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

JUN 8 1990

OFFICE OF
PESTICIDES AND TOXIC SUBSTANCES

William J. Walsh
Pepper, Hamilton & Scheetz
1300 19th Street, N.W.
Washington, D.C. 20036

William H. Hyatt
Pitney, Hardin, Kipp, & Szuch
163 Madison Avenue
P.O. Box 1945
Morristown, New Jersey 07960-1945

Dear Mr. Walsh and Mr. Hyatt:

On February 2, 1990, the Environmental Protection Agency (EPA) received a citizens petition under section 21 of the Toxic Substances Control Act (TSCA) which you submitted on behalf of a number of companies listed in Appendix I to the petition. In your petition, you requested that EPA initiate a proceeding to amend 40 CFR 761.60(a)(4) and 40 CFR 761.60(a)(5) to clarify that sediment containing PCBs dredged from the bottom of a lagoon must be considered as "dredged materials" or as "non-liquid PCBs." You have also requested a declaratory order or interpretive rule adopting this interpretation of the existing regulations.

In your petition, you raise several issues concerning the degree to which the current disposal rules protect against an unreasonable risk of injury to human health and the environment, the cost-effectiveness of the current disposal rules, and the current incinerator capacity to handle Superfund waste. Because the petition does not provide specific information explaining the comparative costs and risks of the disposal options and whether these costs and risks have changed proportionately since the promulgation of the original PCB disposal rules in 1978, the petition does not provide a sufficient basis for EPA to commit to amending the rules in the manner you request in your petition.

PCB-ARCH-EXT0371684

Before receiving your petition, EPA was already considering the issue of proper disposal of PCBs found at Superfund sites. As part of that review, EPA has been examining whether amendments to the PCB disposal rules to address Superfund PCB wastes are appropriate. Your petition raises a number of issues regarding disposal of PCB waste found at Superfund sites that EPA believes merit further investigation. Accordingly, because EPA has already decided to initiate a proceeding to consider whether to amend the PCB disposal rules for PCB waste found at Superfund sites, EPA is granting that portion of your petition.

To the extent that you seek review of a site-specific application of the TSCA regulations to a site being addressed under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. 9601 et seq., that challenge is not appropriate in the form of a TSCA section 21 petition. To the extent the petitioners seek a different interpretation of the TSCA regulations, or issuance of a declaratory order, the request is also inappropriate in the form of a TSCA section 21 petition.

Further, EPA disagrees with the interpretation of the PCB rules asserted in your petition that industrial sludges and sediments containing PCBs in concentrations greater than 500 ppm may be disposed of as "dredged materials" under 40 CFR 761.60(a)(5) or as "non-liquid PCBs" under 40 CFR 761.60(a)(4). Under the current PCB rules, industrial sludges disposed of after the PCB rules were promulgated would fall under 40 CFR 761.60(a)(1) as "PCBs contaminated at concentrations greater than 50 ppm." As such, the only disposal option for these PCBs would be disposal in a TSCA incinerator. As a matter of policy, EPA in 1985 determined to treat industrial sludge similarly to PCB liquids. [TSCA Compliance Program Policy No. 6-PCB-4, August 13, 1985] Under this policy, industrial sludges contaminated between 50 and 500 ppm may be placed in a TSCA landfill complying with 40 CFR 761.75, while sludges contaminated at greater than 500 ppm must be disposed of in a TSCA incinerator complying with 40 CFR 761.70.

The history of the PCB rules shows that the provision for "dredge materials" was never intended to include sludges from industrial waste treatment storage or disposal units. Rather, this provision was limited to material removed when rivers, lakes, or harbors were dredged for navigation as is indicated in the preamble of the proposed and final PCB Marking and Disposal Rule (42 FR 26564; 43 FR 7150). EPA recognized that the manufacturing and use of PCBs in the United States, from 1929 until 1977, resulted in ubiquitous PCB contamination in the environment. Although the PCB rules did not require cleanup of

PCB-ARCH-EXT0371685

past contamination, in some instances PCB contamination would be uncovered in the course of dredging activity necessary to provide for navigation. Such dredge material, EPA believed, contained relatively low level PCB contamination and therefore could be properly disposed of by means other than incineration. Therefore, EPA allowed greater flexibility in determining the disposal option for such material. For example, the proposed Disposal and Marking rule discusses "bottom sediments in rivers and harbors" with no discussion of industrial lagoons. 42 Fed. Reg. 26,564, 26,565 (May 24, 1977). The preamble to the Final Disposal and Marking Rule further discusses the provision for dredge spoils noting the "huge quantities" of dredge spoils and municipal sewage treatment sludges that may be generated. "These changes respond to comments that the proposed rule lacked the necessary flexibility and would be impossible to comply with where unusually shaped articles or very large quantities of material contaminated at a low level with PCBs were concerned." (43 Fed. Reg. 7150, 7152) (February 17, 1978).

Moreover, in the final Disposal and Marking Rule, EPA created two exceptions to the incineration requirement. First, EPA allowed for disposal of soil in either a TSCA incinerator or a TSCA landfill. Second, EPA allowed even more flexible disposal options for dredge spoils and municipal sewage treatment sludges, namely disposal in a TSCA incinerator, a TSCA landfill, or by a method approved by the Regional Administrator. With regard to the provision created for disposal of soils, EPA explicitly stated that the provision was not intended for PCB liquids, slurries or industrial sludges which were to be disposed of under the more restrictive provisions of 40 CFR 761.10(b)(1) or (b)(2) (1978). This statement would not have made sense if EPA had intended to allow industrial sludges and slurries to be disposed of under the more flexible disposal options allowed under 40 CFR 761.10(b)(4) now codified at 40 CFR 761.60(a)(5).

Further, EPA believes that it would be inappropriate to interpret the term "dredge material" contained in 40 CFR 761.60(a)(5) as being coextensive with the term as defined in EPA's rules implementing the Clean Water Act (CWA), under which dredge material constitutes "material that is excavated from 'waters of the United States'" (40 CFR 232.3) Although the term "waters of the United States" is broadly defined under the CWA to include "virtually all surface waters in the country," (International Paper Co. v. Ovelette, 479 U.S. 481, 486 (1987), the definition was adopted within the specific framework of the CWA's goal of restoring and maintaining the integrity of the nation's waters and Congressional intent to assert protecting over waters to the fullest extent of the United States' commerce power and the Constitution. (See 33 U.S.C. § 1251(a)); Quivera

EPA/OTS/CCD TEL NO.202/551216 JUN 8'90 12:03 NO.008 P.04
PCB-ARCH-EXT0371686

Mining Co., v. EPA, 765 F.2d 126 (10th Cir. 1985); United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985). In the case of the PCB rules, the provision for dredge materials was intended as being limited to a number of situations where EPA expected a large volume of low-concentrated material would be disposed of. The intended scope of the term "dredged material," in 40 CFR 761.60(a)(5) is more consonant with how the term, "navigable waters of the United States" has been defined by the Army Corps of Engineers under section 10 of the Rivers and Harbors Act of 1899, which includes those waters which are or may be susceptible to use as a form of interstate transport. Finally, in any event, EPA's definition of waters of the United States under the CWA specifically excludes from coverage "[w]aste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the CWA . . ."(40 CFR 122.2).

EPA also disagrees that industrial sludges are non-liquid PCBs under 40 CFR 761.60(a)(4). In the 1978 Disposal and Marking Rule, EPA created the provision for TSCA landfill disposal of certain non-liquid PCBs, namely non-liquid PCB mixtures in the form of contaminated soil, rags and other debris, including such materials contaminated as a result of spills or placement in old disposal sites. The option of placing such non-liquids in a TSCA landfill was developed to ease the disposal burden on TSCA incinerators until adequate incinerator capacity was developed. The preamble to the 1978 Disposal and Marking Rule explicitly states that this provision does not apply to "PCB liquids, slurries, industrial sludges,..." which must be disposed of in accordance with 40 CFR 761.10(b)(1) or (b)(2) [either a TSCA incinerator or, until January 1, 19980, a TSCA landfill]. 43 FR 7150, 7152. The preamble to the 1979 PCB Ban Rule did not change the meaning of the provision other than to broaden the provision to include rags and absorbent materials used to clean up spills or old (pre-1978) disposal sites. 44 Fed. Reg. 31514, 31520.

In addition, EPA addressed industrial sludges in a note to 40 CFR 761.60(a)(4)(ii) stating that "liquid PCBs shall not be processed into non-liquid forms to circumvent the high-temperature incineration requirements of § 761.60(a)." Consistent with this note is a 1985 policy statement by EPA's Office of Compliance Monitoring regarding industrial sludge stating that industrial sludge should be disposed of as liquid under the PCB rules, rather than under the provision for soils, rags, and other debris.

PCB-ARCH-EXT0371687

Although EPA disagrees with the regulatory interpretations suggested in your section 21 petition, EPA believes that it should initiate an investigation to decide whether to amend the PCB disposal rules for wastes found at Superfund sites and how best to amend these rules if EPA decides to do so. I hope that you and the companies who submitted the petition, as well as other interested members of the public, will avail yourselves of the opportunity to participate in this proceeding and provide comparative cost and risk information on potential disposal options to help EPA determine how to dispose of PCB wastes found at Superfund sites in a cost-effective manner that best protects against unreasonable risk of injury to human health and the environment.

Sincerely,

Linda J. Fisher
Assistant Administrator

Jun 8.90 12:05 No.008 P.06 TEL No.2027551216 EPA/OTS/CCD
PCB-ARCH-EXT0371688

US ENVIRONMENTAL PROTECTION AGENCY
TELECOMMUNICATIONS CENTER
WASHINGTON, DC 20460

EPA

FACSIMILE REQUEST AND COVER SHEET

PLEASE PRINT IN BLACK INK ONLY

TO

William H. Hyatt

~~OFFICE/PHONE~~ Fax Number

267-3327

REGION/LAB

____ ____

FROM

Charles Elkins

PHONE	MAIL CODE
382-3810	TS-792

OFFICE

OTS

DATE	NUMBER OF PAGES TO INCLUDE THIS COVER SHEET
6-8-90	6

Please number all pages

INFORMATION FOR SENDING FACSIMILE MESSAGES TO EPA HEADQUARTERS

EQUIPMENT	FACSIMILE NUMBER NUMBER	VERIFICATION NUMBER
RAPICOM	(202) 382-7883 (auto)	(202) 382-2078
PANAFAX	(202) 382-7884 (auto)	(202) 382-2078
PANAFAX	(202) 382-7886 (auto)	(202) 382-2078
MANUAL	(202) 382-2078	

The EPA Communications Center has the capability for sending and receiving facsimile messages to CCITT Group I, II, and III Equipment.

EPA Form 5040-5 (Rev. 12-83) Replaces EPA Form 5040-5A and the previous edition of EPA Form 5040-5, which are obsolete.

EPA/OTS/CCU
PCB-ARCH-EXT0371689