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U S W A G

May 28, 2002

VIA HAND DELIVERY

Mr. John Morrall
 Office of Information and Regulatory Affairs
 Office of Management and Budget, NEOB, Room 10235
 725 17th St., N.W.
 Washington, DC 20503

Re: Draft Report to Congress on the Costs and Benefits of Federal Regulation;
 Notice and Request for Comments

Dear Mr. Morrall:

The following comments on the Office of Management and Budget's ("OMB") notice of a Draft Report to Congress on the Costs and Benefits of Federal Regulation (67 Fed. Reg. 15013 (March 28, 2002)) are submitted on behalf of the Utility Solid Waste Activities Group ("USWAG").¹ These comments address OMB's request for nominations from the regulated community for regulatory reform through: (1) rescinding outmoded or unnecessary rules, and (2) identifying "problematic Agency 'guidance' documents of national or international significance that should be reformed through notice and comment rulemaking, peer review, interagency review, or rescission." *Id.* at 15015, 15033.

USWAG members are regulated under several federal environmental programs and support OMB's efforts to stimulate development of a regulatory process that, among other things, simplifies and modifies existing rules to make them more effective

¹ USWAG is an informal consortium of approximately 80 electric utility operating companies and associations, including the Edison Electric Institute ("EEI"), the National Rural Electric Cooperative Association ("NRECA"), the American Public Power Association ("APPA"), and the American Gas Association ("AGA"). Together, USWAG members represent more than 85% of the total electric generating capacity of the U.S. and service more than 95% of the nation's consumers of electricity and over 93% of the nation's consumers of natural gas.

and rescinds outmoded rules whose benefits do not justify their costs. Id. at 15015. Consistent with these objectives, identified below are two candidates for rescission under the Environmental Protection Agency's ("EPA") regulatory program for polychlorinated biphenyls ("PCBs") under 40 C.F.R. Part 761.

The first candidate for rescission is a regulation set forth at 40 C.F.R. § 761.35 (entitled "storage for reuse") that imposes record keeping requirements and potential phase-out obligations on entities storing electrical equipment for reuse. For the reasons discussed below, USWAG urges that this regulation be rescinded as applied to the gas and electric utility industry (SIC numbers 4922, 4923, 4924 and 4911) (here after "utility industry").

The second candidate for rescission is an EPA "guidance" document that imposes additional controls on EPA's "PCB Spill Cleanup Policy" ("Cleanup Policy" or "Policy"), which is a longstanding regulatory option for responding quickly and effectively to PCB spills. Any changes to the rights afforded the regulated community under the Cleanup Policy can be implemented only through notice and comment rulemaking under the Administrative Procedure Act ("APA"). Because EPA did not comply with the APA in this case, USWAG recommends that the "guidance" unilaterally altering the scope of the Cleanup Policy be rescinded.

These issues are discussed below.

I. Storage for Reuse Regulation -- 40 C.F.R. § 761.35

A. Regulating Agency -- Environmental Protection Agency; Office of Prevention, Pesticides, and Toxic Substances; PCB Program Office

B. Citation -- 40 C.F.R. § 761.35

C. Authority -- Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.

D. Description of Problem -- This regulation imposes restrictions on the storage for reuse of "PCB Articles," which includes a wide-range of electrical equipment critical to the reliable supply of electricity to millions of entities throughout the United States, including federal (civilian and military), state, municipal, local, commercial, and

residential consumers of electricity.⁴ The regulation limits the storage of such equipment to five years, unless a waiver is granted at the sole discretion of EPA or unless the equipment is consolidated (from many discrete locations within an utility's service area) in a centralized facility designed to hold PCB wastes (so-called "storage for disposal" facilities). Consolidating PCB Articles in a "storage for disposal" facility is impractical because such equipment must be kept on hand at service centers and similar dispersed locations throughout utility transmission and distribution systems to ensure quick access to spare equipment to replace equipment damaged in storms, accidents or system failures.

In developing the storage for reuse rule, EPA readily acknowledged the many reasons in which extended storage for reuse of PCB Articles is warranted, explaining that "there are many legitimate instances which warrant the storage of PCB equipment for many years for the purpose of reuse as spares for critical components of electrical systems." 59 Fed. Reg. 62788, 62821 (Dec. 6, 1994) (emphasis added). EPA emphasized there would be many circumstances within the utility industry where storage for reuse of PCB-containing equipment—well beyond five years—is warranted, due to the longevity of equipment and the unique functions that the varied equipment serves in providing reliable electrical service to the public. As the Agency explained:

There are many compelling reasons for allowing the storage for reuse of PCB Articles. Since transformers, for example, can easily have an active service life of more than 40 years, disposing of this equipment prematurely based upon an arbitrary time limit would not be economically prudent nor serve any environmental goals. Placing such a piece of electrical equipment in storage for reuse to be used as a spare or in emergency situations is both prudent and economically sound.

Id. at 62822 (emphasis added).

EPA also conceded that the real focus of the rule was certain businesses, including brokers, junk yard dealers and service jobs which, "by their nature...accumulate larger quantities or volumes of PCBs" than do owners or users of

² PCB Articles are defined as "any manufactured article, other than a PCB Container, that contains PCBs and whose surface(s) has been in direct contact with PCBs" (at concentrations \geq 50 ppm PCBs). 40 C.F.R. § 761.3. This includes, for example, capacitors, transformers, electric motors, switches, bushings and other PCB-containing equipment critical to the reliable transmission and distribution of natural gas and electricity.

the equipment, such as utilities. Id. Concerned that this former group of entities engaged in sham storage, EPA explained that it is “these situations which the Agency is seeking to control by limiting the time allowed for storage for reuse and imposing other safeguards.” Id. Recognizing, at the same time, that the rule may not be appropriate for all industries (e.g., utilities), EPA specifically requested “comment on the inclusion of site-specific or nationwide exemption or waiver provisions in addition to the [rule’s] proposed waiver provision.” Id.

In response to EPA’s request for comment on this issue, USWAG argued for an exemption for PCB Articles retained in storage for reuse by the utility industry, emphasizing that utilities require an inventory of spare PCB Articles. Virtually every other entity that commented on the issue agreed that application of the storage for reuse rule to utilities was both unnecessary and impractical. For example, the U.S. Department of Energy filed detailed objections to the rule, arguing it would require utilities to abandon perfectly useable and critical equipment with no attendant environmental benefits and unnecessarily threaten the reliable provision of power to the public. The Connecticut Department of Environmental Protection went a step further and explicitly supported the need for a variance for utilities, noting the large number of electrical equipment that utilities must keep on-hand as spares. A broad range of municipalities and private utilities took similar positions, questioning the need for imposing the new restrictions on utilities.

EPA nonetheless promulgated the final rule without an exemption for utilities and without a single word responding to the requests of utilities and others for a variance. EPA failed to refute, contradict, or respond to the evidence in the record demonstrating that there is no legitimate basis for imposing storage for reuse requirements on utilities. The utility industry challenged the rule and the United States Court of Appeals for the Fifth Circuit remanded the rule to EPA, without vacature, because EPA failed to respond to the comments of USWAG and others urging the Agency to exempt utility systems from the rule. Central and South West Services, Inc. v. EPA, 220 F.3d 683, 692 (5th Cir. 2000).

E. Proposed Solution – It has been two years since the storage for reuse rule was remanded to the Agency and it does not appear that EPA has established any internal timetable for responding to the remand (for example, there is no schedule for responding to the remand in EPA’s latest regulatory agenda for TSCA rulemakings, see 67 Fed. Reg. 33823-37 (May 13, 2002)). The bottom line is that the utility industry remains indefinitely saddled with a rule that was promulgated in violation of the APA and on which virtually all commenters agreed made no sense to apply to the utility industry in the first place.

For these reasons, USWAG recommends the proposed solution is for EPA to rescind rule as applied to the utility industry. To date, EPA has not provided a reasoned explanation as to why this regulation is necessary for utility storage of spare equipment. In the meantime, utilities are coping with burdensome requirements that make little sense as applied to electric and gas operating systems. For example, utilities are coming upon the five-year storage limit and are beginning the process of preparing individual "variance" requests for hundreds of thousands of pieces of equipment cross the country being held in storage for reuse (variance requests must be submitted at least six months before expiration of the first 5-year storage deadline, which is August 28, 2003).

Not only is this paperwork burden enormous, but there is no assurance that EPA will grant such requests, or even be able to respond to the thousands of requests before expiration of the five-year limit. Even if granted, there is no way to predict what additional conditions EPA will, under its sole discretion, impose on utilities for the continued storage of thousands of pieces of equipment critical to the operation of utility transmission and distribution systems (equipment that has been stored for years without problems).

F. Estimate of Economic Impacts -- While it is difficult to accurately quantify at this time the total economic impact of preparing individual variance requests for hundreds of thousands of PCB Articles being held in storage for reuse (because such applications are just beginning to be prepared), the economic impacts will be substantial. Virtually every utility in the country (including thousands of rural electrical co-operatives) necessarily store PCB Articles for reuse as spare equipment. The vast majority of these entities will be required to file variance requests to continue to store this equipment.

Equally significant is the fact that rejections of variance requests (which decisions are at the sole discretion of EPA) or the imposition of additional and unwarranted controls on extended storage could compel the premature discard of otherwise useful and valuable electrical equipment currently being held as spares. Another adverse economic impact associated with denial of variance requests will be the increased costs borne by the public for extended power outages. Put simply, utilities may not be able to respond as quickly to power outages because they will be prevented from storing spare equipment at dispersed sites throughout their power delivery systems.

II. Improper Amendments to EPA's PCB Spill Cleanup Policy

A. Regulating Agency -- Environmental Protection Agency; Office of Prevention, Pesticides, and Toxic Substances; PCB Program Office.

B. Citation -- 40 C.F.R. §§ 761.120-135

C. Authority -- Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.

D. Description of Problem -- EPA's PCB Program Office has made several attempts to improperly limit the scope of the Agency's "TSCA PCB Spill Cleanup Policy Rule" ("Cleanup Policy" or "Policy") to spills that are less than 72 hours old. This condition is nowhere in the plain language of the Policy and, in fact, changes the Policy's explicit time frames for responding to PCB spills. Any change to the Cleanup Policy that alters the substantive legal rights of the regulated community—which imposition of a 72-hour limit into the Policy clearly would do—requires compliance with the notice and comment requirements of the APA.

The Cleanup Policy was published in 1987 after prolonged discussions with key environmental and industry group stakeholders and is codified in the Code of Federal Regulations at 40 C.F.R. §§ 120-135. See 52 Fed. Reg. 10688 (Apr. 2, 1987). At the time of its publication in the Federal Register, EPA characterized the Policy as the "TSCA PCB spill cleanup policy rule" and explained that "[t]his rule presents the [TSCA] policy for the cleanup of spills of . . . [PCBs]" and "establishes requirements for the cleanup of spills resulting from the release of materials containing PCBs at concentrations of 50 ppm or greater." Id. at 10688, 10689. Since its publication in 1987, the regulated community, including federal, state, municipal, military, and commercial and industrial facilities, have relied on the Cleanup Policy as one of the key regulatory options for effectively responding to PCB spills.

The applicable regulations state unambiguously that the Policy applies to "spills [of PCBs at \geq 50 ppm] which occur after May 4, 1987." 40 C.F.R. § 761.120(a). Spills that occurred prior to May 4, 1987 are excluded from the Cleanup Policy. Id. The *only* time limits in the Cleanup Policy relate to responding to a spill once it has been discovered:

- (1) cleanup requirements for "low concentration spills" "must be completed within 48 hours after the responsible party was notified or became aware of the spill" (id. at § 761.125(b)(1)(iii) (emphasis added));
- (2) spill cleanup response to "high concentration spills" must be initiated "as soon as possible and within no more than 24 hours (or within 48 hours for

PCB Transformers) after the responsible party was notified or became aware of the spill..." (*id.* at § 761.125(c)(1) (emphasis added)).

EPA has reiterated these time frames in numerous EPA guidance documents and interpretive letters since 1987. See e.g., EPA 1994 PCB Question & Answer ("Q&A") Manual at pages XIV-3, 4, 10 & 13; see also EPA Letter dated January 4, 1989, from Denise Keehner, EPA, to Peter Friedmann, Esq. (explaining that the Cleanup Policy response "clock" starts when a spill is discovered by a company or when the company is notified of the spill, even in situations when the spill obviously is more than 72 hours old). Nowhere in the Cleanup Policy is there the condition that the responsible party must respond to a spill within 72 hours of the spill event. As long as the spill occurs after May 4, 1987 and a response is initiated within 24/48 hours of discovery (depending on the nature of the spill), the Cleanup Policy is available. Indeed, the applicable regulations expressly allow the response time to be extended (with no reference to a 72-hour limit) in times of emergency, adverse weather conditions, or lack of access. 40 C.F.R. § 761.125(c)(1).

Compliance with the Cleanup Policy provides important substantive legal rights for the regulated community. Materials cleaned up in accordance with the Policy are "decontaminated" and can continue to be used and distributed in commerce without restriction. See 40 CFR §§ 761.20(c)(5)(i) & 761.30(u)(1)(i)(C). Compliance with the Policy's response requirements is considered "adequate cleanup" under the PCB disposal regulations and creates a presumption against enforcement for the underlying spill event and the need for further cleanup under TSCA. Id. at §§ 761.50(b)(3)(ii)(A) & 761.135(a). Imposing an absolute restriction on the Policy to spills that are less than 72 hours old substantially narrows the circumstances under which it is available to the public and simultaneously narrows the legal rights that the Policy has historically provided to the regulated community. Moreover, in some cases, the regulated community would be left with no readily available PCB spill response option, thus frustrating the ability to respond effectively to PCB spills.

USWAG was therefore surprised and concerned when the PCB Program Office unilaterally declared in EPA's 2000 PCB Question and Answer ("Q&A") document that the 1987 Spill Cleanup Policy only is available for PCB spills that are less than 72 hours old, even if the spill response requirements and corresponding time frames set out in the Policy are otherwise met. See 2000 EPA Q&A Document at p. 74 (the Q&A document is contained on EPA's PCB Home Page at <http://www.epa.gov/opptintr/pcb/qacombined.pdf>). This new condition was recently reiterated on the cover page to EPA's PCB Home Page, though in making this announcement the Agency readily conceded that the 72-hour limit is "in addition to other applicability limitations found in 40 C.F.R. § 761.120." See EPA's website at

<http://www.epa.gov/opptintr/pcb/>. Even the PCB Program Office admits that the 72-hour limit is nowhere to be found in the plain language of the Cleanup Policy.

USWAG wrote to the PCB Program Office in 2000 arguing that the Cleanup Policy has been applied and enforced consistently by EPA for more than 13 years without the 72-hour limit and that any attempt to substantially narrow the scope of the Policy as codified in the C.F.R. required compliance with the APA's notice and comment requirements. The Program Office has not responded to USWAG's letter nor explained why this new and restrictive condition is necessary when the Cleanup Policy has been used successfully by thousands of federal, state, municipal, and private parties for more than 13 years without a 72-hour spill response limit.

The Cleanup Policy is a rule as defined under the APA, and any substantive change to the rule requires compliance with the notice and comment requirements of the APA. See 5 U.S.C. § 553. The Policy is generally applicable to virtually all PCB spills occurring after May 4, 1987 (see 52 Fed. Reg. at 10689), and is designed to implement and prescribe law and Agency policy regarding the procedures and requirements for responding to such spills. EPA itself has labeled the Policy a "rule"³ and it is published in the Federal Register and codified in the Code of Federal Regulations, all of which make clear to the public that EPA intends for it to be a rule. See American Portland Cement Alliance v. EPA, 101 F.3d 772, 776 (D.C. Cir. 1996); Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 539 (D.C. Cir. 1986). Further, the Cleanup Policy is a document of general applicability and, when complied with, creates binding legal rights for the regulated community and binds the Agency's discretion, characteristics which are the touchstones of an agency rule. See General Electric v. EPA, No. 00-1394 (D.C. Cir., May 17, 2002); Syncor Intern. Corp. v Shalala, 127 F.3d 90, 94 (D.C. Cir. 1997); McLouth Steel Products Corp. v. EPA, 838 F.2d 1317, 1320 (D.C. Cir. 1988); Community Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987).

E. Proposed Solution -- It is well settled that agency action that has a substantial impact on the substantive rights and interests of the public—as would any attempt to substantively amend the Cleanup Policy—is subject to the APA's notice and comment requirements. National Association of Home Health Agencies v. Schweiker,

³ In the opening sentence of preamble to the Policy in the April 2, 1987 Federal Register, EPA characterizes the Policy as a "rule." 52 Fed. Reg. at 10688. The caption of that Federal Register publication also is entitled "TSCA PCB spill cleanup policy rule." Id. (emphasis added).

690 F.2d 932, 949 (D.C. Cir. 1982); Alaska Professional Hunters Assoc. v. FAA, 177 F.3d 1030, 1034 (D.C. Cir. 1999). EPA has never provided the public with notice or an opportunity to comment on the new 72-hour condition, let alone provide an explanation as to why this new and restrictive condition is necessary when the Cleanup Policy has been used successfully by thousands of entities for more than 13 years without such a condition.

USWAG recommends, therefore, that the pronouncements in the form of "guidance" by the PCB Program Office (e.g., in the 2000 EPA PCB Q&A Manual and PCB Home Page) unilaterally incorporating a 72-hour policy into the Cleanup Policy be rescinded.

F. Estimate of Economic Impacts -- Imposition of a 72-hour spill response limit on the Cleanup Policy dramatically restricts the scope of this important, long-standing and cost-effective PCB cleanup option. The economic impacts are significant for the regulated community. Eliminating the option of using the Cleanup Policy greatly increases the costs of responding to releases of PCBs that historically have been addressed under the Policy.

For example, entities that have used the Cleanup Policy to respond to PCB spills on concrete now have no regulatory option under the 72-hour spill response limit. These entities must either completely dispose of the concrete (which could require demolishing an entire structure) or request a case-specific variance from EPA, which often take months and unnecessarily delays cleanup. These alternatives are far more expensive than compliance with Cleanup Policy. Still, EPA has failed to explain why such increased costs are necessary to protect human health and the environment.

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We appreciate the opportunity to provide OMB with these recommended revisions to EPA's PCB program. If you have questions, please contact USWAG counsel, Douglas Green, at Piper Rudnick LLP (202/861-3847).

Respectfully submitted,



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