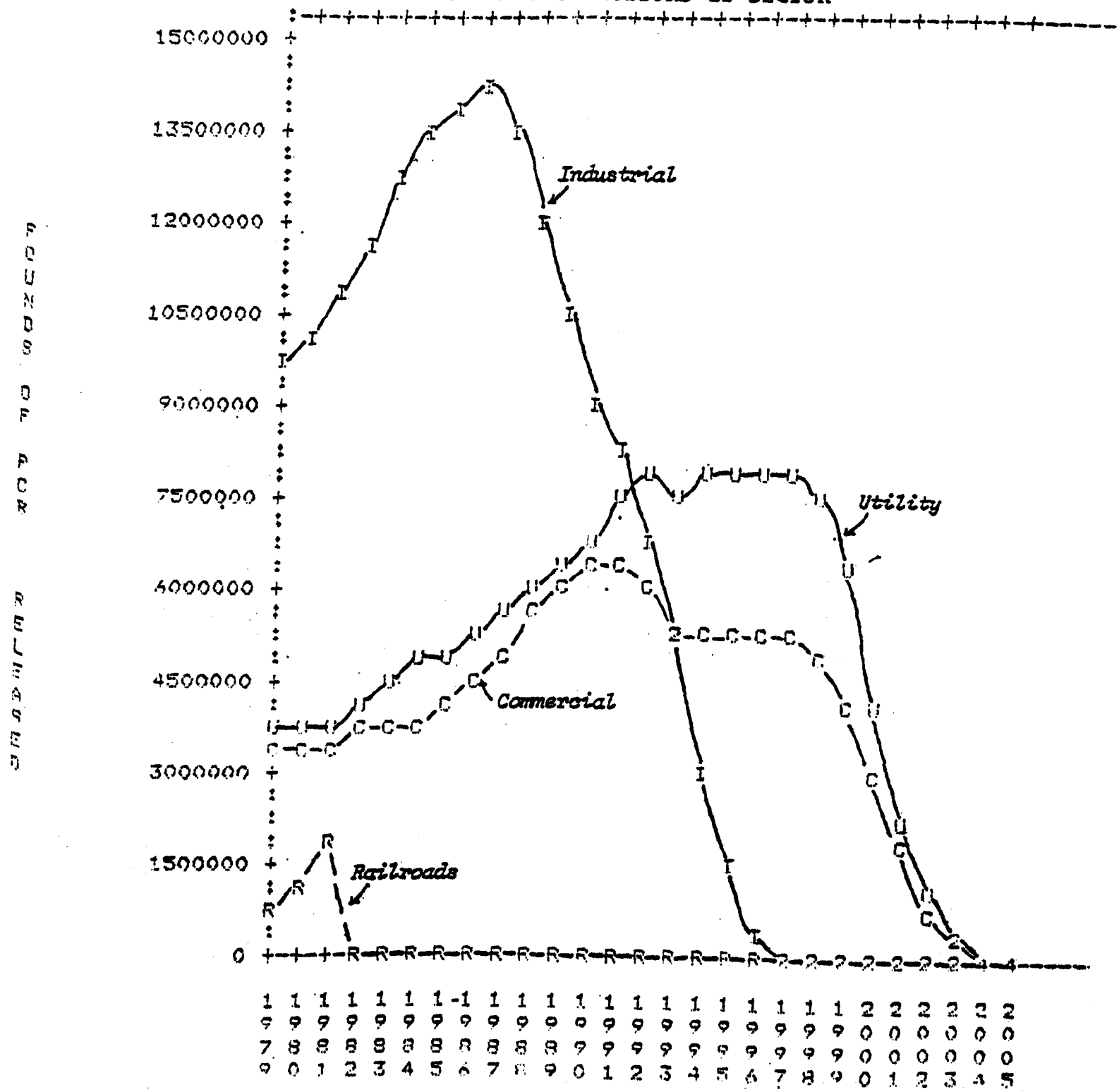
AVERAGE NUMBER OF CAPACITORS/PLANT[1]
BY TARGET GROUP - 1979



Note: Transformers per site for commercial buildings and railroads have not been estimated.

[1]Capacitors per plant by target group is computed by dividing the data in Exhibit II-3 by the number of plants in each target group. See Appendix A for a detailed discussion.

PCB'S REMOVED FROM SERVICE
1979 - 2005
TRANSFORMERS AND CAPACITORS BY SECTOR



KEY FOR PLOTTING SYMBOLS
'I' -- INDUSTRIAL PCB'S
'U' -- UTILITY PCB'S
'C' -- COMMERCIAL PCB'S
'R' -- RAILROAD PCB'S

The objective of the awareness component of the PCB enforcement strategy is to maximize voluntary compliance; that is, to encourage compliance at a plant or facility in the absence of any direct enforcement effort there.

Awareness efforts aimed at individuals who will make PCB disposal decisions are one of the major enforcement tools available to EPA. Although such efforts can be very inexpensive on a per plant or per firm basis, their effectiveness is likely to be limited unless the suspected cause of noncompliance is lack of knowledge about the TSCA/PCB regulations, the sanctions available to EPA, or the Agency's enforcement efforts. Thus, to maximize the overall effectiveness of EPA's PCB enforcement efforts, resources should be spent on awareness efforts which are aimed at target groups, industries or sectors where these problems arise.

There are two parts to the recommended awareness component — the distribution of PCB information and inspection support. Each of these parts is described below. These awareness activities should be considered as continuing efforts by the Agency.

DISTRIBUTION OF PCB INFORMATION

The first part of the awareness component attempts to increase knowledge of the PCB regulations, disposal options, and enforcement efforts among those industries that have a large amount of PCB equipment. There are two levels to this effort.

The initial level of the effort will be directed toward industries where current levels of awareness are low. These industries must be informed, through communication with company headquarters and/or plants, of the following issues:

- The health hazards of exposure to PCB's,
- The disposal, marking and recordkeeping regulations,
- An interpretation of what actions are required by the regulations, and
- A discussion of the sanctions available to the Agency in the event of noncompliance.

Facilities should also be instructed on how to contact EPA when questions arise about the PCB program.

Selection of the industries which will be the principal beneficiaries of this part of the awareness component is based on several measures of current knowledge. The information needed to rank the industries was provided in most cases by interviews with industry representatives.

The interview responses show that certain industries have far better information about PCB's than do others, as indicated in the table below. There are three basic levels of awareness upon which industries were ranked. First is a basic knowledge of PCB's as a hazardous chemical substance; second is knowledge of the PCB regulations and the compliance requirements; and third is awareness of the possible costs of compliance on the industry.

TABLE III-1

INDUSTRY AWARENESS OF PCB'S

INDUSTRY	AWARENESS			
	NO AWARENESS	PCB'S A HAZARDOUS CHEMICAL	PCB REGULATIONS	COST OF COMPLIANCE
Utilities		●	●	●
Textiles	●			
Paper		●	●	●
Stone, Clay & Glass	●			
Steel		●	●	
Non-Ferrous Metals	●			
Railroads		●		
Food		●		
Automobiles		●	●	
Commercial Buildings*	●			
Chemicals		●	●	●
Mining		●	●	

Those industries that already know about the nature of PCB's and about the regulations are as aware as the first level of the PCB awareness program could make them. The resources dedicated to this level should therefore concentrate on the industries or sectors which appear to be relatively ignorant of their compliance requirements. These industries, based on the table above, are:

- Textiles
- Stone, Clay and Glass
- Non-Ferrous Metals
- Railroads
- Food
- Commercial Buildings

The second level of effort is the provision of updated information about PCB's and PCB issues. Such information should be distributed, possibly through large audience publicity techniques, to all PCB user industries. PCB users should also be kept informed of their legal disposal options. Some options, such as the opening of new approved incinerators or storage facilities, may lower the costs of compliance and thus further encourage voluntary compliance.

INSPECTION SUPPORT

The second part of the overall awareness component directs information specifically toward the target groups receiving inspection activity. The success of the inspection component relies strongly on the assumption that decision makers in target groups will make the choice for proper disposal only if they are aware of their likelihood of inspection, their costs of compliance and the likely fine should a violation be detected. Providing and updating this information is therefore an important part of the awareness effort.

The Agency can rely on private channels of communication to distribute important information (such as PCB compliance costs) to target group members of more organized industries. However,

special efforts should be undertaken for the target groups within those industries when communication among members is limited.

The information used to determine which industries are likely to have poor communication, and where, therefore, special effort is required, was taken from interviews with industry representatives. Industry associations were questioned about the existence of regular and frequent channels of communication (for example, industry newsletter) and whether environmental committees existed and distributed environmental information. The results are shown below.

TABLE III-2

INDUSTRY COMMUNICATION CHANNELS

INDUSTRY	LITTLE COMMUNI-CATION	NEWS-LETTERS	OTHER CHANNELS	ENVIRON-MENTAL COMMITTEES
Utilities		●		●
Textiles	●			
Paper		●		●
Stone, Clay & Glass	●			
Non-Ferrous Metals			●	
Railroads			●	
Food*	●			
Automobiles		●		
Commercial Buildings*	●			
Chemicals		●		●
Mining		●		●
Steel		●		●

*Estimated.

Target groups in industries which have at least one form of regular and/or frequent communication and in addition have a formal committee which keeps members alert to environmental issues are likely to learn of PCB developments on their own. However, target groups in industries without such organization may not. These industries, whose target groups will need extra awareness efforts, are:

- Textiles
- Stone, Clay and Glass
- Non-Ferrous Metals
- Railroads
- Food
- Commercial Buildings

The objective of the inspection component of the TSCA/PCB enforcement strategy is to provide a direct physical presence at a sufficient number of plants and facilities where PCB disposal decisions are made to insure compliance with the regulations. The impact of a single inspection is not limited to the site inspected. Rather, it combines with all other inspections to build a perceived risk of discovery and resulting sanction that is sufficient to encourage decision makers faced with PCB disposal decisions to favor compliance over noncompliance.

Inspections are one of a variety of enforcement tools available to EPA. Research by PHB indicated that inspection activities have been found to be effective by a number of regulatory agencies. In particular, the U.S. Food and Drug Administration (FDA) has carried out research concerning the relative effectiveness of a variety of inspection programs.[1] This research indicated several important considerations for the development of the TSCA/PCB inspection component:

1. Inspections based solely on complaints were found to be a poor use of the FDA's resources.

2. Inspections which were followed up by a letter to the company's headquarters (not the site inspected) summarizing the results of the inspection, the required action, and the possible sanctions for continued noncompliance were particularly effective.

[1]See Appendix B for further information on the FDA results.

3. Inspections which concluded with the issue of a formal citation actually hindered quick remedy of the violation.

As described in Chapter I, the overall goal of the TSCA/PCB enforcement strategy is to minimize the amount of PCB's released to the environment through minimizing disposal violations. Other technical violations of the regulations, although important, are not as critical as illegal disposal. It is difficult, however, to implement inspection activities so as to detect disposal violations directly. To solve this difficulty, the inspection component as well as the entire enforcement strategy depends upon PCB records as an acceptable indicator and motivator of compliance. Maintenance of accurate records by a plant or facility provides a measure of overall compliance as well as an indicator and audit trail for specific violations. The practical intent of the inspection component, therefore, is to foster and verify the creation and maintenance of complete and accurate PCB records.

The inspection component will focus on three categories of sectors and industries which require different approaches to inspection. Each of these approaches, however, seeks to maximize inspection effectiveness by allocating inspections to target groups where the inspection will be most effective in causing PCB's to be disposed of properly. The first category includes all utility and industrial users of PCB transformers and capacitors. The second is made up of commercial buildings that use PCB equipment. Railroads that use PCB transformer-equipped locomotives comprise the third category. In addition, some inspection resources will be allocated to complaint response and emergency situations. The remainder of this chapter presents the recommended inspection activity in each of these areas.

UTILITY AND INDUSTRIAL USERS

Utility and industrial users contain the largest numbers of PCB transformers and capacitors, and inspection activity in target groups in these two sectors is found to be relatively effective. The material below describes the activities carried out on an inspection and the scheduling of inspections to specific target groups.

Inspection Activities

Most inspections will be audit inspections in which records of PCB equipment are sampled and verified. There are two types of the basic audit inspection, which are distinguished from each other by the kind of PCB equipment of primary interest. In the first type, the inspector will audit all records but will verify transformer records only. In the second, the inspection will verify both transformer and capacitor records. This type is termed a "joint" inspection. In both types of inspections, all records will be examined by the inspector. The fundamental difference in inspection types lies in which records will be physically verified.

A distinction was made between these two types due to their cost differential, which becomes important when inspection resources are distributed to achieve maximum effectiveness. Although the exact costs of the two types is not currently known, it is clear that a joint inspection, which requires more time, must be more expensive. Thus, it was assumed that a joint inspection costs 50 percent more than a transformer inspection.

In both types of inspection, similar activities must be performed. An audit of the records kept for each piece of PCB equipment must be performed, and in addition, a certain proportion of the entries will be verified by a physical check. Both of these procedures are described in more detail below.

Record Audits

In all inspections the inspector is required to examine the plant's PCB records. The inspector shall evaluate the records for compliance, for accuracy, and for completeness. Any suspicious entries, or any missing entries, will be investigated.

The inspector will also make a comparative evaluation. When historical records are available, they must be used in conjunction with the present records to determine that a complete audit trail exists for all PCB equipment.

In addition, the inspector should compare the plant records of the number and size of PCB equipment owned against standards for a representative plant. These standards should be developed by EPA based on analysis which, given any specific industry and plant configuration, can indicate the number of PCB transformers and large capacitors that should be present. The inspector will match the recorded equipment inventory to the expected; significant deviations from the standards will be investigated.

Physical Inventory Audits

A certain proportion of the records will be verified by a physical check for PCB equipment. Using the inventory of PCB

equipment shown in the records, the inspector shall physically inspect a representative sample of transformers and/or large capacitors. The inspector should verify the presence of the equipment and, in some cases, the PCB content of the equipment (through chemical analysis). The proportions to be so checked should be statistically determined to achieve a minimum level of confidence regarding the overall accuracy of the records.

Inspection Scheduling

The goal of the inspection scheduling method is to allocate limited inspection resources to specific target groups so as to cause the proper disposal of the largest possible quantity of PCB's. This requires that inspections be allocated to the target groups in which they will be most effective. Estimating the effectiveness of an inspection requires an analysis of the compliance decision and the factors that influence it. The compliance decision is made by PCB equipment owners based on a variety of economic and noneconomic factors. PHB has considered both of these types of factors in calculating an inspection efficiency for each target group. The inspection efficiencies are used to develop a schedule of recommended inspections per year by target group. The steps in the determination of the inspection efficiencies and the scheduling of inspections, and a brief description of each, are presented below.

Step 1: Consideration of Economic Factors

The compliance decision based on economic factors is considered as a choice between the cost of compliance and the economic risk of noncompliance. The economic risk of noncompliance is a function of the perceived probability of inspection,

the duration of the inspection effort, and the magnitude of the likely penalty if a violation is detected.[1] The perceived probability of inspection must be large enough, given the duration of the effort and the likely fine, to induce decision makers to select compliance based on economic factors. The probability of inspection, given estimates of duration and penalty, required to insure the proper disposal of a target group's PCB's can be calculated. The number of inspections required to achieve this probability is the required number of inspections to achieve full compliance based on economic factors.

Step 2: Consideration of Noneconomic Factors

Noneconomic factors affect the decision maker's likelihood of compliance irrespective of economic considerations. Such noneconomic factors include the decision maker's level of awareness of the regulations and of the PCB problem as a whole, the quality of communications channels available to the decision maker which effect the availability of information required to make informed decisions and the decision maker's attitudes toward compliance as reflected in his historical behavior when confronted with environmental regulations. These factors are assessed and combined to determine a relative likelihood of compliance for each sector and industry based on noneconomic factors. This relative likelihood is then used to adjust the required numbers of inspections for each target group to arrive at inspection requirements that reflect both economic and noneconomic factors.

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[1]For the purposes of this analysis, PHB has assumed that violations are always detected if an inspection if performed at a noncomplying facility.

Step 3: Scheduling Inspections

Dividing the target group's quantity of PCB's by the adjusted number of inspections required yields an "inspection efficiency" for that target group. The inspection efficiencies are used in a computer model which allocates a fixed quantity of inspection resources to target groups in a manner which maximizes the quantity of PCB's properly disposed.

These steps in the inspection scheduling method for utilities and other industrial users are described in more detail below.

STEP 1: CONSIDERATION OF ECONOMIC FACTORS

The compliance decision is made after the consideration by the decision maker of the economic and noneconomic ramifications of all options involving compliance and noncompliance. The economic factors cause the decision maker to view the compliance decision as an economic choice between the cost of compliance and the economic risk of noncompliance. The economically rational decision maker will comply with the law only when his cost of compliance is less than the economic risk of noncompliance.

The cost of compliance is the sum of the various costs associated with the proper disposal of PCB equipment. These costs may include the cost of retrofilling a transformer to lower its PCB content, the cost of incinerating or otherwise disposing of, or storing PCB fluids, the implicit cost of prematurely disposing of PCB equipment, and other related costs. The cost of compliance may also vary among several compliance options, all of which are within the law.

The economic risk of noncompliance depends upon the ris of being inspected in any given year, and the dollar value of th fine imposed if caught. For example, if there is a one-yea inspection program in which there is a 10 percent chance of bein inspected and the fine if caught is $50,000, the economic risk (o the expected cost of noncompliance) is $5,000. EPA's inspectio effort will continue, however, into the foreseeable future i order to insure the proper disposal of PCB's that will be removed from service in the next ten to twenty years. In a multi-year inspection effort there is a risk of inspection and discovery i each year of inspection activity. This makes the total economic risk of noncompliance considerably greater and allows the probability of inspection in each year of the program to be lower than would have been required to create the same perceived risk in a single year.

In carrying out this step, PHB has assumed that inspection activity aimed at enforcing the TSCA/PCB regulations will continue for at least ten years. If inspection activity is reduced or ended earlier than this, the required probabilities of inspection calculated by PHB are too low to insure compliance. In addition, PHB has assumed an average penalty of $50,000 for each transformer or capacitor disposal violation discovered.[1]

Although the calculations required to compute the probability of inspection needed to equalize compliance and noncompliance costs are essentially the same for transformers and capaci-

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[1]Analysis of the likely disposal violations indicate that if 2000 pounds of PCB's are disposed of illegally (equivalent to one PCB transformer or 43 capacitors), a $25,000 disposal fine and a $20,000 marking violation fine are likely to be imposed. It is further assumed that a $10,000 recordkeeping violation fine will be imposed in half of the cases. This results in a $45,000 to $55,000 average fine with a median value of $50,000.

required to insure that the decision to comply with be economically preferable for each target group calculated. In reality, however, the decision is also influenced by noneconomic factors which are unaffected by the economic circumstances. The derivation of the required probability of inspection assumes that the compliance decision is made on the basis of economic factors and perfect information. This means that no decision maker in a target group will comply until the probability of inspection makes the expected cost of noncompliance higher than the cost of compliance. As soon as the cost of noncompliance is higher, however, all decision makers in a target group will immediately choose to comply. This behavior is represented graphically in Figure A of Exhibit IV-1.

In reality, of course, the costs of compliance and noncompliance are uncertain. The quality of the information and the ability to interpret it will vary between individuals. Some owners will be better able to judge the "true" economic and regulatory situation than others. These considerations lead one to expect a somewhat smooth shift toward compliance as the probability of inspection increases. This behavior is represented in Figure B of Exhibit IV-1. In Figure C of Exhibit IV-1, a straight-line approximation of this shift is diagrammed. Such an approximation was assumed to simplify later computations.

In order to adjust the required probability of inspection to approximate the smooth shift behavior explained above, the probabilities were increased by a percentage proportional to the ambiguity of the compliance decision and the likelihood of a decision error. The adjusted probability represents the probability of inspection at which all decision makers in a target group choose to comply given the smooth linear shift described above. This is illustrated in Figure C of Exhibit IV-1. The ad-

justed required probabilities of inspection by target group are presented in Exhibit IV-2.

The number of inspections required to achieve the required probability of inspection can be calculated using the number of plants and pieces of PCB equipment in each target group. The method of computation differs slightly for transformers and capacitors due to the assumption that a separate compliance decision is made for each transformer while capacitors are the subject of a single, plant-wide compliance decision. An example computation for the chemical industry appears in Exhibit IV-3. For a full discussion of the methodology for calculating the required numbers of inspections, see Appendix C.

There are, however, other noneconomic factors which affect the compliance decision. These noneconomic factors combine to determine a relative likelihood of compliance for each sector and industry which is used to adjust the required number of inspections determined on an economic basis.

These noneconomic factors and their effect on the likelihood of compliance are listed below:

- Quality of Information Flow. Inasmuch as rapid and accurate information flow is crucial to the accurate perception of the options and risks facing the decision maker, industries with well-developed communication channels (such as those created by industry associations) are more likely to understand their choices and make economically rational decisions.

- Degree of Industry Concentration. Concentrated industries are able to communicate information more effectively. Decisions in concentrated industries also effect greater quantities of PCB's, thus making widespread compliance easier to achieve.

- Level of Awareness of PCB Regulations. Industries already aware of the PCB regulations are more likely to comply inasmuch as noncompliance due to ignorance is less likely.

- Compliance History. Industries with a history of noncompliance and resistance to environmental regulations can be expected to resist complying with PCB regulations.

Each of these factors is considered in a comparative ranking technique used to quantify each sector and industry's resistance to compliance based on noneconomic factors. The results of the comparative ranking are used to adjust the required number of inspections to achieve full compliance for each target group by as much as a twenty percent increase or decrease. If the likelihood of compliance is high for an industry, the required number of inspections for the industry's target group is reduced by as much as twenty percent to allow for a higher expected effectiveness for an inspection in that industry. The adjusted number of inspections required to insure that all of a target group's PCB's are properly disposed is presented in Exhibit IV-. for each target group. Appendix D contains a complete discussion of the calculation of the adjusted required number of inspections.

STEP 3: SCHEDULING INSPECTIONS

The adjusted number of inspections required for full compliance are used to calculate inspection efficiencies which can then be used to schedule inspection resources in the most effective manner.

Inspection efficiencies are computed by dividing the pounds of PCB's properly disposed (assumed to be 100 percent of the target group's transformer and capacitor PCB's) by the number of inspections needed to raise the probability of inspection to

the required level for a given target group. This computation assumes that the increase in PCB's properly disposed for each additional inspection is constant.[1] Although inspection efficiency may be expected to diminish as the amount of properly disposed PCB's approaches 100 percent, this approximation is considered to be sufficiently accurate for the purpose of allocating inspections comparatively among target groups. Exhibit IV-3 provides an example of these calculations for target groups in the chemicals industry.

After computing the inspection efficiencies as described above, the efficiencies can be used to allocate inspection resources to target groups in the most efficient manner in order to maximize the pounds of properly disposed PCB's. To accomplish this task, a computer model was prepared that allocates a limited number of inspection resources to specific target groups. The model finds the allocation of inspections that results in the maximum quantity of properly disposed PCB's through use of linear programming, an analytic technique useful for calculating the optimal use of limited resources. The program allocates inspections to target groups with the highest inspection efficiencies until available inspection resources are exhausted. Some target groups with low inspection efficiencies thus are not inspected. A complete discussion of the model and its operation is included in Appendix E.

The output of the model is a schedule of the number of inspections that should be allocated to each target group each year. As described previously, inspections have been divided into two types. The first concerns itself with transformer records

[1]This could be described graphically by a straight line drawn from the origin to the point on the smoothed curve above the adjusted risk of inspection as in Figure C, Exhibit IV-1.

only at a given site, and the second examines both transformer and capacitor records. The model stipulates the use of a joint inspection only when the added cost of the inspection of capacitors as well as transformers at a given site results in a larger quantity of properly disposed PCB's than if the additional resources were expended elsewhere.[1]

The results of the computer model are shown in Exhibit IV-5. Four hundred of the five hundred available inspections were allocated to utility and industrial target groups.[2] One hundred inspections were reserved for commercial building and railroad target groups and emergencies.

COMMERCIAL BUILDINGS

Commercial buildings, generally offices or public buildings, can contain PCB transformers and capacitors used for general electricity requirements. These buildings are scattered throughout the U.S. and the concentration of PCB equipment in any target group of users is expected to be low. Further, it is also anticipated that building owner/operators are unaware of the PCB problem and the extent to which their equipment may contain PCB's. These considerations suggest that the inspection efficiency for commercial buildings will be so low as to require many hundreds of inspections to achieve a significant level of compliance.

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[1]Although the cost of a joint transformer and capacitor inspection is known to be greater than the cost of a transformer inspection alone, the exact cost is currently unknown. Thus it was assumed that a joint inspection required 50 percent more resources than a transformer inspection.

[2]The 500 available inspections were assumed to be joint inspections.

It is reasonable to assume that when disposal of PCB equipment is required, many commercial buildings will contract for disposal services from transformer and capacitor service companies. Thus, it is recommended that fifty inspections be directed to the organizations[1] in the U.S. who offer such disposal and replacement services to commercial buildings. As discussed in Chapter II, it is estimated that PCB equipment in commercial buildings will be removed from service in greater quantities in later years. Thus, this inspection level should be increased as the peak decision period approaches. Such an increase will strengthen the integrity of proper disposal methods in service organizations, thus maximizing the amount of PCB equipment presently in commercial buildings that is disposed of properly. Activities on these inspections should include both examination and verification of records concerning work completed and review of procedures being utilized for the removal, storage and disposal of PCB's.

RAILROADS

Currently there are over 800 PCB transformers containing over 3.2 million pounds of PCB's in electric locomotives. These locomotives are owned by only six of the railroads in the U.S. Further, these PCB's are mandated for removal by 1982. This accelerated schedule will require intensive effort in the next several years to insure proper disposal of these PCB fluids. This effort must be intense enough to insure that PCB's in these mobile and widely distributed pieces of equipment are not subject to improper disposal. Thus, twenty inspections are targeted for railroad shop inspections to insure that all owners of PCB

[1]Approximately 30 to 50 such organizations are thought to exist by Versar, Inc.

transformers in locomotives are inspected at least once each year until the last of the PCB equipment is removed from service in 1982. Activities on these inspections should include both examination and verification of locomotive transformer records and review of procedures being utilized for removal, storage and disposal of PCB's.

EMERGENCY AND CRISIS RESPONSE

The remaining thirty inspections available should be reserved for emergency situations that arise due to reports of improper PCB disposal or handling. Inspections should be ordered upon an evaluation of the emergency situation by appropriate EPA enforcement personnel.

THEORETICAL VS. REAL WORLD COMPLIANCE BEHAVIOR

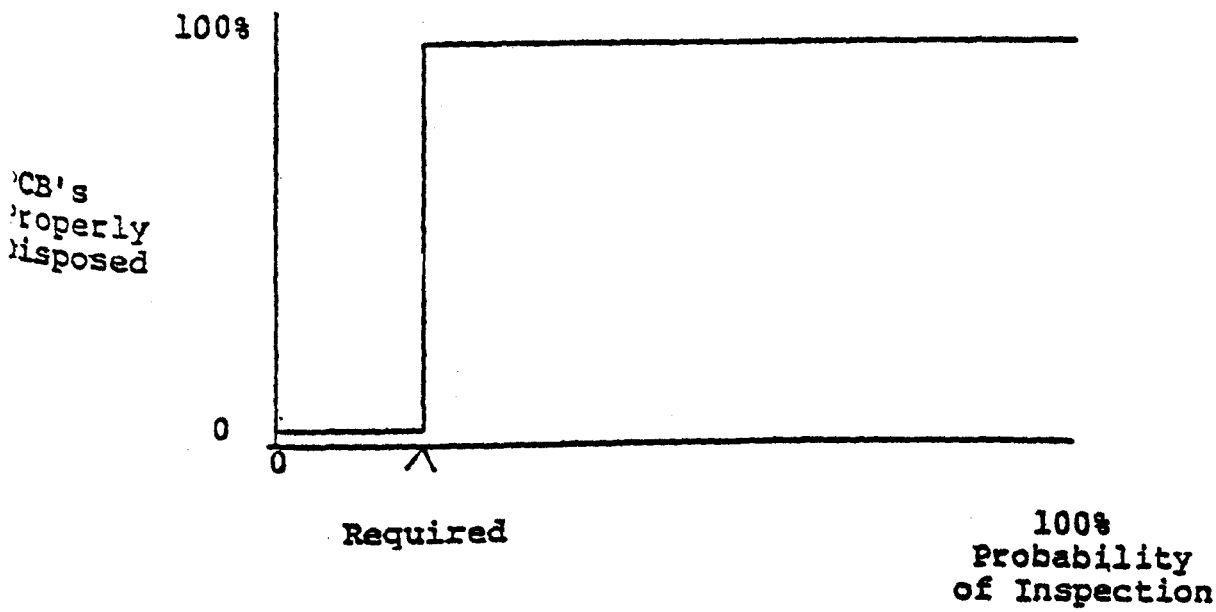

FIGURE A: THEORETICAL BEHAVIOR

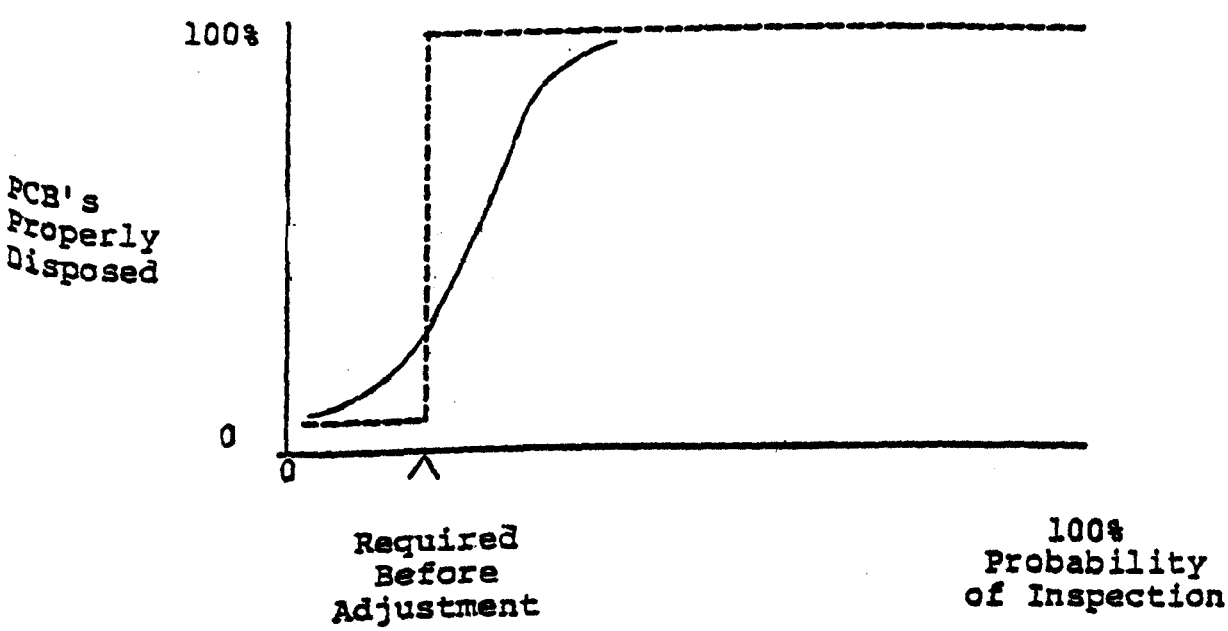

FIGURE B: ACTUAL BEHAVIOR

THEORETICAL VS. REAL WORLD COMPLIANCE BEHAVIOR
(continued)

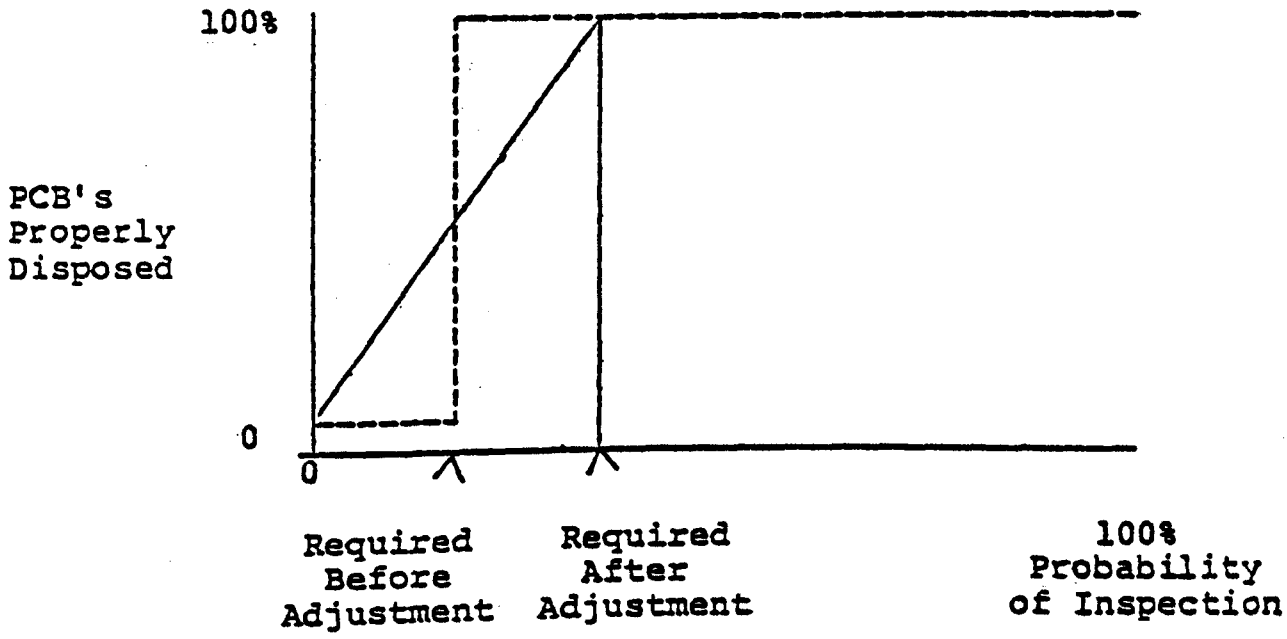

FIGURE C: LINEAR APPROXIMATION

ADJUSTED REQUIRED PROBABILITIES OF INSPECTION[1]
UTILITIES AND INDUSTRIAL TARGET GROUPS
(Annual)

INDUSTRY TARGET GROUP	REQUIRED PROBABILITY OF INSPECTION FOR: TRANSFORMERS	CAPACITORS
UTILITIES	3.0%	
Top 4 Companies		7.9%
Next 4 Companies		7.9%
Next 12 Companies		7.9%
Next 30 Companies		7.9%
Remaining Companies		7.9%
AUTOMOBILE	3.0%	
Top 4 Companies		19.3%
Next 4 Companies		5.5%
Next 12 Companies		0.4%
Next 30 Companies		0.2%
Remaining Companies		0.1%
FOOD	3.0%	
Top 4 Companies		0.5%
Next 4 Companies		0.5%
Next 12 Companies		0.4%
Next 30 Companies		0.3%
Remaining Companies		0.05%
METAL	3.0%	
Top 4 Companies		9.0%
Next 4 Companies		7.5%
Next 12 Companies		3.9%
Next 30 Companies		2.0%
Remaining Companies		0.3%
TEXTILES	3.0%	
Top 4 Companies		1.2%
Next 4 Companies		0.8%
Next 12 Companies		0.8%
Next 30 Companies		0.4%
Remaining Companies		0.08%

INDUSTRY TARGET GROUP	REQUIRED PROBABILITY OF INSPECTION FOR: TRANSFORMERS	CAPACITORS
STONE, CLAY & GLASS	3.0%	
Top 4 Companies		1.7%
Next 4 Companies		1.1%
Next 12 Companies		0.8%
Next 30 Companies		0.3%
Remaining Companies		0.1%
PAPER & LUMBER	3.0%	
Top 4 Companies		2.1%
Next 4 Companies		1.5%
Next 12 Companies		1.4%
Next 30 Companies		1.0%
Remaining Companies		0.1%
MINING	3.0%	
Top 4 Companies		0.3%
Next 4 Companies		0.3%
Next 12 Companies		0.3%
Next 30 Companies		0.3%
Remaining Companies		0.3%
CHEMICALS	3.0%	
Top 4 Companies		5.3%
Next 4 Companies		4.2%
Next 12 Companies		4.7%
Next 30 Companies		2.3%
Remaining Companies		0.3%

[1]Probabilities are those required to insure the proper disposal of all of a target group's PCB's. Probabilities have been adjust for behavioral factors. Probabilities are expressed as a percent target group transformers for PCB transformers and as a percent of target group plants for capacitors reflecting differences in the compliance decision for each. See Appendix C for a detailed discussion of the derivation of these probabilities.

COMPUTATION OF INSPECTION REQUIREMENTS AND INSPECTION EFFICIENCIES FOR THE CHEMICAL INDUSTRY

TRANSFORMERS

TARGET GROUP	REQUIRED[1] PROBABILITY OF INSPECTION	NUMBER OF[2] TRANSFORMERS	TRANSFORMERS[3] PER PLANT	REQUIRED[4] NUMBER OF PLANT INSPECTIONS	PCB'S IN[5] TARGET GROUP (mm lbs.)	INSPECTION EFFICIENCY (mm lbs. PCB/Inspectio
Top 4 Companies	3%	5755	11.6	15	11.34	0.756
Next 4 Companies	3%	2395	9.3	8	4.72	0.590
Next 12 Companies	3%	3199	10.3	9	6.30	0.700
Next 30 Companies	3%	2308	5.0	14	4.55	0.325
Remaining Companies	3%	949	0.7	42	1.89	0.045

CAPACITORS

TARGET GROUP	REQUIRED[1] PROBABILITY OF INSPECTION	NUMBER OF[7] PLANTS	REQUIRED[8] NUMBER OF PLANT INSPECTIONS	PCB'S IN[9] TARGET GROUP (mm lbs.)	INSPECTION EFFICIENCY[6] (mm lbs. PCB/Inspectio
Top 4 Companies	5.3%	495	26	6.86	0.264
Next 4 Companies	4.2%	258	11	2.86	0.260
Next 12 Companies	4.7%	311	15	3.81	0.254
Next 30 Companies	2.3%	466	11	2.75	0.250
Remaining Companies	0.3%	1401	4	1.13	0.283

[1]Source: Exhibit IV-1.
[2]Source: Exhibit II-2.
[3]Source: Exhibit II-4.
[4]Required Number of Plant Inspections = (Required Probability of Inspection x Number of Transformers) ÷ Transformers per Plant. See Appendix C for further discussion of this calculation.
[5]PCB's in Target Group = Number of Transformers x 1,969 Pounds per Transformer.
[6]Inspection Efficiency = PCB's in Target Group Required Number of Inspections.
[7]Source: Appendix A.
[8]Required Number of Plant Inspections = Required Probability of Inspection x Number of Plants.
[9]Source: Appendix A.

ADJUSTED REQUIRED NUMBER OF INSPECTION
TO INSURE THE PROPER DISPOSAL
OF ALL OF EACH TARGET GROUP'S PCB'S

INDUSTRY	TARGET GROUP	ADJUSTED REQUIRED NUMBER OF INSPECTIONS	
		TRANSFORMERS	CAPACITORS
UTILITY	Top 4 Companies	11	29
	Next 4 Companies	7	18
	Next 12 Companies	13	36
	Next 30 Companies	18	47
	Remaining Companies	29	77
AUTOMOBILES	Top 4 Companies	2	11
	Next 4 Companies	1	1
	Next 12 Companies	1	1
	Next 30 Companies	1	1
	Remaining Companies	3	1
FOOD	Top 4 Companies	21	4
	Next 4 Companies	11	2
	Next 12 Companies	14	2
	Next 30 Companies	20	2
	Remaining Companies	299	5
METALS	Top 4 Companies	12	36
	Next 4 Companies	4	10
	Next 12 Companies	8	11
	Next 30 Companies	10	7
	Remaining Companies	66	7
CHEMICALS	Top 4 Companies	14	24
	Next 4 Companies	7	10
	Next 12 Companies	8	14
	Next 30 Companies	13	10
	Remaining Companies	39	4

ADJUSTED REQUIRED NUMBER OF INSPECTION
TO INSURE THE PROPER DISPOSAL
OF ALL OF EACH TARGET GROUP'S PCB'S

INDUSTRY	TARGET GROUP	ADJUSTED REQUIRED NUMBER OF INSPECTIONS	
		TRANSFORMERS	CAPACITORS
TEXTILES	Top 4 Companies	8	3
	Next 4 Companies	5	1
	Next 12 Companies	9	2
	Next 30 Companies	14	2
	Remaining Companies	65	2
STONE, CLAY & GLASS	Top 4 Companies	10	6
	Next 4 Companies	5	2
	Next 12 Companies	7	2
	Next 30 Companies	9	1
	Remaining Companies	38	2
PAPER & LUMBER	Top 4 Companies	13	8
	Next 4 Companies	8	5
	Next 12 Companies	14	6
	Next 30 Companies	16	5
	Remaining Companies	264	8
MINING	Top 4 Companies	51	5
	Next 4 Companies	21	2
	Next 12 Companies	23	2
	Next 30 Companies	93	2
	Remaining Companies	—	—

RECOMMENDED INSPECTION SCHEDULE
UTILITIES AND INDUSTRIAL TARGET GROUPS

SECTOR OR INDUSTRY	TARGET GROUP	NUMBER OF JOINT INSPECTIONS	NUMBER OF TRANSFORMER INSPECTIONS
UTILITIES	Top 4 Companies (360)[1]	11	—
	Next 4 Companies (216)	7	—
	Next 12 Companies (446)	13	—
	Next 30 Companies (571)	18	—
	Remaining Companies (943)	29	—
	TOTAL	78	—
AUTOMOBILE	Top 4 Companies (58)	2	—
	Next 4 Companies (11)	1	—
	Next 12 Companies (17)	—	—
	Next 30 Companies (30)	—	—
	Remaining Companies (116)	—	—
	TOTAL	3	—
FOOD	Top 4 Companies (787)	4	23
	Next 4 Companies (393)	2	11
	Next 12 Companies (548)	2	16
	Next 30 Companies (759)	2	—
	Remaining Companies (11,562)	6	—
	TOTAL	16	50
METALS	Top 4 Companies (398)	12	—
	Next 4 Companies (137)	4	—
	Next 12 Companies (277)	8	—
	Next 30 Companies (327)	8	2
	Remaining Companies (2,201)	8	44
	TOTAL	40	46

[1]Numbers in parentheses indicate number of plants in target group.

RECOMMENDED INSPECTION SCHEDULE
UTILITIES AND INDUSTRIAL TARGET GROUPS
(continued)

SECTOR OR INDUSTRY	TARGET GROUP	NUMBER OF JOINT INSPECTIONS	NUMBER OF TRANSFORMER INSPECTIONS
TEXTILES	Top 4 Companies (236)	4	4
	Next 4 Companies (149)	2	3
	Next 12 Companies (249)	2	7
	Next 30 Companies (419)	2	12
	Remaining Companies (2,054)	2	—
	TOTAL	12	26
STONE, CLAY AND GLASS	Top 4 Companies (366)	6	4
	Next 4 Companies (169)	2	3
	Next 12 Companies (237)	2	5
	Next 30 Companies (316)	2	7
	Remaining Companies (1,404)	2	—
	TOTAL	14	19
PAPER AND LUMBER	Top 4 Companies (452)	10	3
	Next 4 Companies (316)	6	2
	Next 12 Companies (509)	8	6
	Next 30 Companies (588)	6	10
	Remaining Companies (9,436)	10	—
	TOTAL	40	21
MINING	Top 4 Companies (1,620)	6	—
	Next 4 Companies (660)	2	—
	Next 12 Companies (720)	2	—
	Next 30 Companies (3,000)	10	—
	Remaining Companies	—	—
	TOTAL	20	—

RECOMMENDED INSPECTION SCHEDULE
UTILITIES AND INDUSTRIAL TARGET GROUPS
(continued)

SECTOR OR INDUSTRY	TARGET GROUP	NUMBER OF JOINT INSPECTIONS	NUMBER OF TRANSFORMER INSPECTIONS
CHEMICALS	Top 4 Companies (495)	14	—
	Next 4 Companies (258)	7	—
	Next 12 Companies (311)	8	—
	Next 30 Companies (466)	12	1
	Remaining Companies (1,401)	4	35
	TOTAL	45	36

TOTAL NUMBER OF JOINT INSPECTIONS	=	265
TOTAL NUMBER OF TRANSFORMER INSPECTIONS	=	202
EQUIVALENT NUMBER OF JOINT INSPECTIONS IN PROGRAM	=	398

This chapter outlines procedures for measuring the overall effectiveness of the PCB enforcement strategy, for interpreting these results in the light of the changed conditions or new information and, finally, for altering the enforcement strategy in response to these new conditions or information. These updating procedures rely on data collected by EPA inspectors during the inpection process and on new economic data which may become available to the EPA staff in the Office of Enforcement, as well as on changes in the PCB regulations which may arise. The sources and types of data likely to become available are discussed in the last section of this chapter.

MEASURING OVERALL EFFECTIVENESS

As discussed above, the objective of the enforcement strategy is to maximize the quantity of PCB's that are disposed of properly. Given this objective and based on a number of assumptions, PHB has recommended an enforcement strategy. As a first step in the updating procedure, it is important to assess whether or not the strategy implemented by the Office of Enforcement has met the objective.[1]

[1]The updating procedure assumes that the objective of maximizing the amount of PCB's disposed of properly is an appropriate objective. After the initial implementation of the enforcement strategy, EPA should assess the soundness of this objective. To assess the soundness of the underlying objective, EPA should review the number and type of violations detected by inspectors. This review, together with discussions with EPA inspectors, should enable the Office of Enforcement to judge the appropriateness of the objective of the enforcement program. For example, if review of this information revealed that more PCB's entered the environment through spills rather than improper disposal, the EPA should restate the aim of its enforcement strategy and redirect its efforts to ensure proper maintenance of PCB equipment while in service.

Two measures of effectiveness are recommended. The first is a measure of overall effectiveness of the enforcement strategy for each industry and sector. The second is measure of the specific level of effectiveness observed within each target group. The methodology for calculating each of these measures is given below.

Measure of Overall Effectiveness

The overall effectiveness of the enforcement strategy within each industry and sector can be measured by computing the percentage of the PCB's removed from service which were disposed of properly over the past year.[1] To measure this percentage, the quantity of PCB's disposed of properly should be divided by an estimate of the total amount of PCB's removed from service. The following methodology can be used to measure the overall effectiveness of the enforcement strategy for each industry or sector:

> **STEP 1: Recompute the PCB's removed from service in each industry and sector over the past year using the inspection results on the number of transformers and capacitors in service, the age distribution of the remaining transformers and capacitors, and the computer model discussed in Chapter II which projects the PCB's removed from service each year.**
>
> **STEP 2: Calculate the PCB's disposed of in CWLF's and incinerators by each industry and sector over the past year using data from the RCRA manifest reporting system.[2]**

---

[1]For the purposes of discussing the updating procedure, it is assumed that the enforcement strategy is updated annually. However, the strategy should actually be updated when new information necessitates substantial changes in the underlying assumptions.

[2]Prior to the startup of the RCRA system, record inspections will be the source of this information.

STEP 3: Divide the PCB's disposed of in CWLF's or incinerators by the projected amount of PCB's removed from service for a measure of overall effectiveness for each industry and sector.

These three steps yield the percent of PCB's removed from service which were disposed of properly over the past year as a measure of the overall effectiveness of the enforcement program.[1]

Measures of Effectiveness by Target Group

The effectiveness of the enforcement program within each target group can also be measured from the inspection results. To measure this effectiveness the number of transformer violations of all types detected should be divided by the number of transformers inspected. For capacitors, the number of capacitor violations of all types detected should be divided by the number of plants inspected.[2] Subtracting these effectiveness measures from 1.0 will yield the portion of the transformers inspected which are in compliance and the portion of the plants inspected which are in compliance with the PCB capacitor regulations.[3]

---

[1]Since the amount of PCB's disposed of in landfills and incinerators is an actual reported figure and the PCB's removed from service is a projection, the overall effectiveness measure may indicate that more than 100 percent of the PCB's removed from service were disposed of properly. Should this occur the assumptions underlying the removal from service projections should be reexamined. For example, a measure which exceeds 100 percent may indicate premature disposal of PCB equipment; that is, equipment disposed of before it fails or reaches the end of its service life.

[2]Recall that the compliance decision is assumed to be made at the individual transformer level for transformers but at the plant level for capacitors.

[3]Care must be taken to insure that multiple violations related to one transformer or one plant in the case of capacitors are treated as one transformer or plant not in compliance. This will prevent double counting of instances of noncompliance.

The recommended number of inspections to be performed in some target groups is very small. The estimates of effectiveness may, therefore, be inaccurate due to small sample size. Appendix F explains how confidence intervals can be established for these effectiveness measures.

Interpreting the Measures of Effectiveness

After calculating the measures of effectiveness for each sector or industry and for each target group and before revising the enforcement strategy, the difference between the actual effectiveness and the expected effectiveness should be explained.[1] For example, if a target group was inspected up to its required rate of inspection, the EPA would expect to find 100 percent of the plants in compliance. If the measure of effectiveness based on the number of violations detected revealed only a 65 percent compliance level, the source of this difference should be identified.

The difference between the expected and actual effectiveness can be divided into two variances:

1. The variance due to changing economic conditions, and
2. The variance due to the noneconomic factors considered in the decision to comply.

[1]Either measure of actual effectiveness -- the overall or target group -- can be used when interpreting the difference between actual and expected effectiveness. The measure selected should be based on the perceived quality of the data and on data availability.

Each of these variances between the expected and actual is discussed below.

VARIANCE 1: Economics of Compliance Decision

The economics of the compliance decision may have changed due to revised estimates of the distribution and average age of PCB equipment, new estimates of the cost of compliance and actual amounts of the assessed penalties. Changes in these three factors will alter the economic tradeoff of compliance versus noncompliance. This, in turn, will alter the required probability of inspection.

The distribution and average age of PCB equipment developed for this initial strategy are based on extremely limited data. Therefore, as additional information becomes available through inspections, these data should be used to modify the initial distribution by replacing the original estimate of the number of transformers per plant and the number of capacitors per plant with the average number found in the inspected plants. The original estimate of the average age of this PCB equipment should be replaced with the average age observed in the inspected plants.[1]

The cost of compliance will also change as incinerators are granted permits and as CWLF's are permitted to store these hazardous materials. In addition, EPA may have actual data on the

[1]For some target groups, these new estimates may be based on only one or two plants. Even though the sample sizes are small, these data are still preferable to estimates based on no empirical data. Appendix F discusses the calculation of confidence intervals for these estimates.

average amount of the assessed penalty per violation. This information will alter the economic tradeoff of compliance versus noncompliance. Therefore, the inspection effectiveness level for a given target group may be lower or higher than anticipated due to the altered economic conditions.

To calculate the difference between predicted and actual effectiveness due to the change in economic factors, the required probability of inspection should be recalculated for each target group for both transformers and capacitors. This calculation should use the new data on cost of compliance and penalty amounts, as well as the new distribution of transformers and capacitors per plant. The ratio of the actual inspection probability to the new required probability of inspection[1] is the expected level of compliance based on the new economic information. For example, assume 3 percent of the plants were inspected. If using the new economic data, the required probability of inspection should have been 4 percent, the level of compliance expected would be 75 percent (3 percent divided by 4 percent). The change in economic factors, therefore, accounts for 25 percentage points of the difference between the actual and expected levels of compliance within a target group.

VARIANCE 2: Accounting for Noneconomic Factors

After calculating the first variance, any residual variance is assumed to be the result of estimation error in the noneconomic factors which influence decision makers. The difference between the expected level of compliance calculated with revised economic data and the actual level of compliance is the second variance -- the variance between actual and expected

[1]To insure the proper disposal of all of a target group's PCB's.

levels of compliance not accounted for by economic factors. For example, if the new required risk of inspection was 4 percent, a 75 percent level of compliance would be expected at an actual inspection rate of 3 percent (3 percent divided by 4 percent). If the actual compliance level was 65 percent, the remaining 10 percentage point variance (75-65 percent) is assumed to result from inappropriately accounting for the noneconomic factors which influence the decision to comply.

This variance could arise if the target group's communication network or their awareness of the PCB problem was overestimated or underestimated. Also this variance could result from over or underestimating the importance of these noneconomic factors.

UPDATING THE ENFORCEMENT STRATEGY

The procedures described below are designed to enable the EPA to update the enforcement strategy to account for new information and changing economic conditions. The information gathered by the inspectors and available to EPA from other sources should be used to modify both the awareness and the inspection component of the enforcement strategy. Again, the objective of the enforcement strategy is to maximize the amount of PCB's disposed of properly.

Updating the Awareness Component

The awareness component has two parts. The first part is aimed at achieving a baseline level of awareness in all industries and sectors regarding the PCB regulations, the actions

PCB equipment user must take to comply with the regulation and sanctions available to the EPA in the case of noncompliance. e aim of the second part is to support the enforcement effort. modify the awareness component of the enforcement program, EPA ould review the measures of effectiveness for each target group, dustry and sector. The variances discussed above should also be viewed. New awareness efforts should be concentrated on those rget groups where the noneconomic variance accounts for a large rt of the difference in actual versus expected effectiveness.[1]

In addition, the EPA should review the number and type detected violations in each industry or sector and draw out the spectors' judgement concerning the level of awareness which sts within the different industries and sectors. Based on this formation, EPA should redirect some of the awareness resources ward industries and sectors where a large number of violations rred, particularly where it appears that these violations were result of ignorance. Some resources should also be directed ward industries or sectors where awareness is judged to be poor en though few violations have been detected.

Updating the Inspection Component

The inspection component of the enforcement strategy is signed to create a perceived risk of inspection which will qualize the economic cost of compliance and the economic cost of

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These awareness efforts should concentrate on informing firms bout the economic factors which should impact their decision to omply including the cost of compliance and the possible penalties or noncompliance.

noncompliance. Due to EPA's limited inspection resources, it is not possible to inspect each target group at the required rate of inspection. Thus the inspection resources were allocated to maximize the number of pounds of PCB's properly disposed. To do this, the inspection resources were allocated to target groups based on the average number of PCB transformers and capacitors per plant, the required rate of inspection to insure compliance in the target group, and the cost of an inspection.[1] As new data become available, each of these inputs should be updated to reflect the current data and the inspection resources should be reallocated.

To update the inspection procedure, the required risk of inspection must be recalculated based on the new estimates of the distribution of PCB equipment, new estimates on the cost of compliance and actual data on the penalty amounts assessed. This required risk of inspection is then adjusted as before for noneconomic factors. Finally, this adjusted required risk of inspection is readjusted again to account for the second variance (the variance between expected and actual levels of compliance due to estimation error in the noneconomic factors). Using these final adjusted required risks of inspection, new inspection efficiencies are calculated and the computer model is rerun to reallocate inspection resources to target groups.

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[1]As discussed in Chapter IV, two types of inspections were considered -- a transformer inspection and a joint inspection. It was estimated that the cost of a joint inspection would be 150 percent of the cost of a transformer inspection.

The following procedure can be used to update the inspection component of the enforcement strategy.

STEP 1: Recompute the average number of transformers and capacitors per plant in each target group using the data gathered in the inspections.

STEP 2: Using the new estimates of cost of compliance and the average amount of the penalties actually assessed, recompute the required risk of inspection necessary to make the target group members economically prefer compliance with the PCB disposal regulations.[1]

STEP 3: Adjust the required risk of inspection for each target group for the noneconomic factors as was done in the initial strategy.[2]

STEP 4: Compute the variance between expected versus actual effectiveness due to estimation error in the noneconomic factors.[3]

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[1]See Appendix C for a detailed explanation of the calculation of this required risk of inspection.

[2]See Appendix D.

[3]As explained previously, to compute this variance:

- Compare this new adjusted required risk of inspection to the actual inspection rate. Project the expected effectiveness of inspections for each target group by dividing the actual rate of inspection by the adjusted required risk calculated in Step 3.
- Subtract the actual measure of effectiveness from the expected effectiveness of inspections. This difference represents the variance due to improper adjustment for noneconomic factors.

STEP 5: If the variance due to noneconomic factors is relatively small, adjust the required risk of inspection by multiplying this risk by one plus the variance.[1]

STEP 6: Recompute inspection efficiencies using the new adjusted required risks of inspection and the revised estimates of the number of transformers and capacitors per plant for each target group.[2]

STEP 7: Run the computer model to reallocate the available inspection resources given the new inspection efficiencies and the relative costs of joint and transformer inspections.[3]

Steps 1 through 3, 6, and 7 involve updating calculations already performed to arrive at the recommended inspection component and are described in the previous chapters and the Appendices. Steps 4 and 5, however, are unique to the updating procedure and an example will help clarify these steps.

Assume that recomputing the adjusted required risk of inspection given the new cost of compliance and assessed penalties yields an adjusted required risk of inspection of 4 percent. If the target group's actual rate of inspection was 3 percent, EPA would expect their inspections to be 75 percent effective (3 percent divided by 4 percent); that is, 75 percent of the PCB's

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[1]If the expected effectiveness of the inspections is not relatively close to the industry or sector's measure of overall effectiveness, the assumptions concerning the economic and/or noneconomic factors affecting the decision to comply may be inaccurate. Discussions with inspectors and industry representatives should be held to determine the accuracy of these assumptions.

[2]See Appendix D.

[3]See Appendix E for a description of this computer model.

removed from service in this target group were disposed of properly. If the measure of actual effectiveness discussed above was 65 percent for this target group, they did not perform as well as expected. The variance due to improperly accounting for noneconomic factors is, therefore, 10 percent.

To alter the adjusted required risk of inspection the risk is multiplied by one plus the variance. Thus, the new required risk of inspection is 4.4 percent (4 percent multiplied by 1.10). This rate is then used to recalculate inspection efficiencies as discussed in Chapter IV and Appendix D.

While this adjustment is reasonable if the variance due to noneconomic factors is small, it should not be used if the expected and actual effectiveness measures are very different. If the measures differ significantly, the assumptions underlying the computation of required inspection rates should be investigated.

INFORMATION FOR UPDATING THE ENFORCEMENT STRATEGY

Updating the enforcement strategy requries that new information be gathered from inspections and other sources. The new information likely to be available to EPA can be categorized as follows:

I. Updated economic information on the cost of compliance, the amount of the penalties assessed for noncompliance and the available EPA resources. This information is gathered by EPA and based on changes in current conditions such as the permitting of an incinerator, alterations in the penalty policy, and changes in the Office of Enforcement's budget for PCB enforcement.

2. PCB quantity data gathered in the field. This information comes from the EPA inspection program and the RCRA manifest reporting system which requires all chemical waste landfills (CWLF's), incinerators and waste handlers to report on the hazardous wastes transported, treated or disposed each year.

The first category of information will enable EPA to reassess the economic tradeoffs of compliance versus noncompliance. The second category of information will allow EPA to set up a tracking system for PCB transformers and capacitors and to better estimate the amount of PCB equipment in each sector and industry, as well as when this equipment is likely to be retired. Together this information can be used to measure the overall effectiveness of the enforcement strategy and to modify the strategy.

The data which should be gathered during an inspection and the data available from the manifest reporting system are described below. Exhibit V-1 details the data required to update the enforcement strategy, the source of the data and the Office or personnel who should be responsible for collecting this data.

Inspection Data

The EPA inspector is in the unique position of being able to physically verify the existing equipment in the plant. Since the allocation of inspection resources relies heavily on an estimate of the number of transformers and capacitors in each target group's plants, it would be desirable to update these estimates. The inspector also may be able to infer from the plant's records or from physical inspection of a sample of the PCB equipment, the age of the PCB equipment and hence, the likely date of the equipment's removal from service. The inspector will also

keep a record of the number and type of violations detected at each plant. Therefore, at a minimum, the inspector should gather the following information:

- the number of PCB transformers and capacitors in service in each plant,
- the age of each transformer and capacitor in the plant,[1] and
- the number and type of violations detected.

As discussed above, the inspectors' views of the plant manager's awareness of the PCB regulations and other qualitative data are also useful when updating the enforcement strategy.

Manifest Reporting System

The manifest reporting system will require all generators, transporters and disposers of hazardous waste to report on the amount, type and source of hazardous waste handled each year. This system is designed to track all hazardous wastes and hence, to detect violations by checking for discrepancies in the data. This system will allow EPA to keep a record of all PCB's disposed of properly in CWLF's or incinerators by each target group.

[1]The law does not require that age be reported. If these data are unavailable, the inspector should estimate the age distribution of the transformers and capacitors in the plant or, at a minimum, the average age of all PCB transformers and the average age of all PCB capacitors in the plant.

INFORMATION FOR UPDATING
THE ENFORCEMENT STRATEGY

INFORMATION	SOURCE	OFFICE/PERSONNEL RESPONSIBLE FOR COLLECTING INFORMATION
Average number of PCB transformers and capacitors per plant	Inspections	EPA Inspectors
Age distribution of PCB equipment	Inspections	EPA Inspectors
Number and type of violations	Inspections	EPA Inspectors
PCB's disposed of properly	RCRA Manifest Reporting System[1]	Office of Hazardous Wastes
Cost of compliance	Estimates by EPA or EPA Contractors	Office of Enforcement
Cost of inspections	Office of Enforcement	Office of Enforcement
Amount of penalties assessed	Office of Enforcement	Office of Enforcement
EPA resources	Office of Enforcement	Office of Enforcement

[1] Inspections will be the source of this information prior to the startup of the RCRA system.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 11 1980

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: PCB Enforcement Policy Subsequent to Appellate Court Opinion Remanding Portions of the PCB Regulation

TO: Regional Enforcement Directors and Branch Chiefs

On October 30, 1980, the United States Court of Appeals for the District of Columbia Circuit issued the attached opinion in the appellate case brought by the Environmental Defense Fund (EDF) against EPA. EDF had challenged major portions of the PCB rule (44 FR 31514) issued on May 31, 1979 under the Toxic Substances Control Act. The Court struck down that portion of the regulation which limited its application to 50 parts per million or more PCB. The Court also set aside those portions of the rule which define intact, non-leaking transformers, capacitors and electromagnets as totally enclosed uses of PCBs. For a discussion of the 50 ppm cutoff, see pages 25-35 of the attached opinion. Enclosed uses are considered at pages 35-40 of the opinion. Those portions of the regulation relating to totally enclosed PCB uses and the 50 ppm cutoff were returned to the Agency by the Court for "further proceedings consistent with this opinion."

At the same time, the Court upheld the eleven PCB use authorizations permitted by EPA. As the Court noted, the disposal and marking sections of the PCB regulations were not challenged in the litigation. Therefore, these regulations remain in effect, and enforcement activities relating to the disposal and marking regulations should continue as before.

Representatives of the Office of Enforcement are meeting with the Office of Pesticides and Toxic Substances and the Office of General Counsel to develop the appropriate Agency response to the directives of the Court. Our discussions with OPTS and OGC will focus on what Agency steps are necessary prior to any enforcement policy involving the portions of the regulations that were struck down. A further memorandum will be sent to you shortly summarizing the results of those discussions.

In the meantime, you should continue all present enforcement activities relating to PCBs in concentrations of 50 ppm or greater. Nothing in the Court's opinion suggests that EPA's present enforcement program with respect to PCBs in concentrations of 50 ppm or greater should be halted. Civil penalty complaints already issued are unaffected by the decision. Inspections

should continue, and additional enforcement cases should be referred to headquarters for concurrence. In addition, all inspection samples which show any detectable amounts of PCBs, including amounts below 50 ppm, should be retained until further PCB enforcement policy is issued by headquarters. Enforcement should also continue against the use of PCBs in any detectable amounts used as a sealant, coating, or dust control agent.

If you have any questions concerning this memorandum, please call John Lyon, Chief of the Case Development and Legal Branch (telephone 755-8317), for additional information.

A. E. Conroy II

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: New Requirements for PCB Transformers Pursuant to Appellate Court Order

TO: Regional Enforcement Directors and Branch Chiefs

I want to advise you of recent developments in the PCB appellate case filed by the Environmental Defense Fund against EPA. These developments will impose new inspection and maintenance requirements for owners and users of PCB transformers beginning in approximately two months.

Last November, I sent you a memorandum on the October 30, 1980 opinion of the United States Court of Appeals for the District of Columbia Circuit in this same PCB case. That opinion set aside those parts of the 1979 PCB regulation (44 FR 31514) which categorized PCB transformers, capacitors and electromagnets as totally enclosed PCB uses. The opinion also struck down that portion of the regulation which limited its application to 50 parts per million or more PCB.

During the past four months, the Office of Enforcement has participated in discussions about the case with representatives of EDF, industry and the Agency's Office of General Counsel and the Office of Pesticides and Toxic Substances. The discussions have focused on what actions are appropriate in view of the Court's 1980 opinion. Agreement emerged from these discussions that new information was needed before further rulemaking could begin on (1) whether uses of PCBs in tranformers, capacitors and electromagnets were totally enclosed uses and (2) appropriate regulation of PCBs at levels below 50 ppm.

Therefore, the parties asked the Court to allow the 1979 regulation to remain in effect (categorizing PCB transformers, capacitors and electromagnets as totally enclosed) for eighteen months while information is gathered on transformer, capacitor and electromagnet characteristics and also on PCB manufacture at levels below 50 ppm. The parties agreed that during this eighteen month period only persons who adhere to an interim inspection and maintenance program for intact, non-leaking transformers should be allowed to use PCB transformers under the 1979 regulation.

On February 12, 1981, the Court accepted the inspection and maintenance program proposed by EPA, EDF and industry. The Court issued the attached order allowing use of intact, nonleaking PCB transformers, capacitors and electromagnets to continue for eighteen months so long as owners and users follow the court-ordered inspection program. The program is to become mandatory and enforceable sixty days after publication of the Court's order in the Federal Register. Publication is now scheduled for early March 1981.

In the meantime, you may wish to study the Court's order to become familiar with its terms. The inspection and maintenance requirements (or interim measures program) is contained in Appendix B to the order. The requirements are in addition to those contained in the 1979 PCB regulation. Owners of PCB transformers (500 ppm PCB or greater) and PCB contaminated transformers (between 50 and 500 ppm PCB) which pose an exposure risk to food and feed products must inspect such transformers weekly. All leaks must be recorded and moderate leaks (as defined on page 1 of Appendix B to the order) must be reported to the appropriate EPA regional office within five business days. Servicing of the transformer must begin within two business days. Records must be kept (with required information as described in Appendix B), and these records must be made available to EPA upon request.

Similarly, all other PCB transformers (500 ppm PCB or greater) must be inspected every three months. All leaks must be recorded, and servicing as a result of moderate leaks must begin within two business days. Records must be kept and are to be made available for inspection by EPA.

As stated earlier, these new requirements will not become effective until sixty days after publication in the Federal Register. I will send you a further memorandum outlining our enforcement policy as soon as the Court order is published.

If you have any questions concerning this memorandum, please call John W. Lyon, Chief of the Case Development and Legal Branch (FTS 755-8317), for additional information.

A E Conroy II

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

Attachment

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORIGINAL

ORIGINAL

No. 79-1580

ENVIRONMENTAL DEFENSE FUND, INC.,

Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

AD HOC COMMITTEE ON LIQUID DIELECTRICS OF THE
ELECTRONIC INDUSTRIES ASSOCIATION,
NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION,
JOY MANUFACTURING COMPANY,
EDISON ELECTRIC INSTITUTE, et al., and
ALUMINUM COMPANY OF AMERICA,

Intervenors

BEFORE: Edwards and Robinson, Circuit Judges, and Corcoran, United States District Judge for the District of Columbia

O R D E R

Upon consideration of the joint motion filed by respondent, petitioner, and certain intervenors on January 21, 1981, to stay further the issuance of the mandate in this case, it is

ORDERED, by the Court, that the mandate of the Court is stayed for a period of eighteen months insofar as the decision of the Court set aside the regulation promulgated by the

*/ Sitting by designation pursuant to 28 U.S.C. §292(a) (1976).

Environmental Protection Agency (classifying the use of intact, non-leaking, PCB-containing transformers, capacitors, and electromagnets as uses of PCBs in a "totally enclosed manner,") 40 CFR 761.30, 44 Fed. Reg. 31530, 31531, 31548-9 (1979); this stay shall apply only where those claiming the benefit of the stay comply with any applicable requirements of the Interim Measures Program attached as Appendix B to this Order.

Further ORDERED that the mandate of the Court, insofar as the decision of the Court set aside the regulation promulgated by the Environmental Protection Agency defining "PCBs" (for purposes of the statutory prohibition on further manufacture, processing, distribution in commerce, and use of PCBs) as PCBs in concentrations of 50 parts per million or greater, 40 CFR 761.2(x), 44 Fed. Reg. 31444 (1979), is stayed for the following periods:

> With respect to use of PCBs in transformers, capacitors, and electromagnets, for a period of eighteen months;
>
> With respect to all other manufacture, processing, distribution in commerce and use of PCBs, for a period of thirty days.

Further ORDERED that Intervenor Edison Electric Institute undertake the actions set out in Appendix A to this Order.

Further ORDERED that Respondent Environmental Protection Agency publish in the Federal Register, within three weeks

after the date of this Order, an Advanced Notice of Proposed Rulemaking relating to the use of PCBs in electrical equipment.

Further ORDERED that Respondent Environmental Protection Agency promulgate a final rule with respect to the use of electrical equipment containing PCBs within six months of receipt of the material set out in Appendix A.

Further ORDERED that if the Edison Electric Institute or the Environmental Protection Agency fails to comply with the orders of this Court set out above, any party may apply to the Court for appropriate relief, including the immediate issuance of the Court's mandate.

Further ORDERED that the parties submit to the Court a status report on October 1, 1981.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

APPENDIX A

PROPOSAL TO SUPPLY EPA WITH INFORMATION FOR RULEMAKING ON USES OF PCBS BY THE ELECTRIC UTILITY INDUSTRY

INTENT TO PROVIDE INFORMATION

To assist EPA in the development of an adequate rulemaking record for the regulation of PCBs, USWAG will retain independent contractor(s), acceptable to EPA and EDF,[1/] to conduct a study on current PCB usage in utility equipment.[2/] This study will address the effects of the use of PCB-containing equipment on human health and the environment. It is expected that data will be supplied on: types of electrical equipment; leakage phenomena, including the incidence and magnitude of leaks; feasibility of containment, inspection and maintenance; and feasibility of transformer and capacitor phase out. Additionally, several other areas of inquiry will be included, such as the impact of a regulatory cutoff above or below 50 ppm; the health effects of PCBs; a pathway analysis for PCBs that may be released into the environment from electrical systems; nonelectrical materials potentially containing PCBs; and viable substitutes for PCBs. Finally, an overall economic

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1/ To insure the timely commencement of the study, EPA and EDF will promptly respond as to the acceptability of the contractor(s) proposed.

2/ Other uses of similar equipment by other industries may vary and for this reason will not be covered. In addition, other equipment containing PCBs, such as small capacitors, that is used more broadly throughout the industrial, commercial and residential sectors will not be included.

analysis would be developed to reflect both costs incurred to date to comply with the TSCA-PCB regulations as well as the incremental costs of new regulatory approaches.[3/]

It is contemplated that the study will be completed within nine months and portions of it will be submitted to EPA prior to that time.[4/] If it appears that USWAG will be unable to complete Tasks 1 through 4 below within nine months despite good faith efforts to do so, it may request of EPA and EDF an additional period of up to three months for its work. EPA and EDF will not unreasonably withhold their consent to such extension, after considering USWAG's efforts to date and the circumstances which USWAG believes necessitate the extension.

3/ In addition to the information contained in the study, USWAG reserves the right to submit to EPA such other studies, information, and data (e.g., problems of testing and development of testing protocols) as USWAG believes are necessary or appropriate to further rulemaking.

4/ Since some brief period of time will be necessary to engage consultants and develop sampling protocols following acceptance of the scope of work by the parties, the study period should commence no later than two months following the issuance of a stay of mandate by the Court. It is contemplated that Task 1 would be completed within three months of the commencement of the study and Task 2, with respect to PCB Capacitors and PCB Transformers, would be completed within six months of the commencement of the study.

SCOPE OF THE INFORMATION GATHERING EFFORT

The scope of information gathering will be divided into several discrete tasks, as set forth below.

1. Compilation of a complete listing of all types of electrical equipment that contain mineral oil or other fluid containing PCBs.

The first task will be to list and quantify such equipment, describe its use, geographical location,[5/] and distribution of ranges of PCB concentrations. Descriptions of equipment maintenance procedures and of measures taken for worker protection also will be provided. The inventory of equipment will include: transformers, capacitors, electromagnets, electrical switches, voltage regulators, and underground cable systems as well as any other utility equipment identified as containing PCBs. A complete narrative on each category of equipment will be provided covering its function, configuration and chemical content.

2. Frequency of leaks or ruptures.

For purposes of the study, "leak" will be defined quantitatively. Leaks may be described as small, as moderate or as ruptures.[6/] Small leaks include all instances in which a PCB Article has any PCBs on any portion of its external surface, but

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5/ Geographical location shall include not only various geographical regions of the United States but also various types of terrains (e.g., deserts, swamps, near or over waterways).

6/ Further differentiations of leaks may be necessary.

no PCBs have run off the surface of the PCB Article.[7/] Moderate leaks include instances in which a leak results in any quantity of PCBs running off the surface of the PCB Article. Initially, ruptures will mean leaks causing immediate cessation of equipment function, although other definitions may be applied. For each type of electrical equipment, an attempt will be made to determine the frequency of leak or rupture, the volume of liquid lost, equipment type, and geographical location. These leaks may conform to a frequency distribution of magnitude according to different variables. Equipment type, geographic location, age and electrical loading (to the extent data are available) are factors to be evaluated. The relationship between equipment failure and subsequent leaking will be studied.

3. Feasibility of a program to contain, inspect and maintain different electrical equipment items.

This task will be to identify a number of inspection and maintenance programs and to provide cost estimates and technological feasibility evaluations with respect to each program. Variables to be considered may include electrical equipment type, geographical location, and potential for exposure to different concentrations and quantities of PCBs. At a minimum, the following programs shall be evaluated:

7/ "PCB Article" is defined at 40 C.F.R. § 761.2(t).

(a) A program to provide complete containment of any PCBs which might leak from each category of electrical equipment identified in Task 1.

(b) A program to inspect visually, at various frequencies ranging from weekly to annually, all items within each category of electrical equipment for leakage and to correct all moderate leaks detected.

4. Feasibility of a phase-out program for transformers and capacitors.

The approach to this effort will be similar to the feasibility of inspection, maintenance and containment as described above.[8/] Alternative approaches will be assessed, including the following:

(a) 2, 5, 10 & 20-year phase outs of PCB Transformers;

(b) 2, 5, 10 & 20-year phase outs of PCB-Contaminated Transformers;

(c) 2, 5, 10 & 20-year phase outs of PCB Capacitors.[9/]

In this aspect of the study, the availability of replacement equipment and liquids will be examined, as well as their suitability,[10/]

8/ The evaluation will also reflect the viability of substitutes.

9/ The time frames will be measured from January 1982.

10/ For example, it may be necessary to assess the toxicity and flammability of substitute fluids, in addition to developing data on the availability of equipment and raw materials.

the availability of storage and disposal facilities, and the feasibility of reducing or eliminating PCB concentrations by retrofilling.[11/] An attempt also will be made to analyze the effect an increased demand for replacement equipment may have on prices.

5. Literature Search.

A comprehensive literature search and review of the health effects of PCBs will be undertaken and an attempt will be made to assess the risks posed by phenomena such as small leaks and ruptures.

6. Pathway analysis.

An attempt will be made to examine the environmental pathways that PCBs could take if they escape from electrical equipment. Conditions reflecting normal operation of transformers and capacitors will be evaluated, as well as those involving equipment that has exploded or otherwise suddenly released PCB-containing fluid into the environment. For example, volatility and transport mechanisms (such as surface water drainage, groundwater infiltration and ground cover embodiment and/or release) would be considered.

11/ In evaluating substitutes for PCBs, including retrofilling, the contractor performing the study shall seek and consider information from manufacturers of substitutes and independent servicing companies.

7. Non-electrical system sources of PCBs.

The study will also seek to determine the risks and benefits of permitting the continuation of certain non-enclosed uses of PCBs, such as burning of fuel oil.

SAMPLING PROCEDURES

The study must reflect a statistical approach that assures a high degree of confidence in the validity of the results.

EPA AND EDF REVIEW

It is contemplated that EPA, EDF, USWAG and the contractor performing the study will meet for progress reports periodically and with sufficient frequency to keep EPA and EDF abreast of the progress of the study. EPA and EDF, at their own expense, will have the right to review all underlying data generated in connection with the study. It is understood that identification of particular companies, facilities and locations may be masked. While it is not anticipated, review of the ongoing study may result in the need for additional information or for the refocusing of certain portions of this study. Such revisions may result in an extension of the completion date as set forth above.

APPENDIX B

INTERIM MEASURES PROGRAM

This document describes the interim measures required for all owners and users of PCB Transformers and certain owners and users of PCB-Contaminated Transformers who wish to continue to use, or store for reuse, transformers containing PCBs while EPA conducts further rulemaking with respect to PCB uses which the Agency previously had designated as "totally enclosed." To continue to use transformers containing PCBs during this interim period, owners and users of this equipment must comply with the requirements set forth in this document within sixty days after the publication by EPA of the Federal Register Notice announcing the Interim Measures Program or within ninety days after January 21, 1981 (the date of filing the Joint Motion for Further Stay of the Issuance of the Mandate), whichever is later.

I. Definitions:

The following definitions apply to this document. The definitions which are part of EPA's PCB Ban Rule, 40 C.F.R. Part 761, also apply to this document unless they are inconsistent with the definitions set forth below.

A. "leak" means any instance in which a PCB Unit has any PCBs on any portion of its external surface.

B. "moderate leak" means any leak which results in any quantity of PCBs running off or about to run off the external surface of the PCB Unit.

C. "PCB Unit" means any PCB Transformer or PCB-Contaminated Transformer in use or stored for reuse.

D. "posing an exposure risk to food and feed products" means any potential exposure of food and feed products to PCBs as defined below. PCB Units used by federally inspected meat, poultry product, and egg product establishments, as well as facilities manufacturing, processing, packaging or holding human food or animal feed, but excluding retail establishments such as grocery stores and restaurants, are considered to pose an exposure risk to food and feed products, unless the PCB Unit is in a location such that a discharge of the dielectric fluid cannot contaminate the food and feed products or processes.

E. "servicing" means repairing and cleaning or replacing the PCB Unit to eliminate the source of the leak. Cleaning of the PCB Unit means removing any unsolidified dielectric fluid on its external surface.

F. "visual inspection" means to investigate for any leak of dielectric fluid on or around the PCB Unit. A visual inspection should not require an electrical shutdown of the PCB Unit being inspected. The extent of the visual inspection will depend on the physical constraints of each PCB Unit installation.

II. <u>The following procedures must be followed with respect to all PCB Units posing an exposure risk to food and feed products</u>:

A user of a PCB Unit posing an exposure risk to food and feed products shall notify the owner of the PCB Unit that the Unit poses an exposure risk to food and feed products. If the user fails to notify the owner, the user is responsible for the inspection, recordkeeping, reporting and servicing of the PCB Unit as set forth below.

The owner of a PCB Unit posing an exposure risk to food and feed products shall perform the following activities:[1/]

A. A visual inspection of each PCB Unit posing an exposure risk to food and feed products shall be performed at least once every week.

B. All leaks shall be recorded. All moderate leaks shall be reported to the appropriate EPA regional office within five (5) business days from the date the leak is observed. If a PCB Unit is found to have a moderate leak, servicing is required

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1/ If the owner of the PCB Unit is not the owner of the food and feed establishment, the owner of the PCB Unit shall have no obligation to perform the inspections required in this section, until the owner is notified by the establishment that the establishment is a food and feed facility or until the owner of the PCB Unit has other knowledge that the establishment is a food and feed facility. To inform food and feed establishments of the necessity of notifying owners of PCB Units used at their establishments, utilities undertake to mail to their commercial and industrial customers an announcement requesting food and feed establishments to contact the utility or other owner of the PCB Unit.

and must commence within two (2) business days from the date the leak is observed.

C. Records, containing inspection/servicing history, with respect to all PCB Units posing an exposure risk to food and feed products shall be maintained for a period of three years and shall be made available for inspection, upon request, by EPA. Such records shall contain the following information for each PCB Unit:

(1) its location;

(2) the date of each visual inspection made of the Unit, together with an identification of the person performing the inspection;

(3) all leaks observed in the Unit, together with the date observed, and whether the leak was a moderate leak; and

(4) a description of all servicing performed on the Unit commencing as of the date the Unit is first inspected pursuant to these Interim Measures, together with the date of such servicing.

D. Reports to EPA regional offices shall be in writing and shall contain the location of the PCB Unit involved, the date the moderate leak was observed, an estimate of the extent of the leak and a description of the servicing performed, including the date(s) of the servicing performed.

III. <u>The following procedures must be followed with respect to all PCB Transformers in use or stored for reuse posing no exposure risk to food and feed products (all PCB Transformers not covered in section II)</u>:

Owners of PCB Transformers in use or stored for reuse posing no exposure risk to food and feed facilities shall perform the following activities:

A. A visual inspection of each PCB Transformer posing no exposure risk to food and feed products shall be performed at least once every three months.

B. All leaks shall be recorded. If a PCB Transformer is found to have a moderate leak, servicing is required and must commence within two (2) business days from the date the leak is observed.

C. Records, containing inspection/servicing history, with respect to all PCB Transformers in use or stored for reuse shall be maintained for a period of three years and shall be made available for inspection, upon request, by EPA. Such records shall contain the following information for each PCB Transformer:

(1) its location;

(2) the date of each visual inspection made of the PCB Transformer, together with an identification of the person performing the inspection;

(3) all leaks observed in the PCB Transformer, together with the date observed, and whether the leak is a moderate leak; and

(4) a description of all servicing performed on the PCB Transformer commencing as of the date the PCB Transformer is first inspected pursuant to these Interim Measures, together with the date of such servicing.