H. § 761.61 Remediation Waste

The heart of EPA's plans to lower the costs of PCB clean up and disposal is its proposed § 761.61 self-implementing procedures for remediation waste. Numerous revisions of the proposed rule are needed to achieve the projected $5 billion cost savings. We discuss: (1) the overly restrictive definitional limitations on availability of these procedures; (2) the inappropriate sampling protocol proposed for such materials; and (3) the need for additional pre-approved, self-implementing methods.

We note first that the primary purpose of § 761.61 is to set forth fixed criteria upon which parties can rely to determine that self-implemented clean up has been sufficient. We therefore question why any discussion is included in this section of disposal alternatives. Disposal has always been, in effect, "self-implementing," with the available options spelled out in § 761.60. Clarity and consistency would be served by retaining this distinction.

Were § 761.61 limited to discussing the self-implementing clean up criteria, there would be no need for describe either "performance-based" or "risk-based" disposal. The paragraph (b) performance-based disposal options in fact are only references to otherwise approved § 761.60 disposal options. The paragraph (c) risk-based disposal option can, as discussed above (p. __, *supra*), be folded into the existing approval process under § 761.60(e), as both require approval from the same EPA offices under the same protection of health and the environment criteria.

We also note that EPA's proposal is unclear about the status of "debris from the demolition of buildings." The § 761.3 definition of "non-remediation waste" appears to include only building materials that were "manufactured, coated, or serviced with PCBs." Building debris that contain PCBs because spills occurred in the building appear therefore to be excluded from that definition. It is not clear, however, that such contaminated building debris would fall within the § 761.3 definition of "PCB remediation wastes," as a building may well not be considered an "environmental media." A clear determination of where building debris fall is needed. Regardless of definition, however, all disposal options for non-liquids should be available.

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1. Introductory Note and ¶ (a): References to Containment On-Site Are Needed

Prominently missing from the introductory note and paragraph (a) of § 761.61 is any recognition that the most protective and cost-effective clean up will often be containment on-site. Indeed, concerns often expressed about both landfilling and incineration, as well as the risks consequent to movement of contaminated material, often dictate on-site containment. These sections of the rule should therefore be revised to read:

> PCB remediation waste shall be contained on-site, removed or otherwise disposed of in accordance with one of the options in paragraphs (a) through (c) of this section. ...
>
> (a) Self-implementing site remediation. Where applicable, the cleanup, containment and disposal of PCB remediation waste may be conducted in accordance with the following requirements without a written approval from EPA.

2. ¶ (a)(1): EPA Has Too Narrowly Defined the Self-Implementation Universe

EPA's proposed applicability section would disqualify a large number of sites from utilizing the self-implementation remediation provisions. Unless revisions are made, most site owners will find too much ambiguity to take advantage of the option.

First, in paragraph (i), EPA should clarify that only PCBs directly contaminating the listed items are excluded. If a spill resulted in other items, such as soil, being contaminated, those other items should not be excluded from using self-implementation provisions.

Second, areas having human populations and animal populations which might have a higher sensitivity to the toxic effects of PCBs is not a legitimate concern. The Agency proposes prohibiting employment of self-implementation cleanup standards in areas described (in proposed § 761.61(a)(1)(G)), as having "human populations" or "animal populations" "which might have a higher sensitivity to the toxic effects of PCBs." This prohibition, if read literally, could

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limit self-implementation clean up to totally unpopulated areas, as the human populations found in the included "residential dwellings" could theoretically include all humans and the included "National Parks" could include all animals. Who "higher sensitivity" humans or animals are is nowhere suggested; they could be found literally anywhere.

Third, the exclusion of every NPL site is unnecessarily broad and could significantly delay remediation. Only those portions of NPL sites for which EPA has made a final decision on PCB actions should be excluded (*i.e.*, those for which EPA has issued a ROD).

Fourth, the exclusion of every site subject to RCRA Subtitle C permitting or corrective action requirements is unnecessarily broad and could be construed to disqualify thousands of industrial sites. Rather, only those portions of sites where EPA has issued corrective action orders pursuant to RCRA should be excluded.

Fifth, the exclusion of every site subject to environmental enforcement action is unnecessarily broad and should be removed. Alleged violations of administrative requirements, for example, should not preclude expeditious cleanup of PCB-contaminated areas.

Finally, the rule should be clear that the self-implementing provisions can be applied in a portion of a site even when other portions of the site are not eligible due to one of the exclusionary criteria.

The following amendments to the applicability section for self-implementing site remediation should be made:

(a) Applicability. The self-implementing remediation provisions do not apply to <u>portions of sites involving</u> the following:

(i) <u>PCBs in</u>: ~~spills which result in direct contamination of:~~

(A) Surface and ground waters
(B) Sediment in lakes, ponds, rivers, or streams
(C) Sewers and sewage treatment systems
(D) Any private or public drinking water sources or distribution systems
(E) Grazing land

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(F) Vegetable gardens

~~(G) Areas having human populations ... and animal populations ... which might have a higher sensitivity to the toxic effects of PCBs.~~

* * *

(iii) Any portion of a site that:

(A) Appears on the Comprehensive Environmental Response, Compensation and Liability Act's (Superfund) National Priorities List at 40 CFR Part 300 Appendix and for which EPA has issued a Record of Decision addressing PCBs for that portion of the site.

(B) ~~Is currently the subject of a permitting action under Subtitle C of the Resource Conservation and Recovery Act or approval under this part, or cleanup conducted under subpart G of this part.~~
Has an EPA-approved corrective measures plan pursuant to § 3004 or § 3008 of RCRA.

~~(C) Is currently the subject of any enforcement action under any statute administered by EPA.~~

(C) Is the subject of a cleanup conducted under Subpart G of this part.

3. ¶ (a)(2): Thirty-Day Notice Is Unnecessary and Contrary to the Purpose of Self-Implementation

EPA proposes requiring notice to the EPA Regional Administrator, the state environmental agency, and the local or county environmental agency thirty days prior to conducting a self-implementing remediation. 59 Fed. Reg. at 62862 proposed § 761.61(a)(2)). The notification must include a description of the nature and extent of the contamination, the procedures used in sampling, test results, and proposed remediation options. *Id.*

A notification requirement is entirely unnecessary and will deter self-implementing cleanups. The intent of the self-implementing option is to encourage voluntary cleanup of PCB spills by promoting flexibility and by eliminating the necessity of obtaining EPA approval provided that the remediation is conducted in conformity with the specified standards and procedures. *Id.* at 62796. As EPA notes, "approval under TSCA would not be necessary ...." *Id.*

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The notification process would necessarily delay cleanup and remediation for thirty days. By requiring such a delay, the ability to respond effectively to a spill is hindered. For instance, utilities wanting to perform a cleanup of a PCB spill on a customer's property would be forced to postpone for a period of thirty days after providing notice to EPA and the other entities.[23] Such a result should be avoided by deleting the notice requirement.

No need exists to submit information to EPA prior to initiation of a self-implementing cleanup. Sufficient requirements already exist for maintenance of records of remediation activities. *See* § 761.125(c)(5). The proposed regulations would incorporate these post-remediation recordkeeping requirements into the self-implementing cleanup provisions. 59 Fed. Reg. at 62862 (proposed § 761.61(a)(3)). As a result, the regulated community will be confronted with a duplicative set of pre-notification cleanup requirements and post-cleanup record-keeping requirements. If EPA is concerned that self-implementing remediations will be inadequately or improperly performed, the proposed and existing rec-ordkeeping requirements provide more than an adequate means of ensuring proper conduct. *Id.*

4. An Enforcement Waiver Should Be Applicable to Self-Implementing Cleanup

Under the 1987 spill cleanup policy, a clean up conducted in accordance with the numerical and procedural requirements creates a presumption against future EPA enforcement action and the need for additional cleanup under TSCA. § 761.135(a). EPA should similarly include an express provision that compliance with the requirements of the self-implementing provisions creates a presumption against future TSCA enforcement actions and additional cleanup requirements. Such a provision would encourage self-implementing clean up by providing the regulated community with a level of comfort that the self-implementing provisions eliminate the need for further remedial activities and would not expose the party to Agency enforcement actions.

EPA's reluctance to include an enforcement waiver appears to be its desire to retain the discretion to penalize parties for some earlier "act of unauthorized

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[23] Notification to state, local and county authorities is entirely redundant and goes beyond the scope of EPA's authority under TSCA. *See* Supplement I.

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disposal." 59 Fed. Reg. at 62797. Putting aside the significant issue of the statute of limitations that could limit any such actions, EPA should reconsider its approach. If cleanup and self-implementing methods are the real goals, the balance reflected in the rules should favor performance, rather than retribution.

By providing an enforcement waiver, EPA might be giving up some fines for past disposal infractions (assuming such actions are not barred by the statute of limitations), but the Agency would still retain the authority to require additional remediation if it found that the cleanup levels for remediation waste had not been achieved or that the self-implementing cleanup had not been performed in good faith. EPA still would retain its authority to ensure compliance with the self-implementing cleanup provisions, while providing an incentive for the regulated community to pursue such actions, thereby achieving the proper balance.

5. ¶ (a)(4): Remediation Waste Clean Up Criteria and Verification Sampling Requirements Should Be Revised

As we detailed in Part III, EPA should be taking advantage of the successes it recognizes of the 1987 spill policy in setting clean up criteria for remediation waste. Accordingly, the requirements in paragraph (a)(4) should, as we detailed in Part III, be the same requirements, using the same terminology, as under the new spill policy. That is:

(1) Distinctions should be made between residential/commercial and restricted access areas -- not between "high" and "low" exposure areas;

(2) The existing definitions of porous (non-impervious) and non-porous (impervious) should be retained; and

(3) The existing clean up standards for surfaces shall be retained (with an additional standard as we propose for rarely visited areas).

Paragraph (a)(4) also establishes sampling requirements for verification clean up. As discussed in Part III.D (pp. ___, *supra*), these requirements go far beyond what is reasonably required to assure an adequate clean up. We recommend there an alternative, performance standard.

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6. ¶(a)(4): Solvent Extraction Approval Can Be Stated More Simply and Clearly

The proposed rules in (a)(4)(i)(3) and (a)(4)(ii)(4) appropriately allow solvent extraction as a clean up method. Subsection (iii) - (v) of each provision, however, are unduly confusing. EPA's intentions could much more simply be achieved by stating in a new subsection (iii) that would replace proposed (iii) - (v):

(iii) All solvent shall be disposed in accordance with this subpart. Treated non-liquid remediation waste may either be disposed in accordance with this subpart or, if it meets the applicable clean up level criteria, remain on site.

7. ¶ (a)(4): Microencapsulation Reagents Should Not Be Limited to Cement and Lime/Pozzolans-Based Materials

The proposed Rule in paragraphs (a)(4)(i)(4) and (ii)(5), defines microencapsulation as "stabilization of debris containing PCBs with the following reagents such that the leachability of any associated PCB is reduced to specific levels: Portland cement or lime/pozzolans (*e.g.*, fly ash and cement kiln dust)."

First, the definition should apply to all PCB remediation wastes, not just debris. The use of the word debris seems inconsistent with the intent of the provision and is probably a drafting error. Otherwise, this provision would apply to a very limited type of waste.

Second, the reagents identified are too restrictive. There are other commercially available substances that may not fall into the above categories that are effective in reducing the leachability of PCBs. Furthermore, some of the PCBs released to the environmental media such as soils and sediments are expected to be associated with oil/hydrocarbons. Reduction of PCB leachability may not be effective unless these oil/hydrocarbons are also immobilization agents. This can be achieved by addition of organophilic substances as the immobilization agents. Therefore, as long as the leachability of PCBs is reduced to an acceptable level, it is irrelevant whether the Portland cement, lime/pozzolan-based material, or some other agent is used in the encapsulation process.

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Third, as we propose for wastes treated by solvent extraction, the rule would be more understandable if subpart (iii) of each subsection read:

> (iii) Microencapsulated or vitrified PCB remediation waste meeting the TCLP standard may remain on-site; waste not meeting the standard shall be disposed in accordance with this subpart.

Finally, we question EPA's plan to use the toxicity characteristic leaching procedure ("TCLP") to determine the effectiveness of microencapsulation or vitrification. The rationale is an alleged parallel to use of the test in the RCRA hazardous waste program.

The TCLP test is used in the RCRA program to simulate the slightly *acidic* environment of a municipal solid waste landfill in which wastes may be crushed. An *untreated* waste is ground up before testing and, if it passes, it may be disposed of as a nonhazardous solid waste in a solid waste landfill. Therefore, in the RCRA program, the TCLP test may have a tenuous relationship to the behavior of wastes in a municipal landfill -- albeit under conservative assumptions. Such a test would be relevant when the microencapsulated or vitrified material is to be landfilled.

In contrast, *treated* PCB-containing wastes (*i.e.*, solidified, vitrified or otherwise microencapsulated) will often *not* be placed into a solid waste landfill, but rather will remain on-site -- uncrushed and not in an acidic environment. The TCLP test is not an appropriate representation of environmental conditions in an on-site disposal setting. *See*, *Edison Electric Institute v. EPA*, 2 F.3d 438 (D.C. Cir. 1993); *Leather Industries of America v. EPA*, 40 F.3d 392 (D.C. Cir. 1994). When that is the case, EPA should allow use of other methods that do not crush the material and place it in an acidic test environment.

8. ¶ (a)(4): The Self-Implementing Rule Should Be Expanded to Include Other Demonstrated Technologies

EPA permits the use of only three treatment technologies: solvent extraction, microencapsulation and vitrification. The Preamble states that the solvent extraction technology was included because it is: (1) generally effective in a variety of situations; (2) commercially feasible at ambient temperatures (*i.e.*, no external heat source); (3) safe enough to be conducted without prior approval; and (4) prevents unreasonable risk of injury to health and the environment.

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Soil washing and biological treatment are applicable technologies for PCB treatment that also satisfy each of these four factors. They, too, should be included in the list of technologies available under the self-implementing option.

Solvent extraction that operates at above ambient temperatures, thermal desorption, and chemical dechlorination/dehalogenation processes satisfy three of EPA's factors, failing only the no external heat source test. As EPA is considering inclusion of vitrification as a self-implementing treatment technology, it should also allow use of these other technologies.

Inclusion of these technologies under the self-implementing option would eliminate the time-consuming, resource-intensive, decision-making process that would be required if approval had to be sought under the risk-based option each time these technologies were used. Any EPA concerns about, *e.g.*, emission controls or by-product analysis, could be specified in the final rule.

These additional treatment technologies and specific rule language proposals are described in the comments being filed by Pepper, Hamilton & Scheetz and ENVIRON Corporation and by General Electric. We urge EPA to incorporate them in § 761.61 clean up.

9. § 761.61(a)(4)(iv): Deed Restriction Requirements Should Be More Limited

Following a self-implementing cleanup, § 761.61(a)(4)(iv) requires the filing of a deed restriction under certain circumstances. In particular, when a remedial activity includes the use of a fence or a cap, a notice of their existence and the requirement to maintain the fence or cap must be placed on the deed by the owner of the site.

We believe this requirement is too burdensome. From time to time, pipeline companies, industrial facilities, or utilities perform remediation at off-site locations. Remediation may extend to the property where the company holds either no rights or only an easement right; the property is not owned by the company.

Many companies may not have the right to file deed restrictions on property they do not own. If a deed restriction were filed, the company would be exposed

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