EXERPT FROM PRELIMINARY DRAFT OF EPA MANUAL FOR ENFORCEMENT OF PCB REGULATIONS

EXAMPLES OF PCB VIOLATIONS BY GRAVITY LEVEL

LEVEL I

— improper storage or disposal of very small containers, rags, small amounts of soil

— storage of transformers, capacitors and containers with slow drip leaks that have resulted in very minor contamination

— unfilled storage space of slightly less than 10%

— concentration of decontamination solvent slightly greater than .05% PCB

— mark within 1/2" of required size

— mark slightly worn

— minor omissions in records

— improper storage of non-leaking transformers, capacitors and containers

LEVEL II

— failure to mark

— inaccurate recordkeeping

— improper storage of small numbers of containers, transformers and capacitors that have rapid drip leaks, resulting in significant, but still relatively minor, contamination

— improper disposal of one pound or less of a PCB substance or liquid mixture

LEVEL III

— failure to keep records

— fairly largescale improper storage

— failure of a PCB disposal facility to maintain proper combustion temperatures, ensure proper dwell time, or control stack emissions properly

LEVEL IV

— failure to monitor leachate collection in chemical waste landfills

— seepage resulting in groundwater contamination

— largescale dumping and/or spilling of PCB substances or mixtures resulting in significant pollution or contamination

— operation of an unapproved PCB disposal site

I. *Wrap-up Activities of the Inspector.*

After each inspection the inspector shall write an Inspection Report based upon information on the Violation Worksheet and his Field Notes. The Inspection Report shall detail all violations which the inspector believes he found during the inspection and shall describe all relevant supporting evidence. After completing the Inspection Report, he shall submit that document, along with the Violation Worksheet, a copy of his applicable Field Notes and other relevant supporting documents, in accordance with Regional procedures, to the designated Regional PCB Marking and Disposal Regulation Violation Coordinator. The inspector shall keep the original Field Notes in his files and shall make and keep on file copies of all other material sent to the Violation Coordinator.

II. *Wrap-up Activities of the Laboratory.*

After the laboratory performs its analysis on the PCB samples collected at the disposal site, the appropriate laboratory personnel shall send a copy of all laboratory records relevant to such sample analysis, along with a copy of the relevant Chain of Custody Record, to the Regional PCB Violation Coordinator. All originals of the above documents shall be maintained by the laboratory as permanent records until required in an enforcement action.

III. *Decisionmaking by the Regional PCB Marking and Disposal Regulation Violation Coordinator.*

Each Regional Administrator shall appoint a PCB Marking and Disposal Regulation Violation Coordinator. All PCB Marking and Disposal Regulation Inspection Reports shall be sent to such Violation Coordinator, in accordance with Regional procedures, by the inspector who made the inspection pursuant to the PCB Marking and Disposal Regulation. It should be emphasized that the Violation Coordinator may be any person whom the Region designated for such position. It is anticipated that the Regions shall integrate the function of the PCB Violation Coordinator into their existing decisionmaking structures.

The Violation Coordinator shall examine each Inspection Report and shall determine the answers to the following questions:

A. Is there a probable violation?

B. If yes, what type of action, if any, should be brought against the alleged violator?

C. If the action is one for administrative civil penalty assessment, how much should the proposed civil penalty be?

Criteria and guidelines for decisionmaking in each of the above three areas are provided below.

A. *Is there a probable violation?*

To determine whether or not there is a probable violation the Violation Coordinator must examine all the evidence provided in the Inspector's Report. In addition, the Violation Coordinator should take all other reasonable steps (such as speaking with the Inspector, personnel of the laboratory performing any relevant sample analysis, and appropriate Regional attorneys) which he deems necessary for a determination of the existence and extent of a violation. If the Violation Coordinator determines that there is insufficient evidence to indicate a violation he shall take reasonable steps to gather sufficient evidence if he believes that:

1. such evidence may be obtained without unreasonably intensive resource efforts, and
2. the violation if substantiated, is not an insignificant one.

If the Violation Coordinator determines that there is sufficient evidence to indicate a violation on the part of someone, he shall determine, in accordance with the following criteria, what action, if any, should be brought against the alleged violator.

B. *What action, if any, should be brought against the alleged violator?*

There are several types of actions which may be brought against the alleged violator. These are:

1. notice of non-compliance
2. administrative civil penalty
3. civil court action
4. criminal court action.

The starting point for the Violation Coordinator should be that most violations will be handled via administrative civil penalty. Thus, when the Violation Coordinator determines, based upon review of an Inspection Report and other review, that there is a violation he should assume at the outset that an administrative civil penalty should be assessed upon the violator. After making such initial assumption he should follow the following guidelines in determining whether another enforcement action should be taken in lieu of, or in addition to, administrative assessment of a civil penalty.

Notice of Non-Compliance

A notice of non-compliance may be issued in lieu of a civil penalty where the violation does not constitute a significant threat to health or the environment and where:

1. the alleged violation is the first such violation of the PCB Marking and Disposal Regulation on the part of the particular violator; and

2. the alleged violation is not a violation by a disposal facility of any of the regulatory requirements covering such facilities under the PCB Marking and Disposal Regulation, regardless of whether the disposal facility is approved or unapproved; and

3. the alleged violation does not entail the illegal actual disposal of PCBs on the part of the alleged violator (this does not include insignificant leaks); and

4. the alleged violation does not appear to have been a willful one.

However, it should be noted that even though the violation satisfies the above four tests the Administrative penalty remedy should not be summarily dismissed. The lesser remedy of issuance of a notice of non-compliance should be employed only where the Violation Coordinator determines, in his discretion, that the violation "passes" the above four tests and that issuance of a notice of non-compliance will be sufficient to induce the violator to cease violation of the regulation in those respects stated in the notice of non-compliance.

Civil Court Action

A civil court action may be brought against the alleged violator, for appropriate relief, in addition to assessment of an administrative civil penalty, where the civil penalty remedy is insufficient to obtain the desired compliance with the regulation. For instance, a civil court action may be appropriate in the following instances:

1. there is a PCB spill or leak which poses a risk of injury to health or the environment; or

2. in the case of a violator who either:

a. has been previously assessed a civil penalty for actual illegal disposal, or

b. is known to have engaged in the actual illegal disposal of PCBs on a widespread or continuing basis, or

c. has been assessed civil penalties for recordkeeping violations, or

d. is known to have engaged in recordkeeping violations on a widespread or continuing basis.

3. the relief desired is that certain PCBs be seized and condemned

4. a violator has previously failed to pay a civil penalty lawfully assessed under TSCA for previous violations and the desired relief is to obtain an injunction against all such TSCA violations by such violator.

Criminal Court Action

A criminal court action should be brought where the alleged violation was a knowing or willful one. For example, criminal court actions should be brought for knowing and willful violations of the following types:

1. actual disposal of PCBs contrary to regulatory requirements; or

2. violation of the recordkeeping provisions of the Regulation.

C. If the Action Taken Against the Alleged Violator is Assessment of the Administrative Civil Penalty, How Much Should the Proposed Civil Penalty Be?

This section provides some guidance and sets parameters for the assessment of civil penalties, pursuant to TSCA 16(a), for violations of Section 15(a). The only penalty guidelines provided in Section 16(a) are that penalties of up to $25,000 may be assessed for each day of such violation, and that in assessing the penalty "the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." The following guidelines are intended to assure nationwide consistency in penalty assessment, and to assure that violation of TSCA should not only bring no economic benefit to the violator, but should be the cause of some financial loss, i.e., there should be a strong economic disincentive to violate the Act.

This section describes how to compute a penalty for the purpose of serving a written notice of proposed assessment of civil penalty under Section 16(a)(2).

To make penalty assessment reasonably uncomplicated and consistent while leaving some discretionary judgment in the Regional Administrator, this system requires an initial assignment of a violation to one of four levels of gravity. The initial penalty assessment will be at a fixed amount for each level of gravity. Following the initial assessment several adjustment factors, as specified in the statute, are utilized to raise or lower the initial penalty.

The four gravity levels are as follows:

Level I — This violation is of the type which could cause only localized harm, such as failure to promptly dispose of PCB contaminated rags, minor leaks in stored transformers, etc. The initial assessment for a Level I violation will be $1000/day/violation. Where such a violation meets the criteria discussed on page for issuance of a Notice of Non-Compliance, the penalty may be waived.

Level II — These violations are generally serious in nature. This level may include general recordkeeping and marking violations, and storage violations where exposure is more hazardous than at Level I. The initial assessment for a Level II violation is $5000/day/violation.

Level III — This level applies to violations of a very serious nature. Such violations may include failure of incinerators to maintain proper temperatures for sufficient periods of time, and leakage from a chemical waste landfill not resulting in permanent environmental damage. In many cases, the differences between Levels II, III and IV violations are largely only ones of degree, depending on such factors as the extent of possible harm. The initial assessment for a level III violation is $15,000/day/violation.

Level IV — These violations are the most egregious, both in terms of blatant disregard for the requirements of the standard and damage caused. Such violations would include significant spilling and dumping of PCBs resulting in large scale contamination and operating an unapproved disposal facility. The initial assessment for Level IV is $25,000/day/violation.

In determining the gravity level for a violation, the Violation Coordinator, in accordance with regional procedures, should incorporate the statutory factors of nature, circumstances and extent of the violation, i.e., rather than computing separately for nature, circumstances, extent *and* gravity, all four factors should be considered in the initial level assignment which is termed "gravity." In arriving at this determination, the Coordinator should consider factors such as the extent of exposure, both in terms of numbers, (i.e., number of people, volume of water) and possible severity and permanence of harm. Upon making the level of gravity determination, the indicated penalty should be used as a base from which adjustments should be made according to the following additional statutory criteria:

1. Violator's ability to pay. This factor may be difficult to consider at the time of penalty assessment, since the inspector ordinarily will not examine violator's financial records (See Section 11(b)(2)(A)). Thus, the inability of a violator to pay probably would not be fully considered until raised by the violator either in his answer to the complaint, or in a settlement conference. However, several factors can be evaluated at the initial stages of penalty determination. The inspector should inquire of the person-in-charge the size of the business being inspected. Gross annual revenue is probably the best indication. In addition, the inspector or violation coordinator can consult Dun & Bradstreet, even prior to the inspection, to determine gross annual revenue. In determining a violator's ability to pay, the fact that a company is a subsidiary of a parent corporation should be considered, i.e., it is appropriate to look at the resources of the parent. A reduction of penalty amount of up to 20% may be allowed where gross annual revenues are below $250,000 and up to to 10% where gross annual revenues are between $250,000 and $1,000,000. No reduction will be allowed for larger companies.

2. Inability of a violator to continue in business. This category is intertwined with "ability to pay." A substantiated claim of inability to continue in business if a large penalty is sustained may require negotiation of the penalty to an amount lower than would otherwise be assessed under these guidelines. Since such a claim will not normally be raised until after the initial penalty assessment, it is discussed below.

3. History of prior such violations. Where a violator has no prior history of violation of EPA regulations or statutes, penalties may be reduced up to 20%. A violator with a prior history of EPA violations, but with no prior violations of TSCA receives no penalty adjustment. If a violator has any previous TSCA violations his penalty should be increased 10%, for each prior TSCA violation. If a violator has violated the *same* standard previously, the repeated nature of this violation requires that the penalty be raised 25% for Levels I and II; and 50% for Levels III and IV (up to $25,000 total) — these figures should be doubled in cases where the same standard is violated for the third time. For the purpose of this "repeat" policy, a company with more than one facility can be assessed for a repeat violation if the second violation takes place at a different facility than did the initial violation.

4. Degree of culpability. The degree of culpability of a violator should also be considered in the penalty assessment. A reduction of up to 20% may be allowed where the violation was substantially contributed to by persons outside the violator's company, or where the violator has made a good faith effort to comply with the regulation. Conversely a person who negligently and/or willfully violates the Act suffers an upward penalty adjustment. Thus, a negligent violator can be assessed up to an additional 20% penalty, depending on his degree of negligence. A willful violator should be assessed an additional 25% penalty. The maximum adjustments for culpability are down 20% or up 25% — i.e., if a violator is willful and negligent the willful 25% upward adjustment only is assessed. Of course, such a violator may be the subject of criminal proceedings.

Computation of Penalties — In calculating the adjusted initial penalty, the adjustments should be added together prior to being applied to the initial level of gravity figure. For example, with a level II violation the penalty based on that level alone is $5000 if the violation was for one day. If the company's revenues are between $250,000 and $1,000,000 it is entitled to a 10% reduction; if the company has a previous TSCA violation 10% is added on; and if the violation occurred in spite of some good faith efforts by the company it may be entitled to a reduction of, say, 10%. The adjustment factors are, -10, +10, and -10, for a net reduction of 10%, which when applied to the $5000 initial penalty, results in a $4500 proposed penalty assessment sent to the violator. Do *not* compute the penalty piecemeal, i.e., do not deduct 10% of the remainder for culpability.

In computing duration of a violation generally only count the days on which the violation was actually observed. Thus if a violation is observed during an inspection, and the complaint is not served for a month, compute the penalty as if the violation lasted one day, not a full month. However, if reliable evidence exists that the violation was present before the inspection, an assessment for multiple days of violation may be appropriate.

IV. *Disclosure of Information — Confidentiality Posture*

TSCA Section 14 addresses the protection of trade secrets and confidential information. Section 14 provides that any information reported to or otherwise obtained by EPA under this Act, which is exempt from disclosure pursuant to subsection (a) of Section 552 of Title 5, United States Code, by reason of subsection (b)(4) shall not be disclosed by the Administrator or by any officer or employee of the United States.

Exceptions from this prohibition are also provided. Disclosure of information described in Section 552(b)(4) of Title 5 may be made in the following situations:

1. to officers or employees of the United States in connection with their official duties to protect health or the environment, and for specific law enforcement purposes.

2. to contractors with the United States when the Administrator determines it to be necessary for the satisfactory performance of their duties in connection with this Act and under such conditions as necessary to preserve confidentiality as the Administrator may specify.

3. if the Administrator determines it necessary to protect health or the environment against an unreasonable risk of injury to health or the environment.

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

Disclosure of any health or safety study or information obtained from such a study on any substance or mixture which is already being distributed or for which testing is required under Section 4 or for which notification is required under Section 5, is not prohibited. Data in such a study, however, which discloses manufacturing processes or the proportions of a mixture may not be disclosed if such processes or proportions would otherwise be entitled to protection from disclosure.

Section 14(c) of TSCA provides that a manufacturer, processor or distributor in commerce of a toxic substance may:

A. designate the data which such person believes is entitled to confidential treatment under subsection (a) of the same section, and

B. submit such designated data separately from other data submitted under this Act.

Designation by a manufacturer, processor, or distributor that certain information is entitled to confidential treatment must be made in writing.

Section 14(c)(2)(A) states that where the Administrator proposes to release for inspection data which has been designated by the manufacturer, processor, or distributor as being entitled to confidential treatment, the Administrator shall notify in writing and by certified mail, the manufacturer, processor, or distributor who submitted such data, of the intent to release such data and that if release of such data is to be made pursuant to a request made under the Freedom of Information Act, such notice shall be given immediately upon approval of such request by the Administrator. The Administrator may not release the data before the expiration of 30 days after the manufacturer, processor, or distributor submitting such data has received the notice of the Administrator's intent to release such data.

Section 14(c)(2)(B) states an additional requirement that where disclosure of data is warranted by a determination by the Administrator that such disclosure is necessary to protect the health or the environment against an unreasonable risk of injury to health or the environment, the Administrator must notify each manufacturer, processor, and distributor who submitted such data of such release. Such notice shall be made in writing by certified mail at least 15 days before the release of such data, except that if the Administrator determines that the release of such data is necessary to protect against an imminent, unreasonable risk of injury to health or the environment, such notice may be made by such means as the Administrator determines will provide notice at least 24 hours before such release is made.

EPA regulations dealing with confidentiality of business information appear in 40 CFR Part 2, Subpart B.

Handling Inspection Data

For the purposes of: (1) assuring Agency compliance with Section 14 of the Toxic Substances Control Act; (2) limiting the likelihood of inadvertent disclosure of confidential business information; (3) affording businesses a fair opportunity both to assert a confidentiality claim and to substantiate the claim prior to an EPA ruling on the claim; (4) protecting the interests of members of the public who request disclosure of business information under the Freedom of Information Act, 5 U.S.C. 552; and (5) furnishing assistance to those EPA officers and employees who must deal with confidentiality claims and requests for information obtained by the Agency pursuant to its inspection authority, the following procedures will be employed in handling inspection data:

A. At the time an inspector presents the TSCA Notice of Inspection to the appropriate official at a facility which is about to be inspected, he shall also present one copy of the TSCA Inspection Confidentiality Notice. At the time the inspector presents a copy of said TSCA Inspection Confidentiality Notice to the facility official, he shall place a second copy in an envelope addressed to the chief officer of the business whose facility he is inspecting. The inspector should determine the name and address of such chief officer before his arrival at the inspection site. The inspector shall mail the envelope at his earliest opportunity, via certified mail return receipt requested. In any event, the envelope should be mailed *no later* than 2 days after completion of the inspection of the facility.

B. When an inspector submits his Inspection Report, via Regional procedures, to the PCB Violation Coordinator, the inspector shall include a third copy of the TSCA Inspection Confidentiality Notice along with his Inspection Report and shall keep a fourth copy for his own records.

C. The business concern which receives the TSCA Inspection Confidentiality Notice must make its confidentiality claim within 30 days after the chief officer receives the Notice.

D. When a business concern asserts a timely claim of confidentiality for inspection data, the inspection data for which confidentiality was claimed shall be removed, in accordance with Regional procedures, from the main file of the Inspection Report. Such data shall be placed in a locked file cabinet and shall be accessible only to EPA employees and contractors in the exercise of their official duties and responsibilities. If such a claim is received before the PCB Violation Coordinator receives the Inspection Report on the facility for which the claim is made, the appropriate Inspector shall remove such data and keep it in a locked file. He shall turn over such data (marked as "Claimed TSCA Inspection Confidential Data") to the PCB Violation Coordinator with his Inspection Report. If the confidentiality claim is received after the PCB Violation Coordinator has possession of the Inspection Report he shall be responsible for separating such data, for maintaining it in a locked file, and for marking it "Claimed TSCA Inspection Confidential Data".

E. If a formal or informal request for data claimed as confidential is made by any person other than an EPA employee or contractor the person in possession of the data claimed as confidential shall forward such data, in accordance with Regional procedures, to the person designated in the Region to handle such requests. Such person shall follow established procedures for granting or denying the request for information.

F. If a person other than an EPA employee or contractor requests data obtained during an inspection and no claim of confidentiality has been asserted with respect to such data, the following procedures shall be followed:

1. If the request for information is received by EPA before the expiration of 30 days from the date when the chief officer of the business concern whose facility was inspected received the TSCA Inspection Confidentiality Notice, it shall be presumed that a claim of confidentiality will be made within the thirty day period. The information request shall be initially denied and the chief officer of the business whose data was requested shall be notified and required to substantiate any claims of confidentiality which he may make, in accordance with procedures stated in 40 CFR Section 2.204.

2. If the request for information is received by EPA after expiration of such 30 day period, the requested data shall be treated, in accordance with procedures stated in 40 CFR Part II, Subpart B, like any data for which no claim of business confidentiality has been made.