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

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MEMORANDUM

SUBJECT: Interpretive Statement on Change in Ownership of Real Property Contaminated with PCBs

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Section 6(e) of the Toxic Substance Control Act ("TSCA") generally prohibits the distribution in commerce of polychlorinated biphenyls ("PCBs"). In a number of instances in the past twenty years, the Agency has interpreted this statutory prohibition to apply to the sale of real property contaminated with PCBs if the contamination occurred after 1978 (when the statutory prohibition in section 6(e) took effect). For the reasons set forth in this Memorandum, the Agency has reexamined this interpretation and has determined that the interpretation is not required under TSCA. Under its new interpretation of section 6(e), the Agency will not consider the transfer of ownership of real property that is contaminated with PCBs as a prohibited distribution in commerce of PCBs. The Agency has concluded that limitations on the conveyance of real property are not necessary to advance the statutory goal of limiting exposure to PCBs, and that in many cases limitations on conveyance of real property serves not only as an unnecessary barrier to economic redevelopment, but may actually delay the cleanup of contaminated properties as well. The Agency believes that restrictions on the transfer of real property should be avoided unless necessary to achieve the statutory purpose of protecting the public from exposure to PCBs, and that in light of the fact that change in ownership of the property does not change the status quo in terms of the PCBs on the site, the Agency believes

that real property transfer prohibitions do not serve any protective purpose. The Agency is therefore announcing this reinterpretation of section 6(e).

Statutory Background

Section 6(e)(3)(A)(ii) of TSCA provides generally that "no person may process or distribute in commerce any polychlorinated biphenyl after [April 11, 1979]." Under section 3 of TSCA, "commerce" is defined as "trade, traffic, transportation, or other commerce (A) between a place in a State and any place outside of such State, or (B) which affects trade, traffic, transportation, or commerce described in clause (A);" and "distribution in commerce" as the sale into commerce, introduction or delivery for introduction into commerce, or the holding after introduction into commerce of a chemical substance, mixture, or article containing a chemical substance or mixture.

The purpose of TSCA is to "prevent unreasonable risks of injury to health or the environment associated with the manufacture, processing, distribution in commerce, use, or disposal of chemical substances." S.Rep. No.94-698, 94th Congress, 2nd Session, 1, reprinted in Legislative History of the Toxic Substances Control Act, December 1976 ("Legislative History of TSCA"), 157; see also H.Rep. No. 94-1341, 94th Congress, 2nd Session, ("The Committee Bill takes a major step forward in providing urgently needed authority to protect health and the environment from dangerous chemicals"), Legislative History of TSCA, 409. While Congress established in TSCA a number of mechanisms for potentially regulating risks from chemical substances, PCBs were singled out for special treatment; PCBs were the only chemical substance explicitly banned under the terms of the statute when TSCA was promulgated.

The language banning PCBs was in neither the House nor Senate version when TSCA was first introduced. Instead, amendments were offered in both Chambers to ban PCBs. When Congress considered banning PCBs, the chemical was widely used; in the Senate it was estimated that 10 million pounds of PCBs escaped into the environment annually. Legislative History of TSCA at 240. There was much discussion of the dangers posed by PCBs. See Legislative History of TSCA at 233-240 (Senate), 581-590 (House). The transport of equipment containing PCBs was also identified as a source of danger; Senator Magnuson from Washington noted an incident in that State when an inadequately crated transformer was dropped on a dock during shipping and 300 gallons of PCBs leaked into the Duwamish Waterway. Legislative History of TSCA at 212. The clear intent of the legislation was to prohibit the continued manufacture and use of PCBs and require the transition to the use of safer alternative chemicals. See, e.g., Legislative History of TSCA at 236 (Senator Nelson, comparing PCBs to DDT, a pesticide the use of which was banned by Congress a few years earlier: "This Amendment would allow time for the phasing out of the manufacture and use of PCBs over 2 ½ years"); 508 (Congressman Dingell: "[I]t is clear that steps to control production, use, and disposal [of PCBs] are needed....If Japan, as the largest producer of electronic equipment, can replace PCBs with some other, more neutral component, then the U.S. can follow suit"); 588 (EPA Administrator Russell Train: "[T]here is absolutely no disagreement whatsoever that PCBs should be eliminated, all uses should be gotten rid of just as rapidly as we can").

There were minor differences in the treatment of PCBs between the version of TSCA that passed the Senate and the version that passed the House. After the Conference Report produced the final version of TSCA that was enacted into law, Senator Pearson declared that the bill would "provide for specific prohibitions regarding the manufacture, use, and disposal of PCBs, a widely used and long-lived toxic chemical substance" (TSCA Legislative History at 735); Congressman Broyhill agreed that the "purpose of this [PCB] ban is to preclude the manufacture, processing or distribution in commerce of new PCBs or new equipment containing PCBs in 2 ½ years after the effective date" (TSCA Legislative History at 744).

The legislative history makes it abundantly clear that Congress wanted the United States to move quickly from PCBs to alternative chemicals and, where switching to another chemical was not possible, to otherwise protect human health and the environment from exposure to PCBs. Nothing in the legislative history suggests that Congress intended to place restrictions on the transfer of ownership of real estate that might become contaminated with PCBs after 1978.

Previous Interpretation

Although there have not been many explications of the interpretation, the Agency seems to have interpreted the prohibition upon distribution of PCBs in commerce to apply to sales of real estate for a number of years. For example, on April 9, 1985, Suzanne Rudzinski, Chief of EPA's Chemical Regulation Branch, sent a letter to Laret Bolthouse, an attorney representing a client who owned property contaminated with PCBs stating: "Section 6(e) of TSCA prohibits the distribution in commerce of PCBs unless authorized by the EPA Administrator through rulemaking, and the sale of property contaminated by PCBs is not specifically authorized. However, EPA has maintained the policy of allowing the sale of such property after the Regional Office has approved the clean-up of the property. If your client sells property contaminated with PCBs without the approval of the Regional Office, he will have violated the prohibition on the distribution in commerce of PCBs." A similar letter was sent by the Deputy Assistant Adminstrator of EPA's Office of Prevention, Pesticides, and Toxic Substances, to an attorney representing the Utilities Solid Waste Activities Group in 2002. See July 15, 2002 Letter from Susan Hazen to Douglas H. Green.

This interpretation is also reflected in the PCB Spill Cleanup Policy, 40 CFR Part 761, Subpart G (52 Fed.Reg. 10688, April 2, 1987) (announcing enforcement policy that would allow people to clean up spills of PCBs at various concentrations; prior to announcement of the policy, only "decontaminated materials" (an example of which was "soil") could be used, processed, or distributed in commerce), and in the Agency's regulation that permits the distribution in commerce of decontaminated materials (40 CFR §761.20(c)(5), 53 Fed.Reg. 24206 (June 27, 1988)).[1]

Finally, in two recent instances involving transfers of PCB-contaminated properties under the Base Realignment and Closure Act ("BRAC"), the Agency informed the Department of

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[1] The preamble to this regulation stated that EPA is excluding from the prohibition on the distribution in commerce, among other things, decontaminated structures. 53 Fed.Reg. at 24216.

Defense that the transfer of the Naval Air Warfare Center, an industrial facility owned by the United States Navy (and managed under contract by Raytheon), to the City of Indianapolis, Indiana, and the transfer of Mare Island, a former ship-repair site owned by the Navy, to the City of Vallejo, California, would be in violation of the statutory prohibition on the distribution of PCBs in commerce.[2]

Rationale for New Interpretation

In reexamining both the text of TSCA and its legislative history, the Agency has determined that its previous interpretation that the change in ownership of real property, where there is no movement or change in status or treatment of PCBs, is an unlawful "distribution in commerce of PCBs" is neither compelled by the plain language of TSCA nor by its legislative history. For the reasons given below, the Agency finds that the interpretation that transfers in ownership of real estate are not prohibited by TSCA to be more compelling, and hereby adopts such interpretation.

First, the Agency believes that prohibiting transfers in the ownership of real estate is not necessary for the protection of human health and the environment from the risks associated with PCBs. The "distribution" of real estate does not raise any risk concerns similar to those raised by the movement or distribution of PCBs or equipment containing PCBs, where physical movement is likely and different exposure scenarios can be raised by the change in location of the PCBs. The Agency has determined that unnecessary restrictions on the transfer of real property should be avoided, and that in light of the fact that change in ownership of the property does not change the status quo in terms of the PCBs on the site, the Agency believes that prohibiting the transfer does not serve any protective purpose.

Given that transfer in ownership of a piece of property does not change the status quo of the PCBs on the site, a transfer itself would not increase any risks to the environment or human health. A change in ownership does not abrogate, accelerate, or trigger anew any existing operational requirement of TSCA. Any previously applicable requirements of TSCA and its regulations will continue to apply to the site after the transfer. For example, the regulation (40 CFR §761.30(p)) authorizing continued use of a contaminated porous surface under certain specified conditions will continue to apply after ownership of a site is transferred; the new owner will be authorized to continue the use of the contaminated surface for the remainder of its useful life, so long as the requirements of the regulation continue to be met. Both the authorization for use and the obligation to comply with the conditions specified in the regulation remain unchanged, and apply to the new owner just as they did to the previous owner.

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[2] In the case of the Indianapolis facility, EPA issued a letter of enforcement discretion that allowed the transfer to go forward. (Letter of May 28, 2002 from Thomas Skinner, Regional Administrator, Region 5, and Sylvia K. Lowrance, Principal Deputy Assistant Administrator, Office of Enforcement and Compliance Assurance, to Donald Schregardus, Deputy Assistant Secretary of the Navy). In the case of Mare Island, EPA allowed the transfer of the property under the terms of a settlement of an enforcement complaint. (See *In the Matter of Mare Island Naval Shipyard (Eastern Transfer Parcel)*, Order of December 20, 2001).

Furthermore, if there were a change in the status quo with respect to the PCBs on a transferred site, such a change could potentially trigger actions under TSCA and/or its regulations. The transfer is not a release of any obligations of either the seller or the purchaser regarding proper handling, clean-up, or disposal of contaminated material. The Agency has ample authority under TSCA to address concerns associated with the use and disposal of PCBs, and this new interpretation does not affect that authority.

Second, prohibiting the transfer of ownership of real estate is not only unnecessary, it can be harmful. The two recent examples of the BRAC properties in Indiana and California are instructive. In the case of the Naval Air Warfare Center in Indianapolis, the Navy had been operating a manufacturing facility at the Center for a number of years. The facility employed approximately 1,500 people, and was managed by Raytheon. Under the terms of the BRAC law, the Navy had to "close" the facility. In an effort to maintain the site and keep the 1,500 workers employed, the City of Indianapolis offered to take the site from the Navy. No changes were planned for the facility; Indianapolis proposed to have Raytheon continue to manage the facility and have the facility operations remain as they had been under the Navy. Under the Agency's previous interpretation, the Navy could have operated the site indefinitely (with adequate precautions being taken to prevent worker exposure to the PCBs on the site), but it could not transfer ownership of the site unless the PCBs on the site were fully cleaned up. Had the Agency not exercised enforcement discretion in this instance, the combined application of BRAC and EPA's previous interpretation of section 6(e) would have required the facility to shut down, and 1,500 jobs would have been unnecessarily lost.

In the case of Mare Island, the Navy proposed to transfer a BRAC property to the City of Vallejo for redevelopment purposes. Before the transfers, the property was contaminated and unused. The City of Vallejo envisioned transferring the property to developers who proposed to do a clean-up and return the property to productive use. Prohibiting the transfer would have discouraged both redevelopment and clean-up of the property. Because the transfer was eventually allowed, the property is being cleaned up and is expected to be returned to productive use.

With the recent enactment of Brownfields legislation (Public Law 107-118, January 11, 2002)[3], the Agency is deeply concerned that its previous interpretation of TSCA section 6(e) could frustrate the intent of that law to encourage the clean-up and return to productive use of contaminated or potentially-contaminated properties. An interpretation of TSCA that allows the change in ownership of properties, without affecting the Agency's ability to regulate use or disposal of PCBs on the properties where appropriate to protect health or the environment, will allow programs like Brownfields to go forward without putting the public at risk. For all the reasons discussed above, the Agency is therefore adopting the interpretation of TSCA that the

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[3] The Small Business Liability Relief and Brownfields Revitalization Act was designed to encourage the cleanup and redevelopment of old industrial properties in a manner that would clean up the environment, create new jobs, and protect small businesses from frivolous lawsuits. See Remarks by the President in Signing of H.R. 2869, the Small Business Liability Relief and Brownfields Revitalization Act, January 11, 2003.

prohibition contained in section 6(e)(3)(A)(ii) banning the "distribution in commerce"of PCBs, does not prohibit the transfer of ownership of real property that may be contaminated with PCBs.

For further information about this statement, contact Bob Perlis of the Office of General Counsel at 202-564-5636 or Tony Baney of the Office of Pollution Prevention and Toxics at 202-566-0514.