**§ 606.44 Notification of determinations.**

The UIS Director will make determinations under §§ 606.41, 606.42, and 606.43 on or before September 10 of the taxable year, will promptly notify the applicants and the Secretary of the Treasury of such determinations, and will cause notice of such determinations to be published in the **Federal Register**. The UIS Director also will inform the Secretary of the Treasury and cause notice to be published in the **Federal Register** of information with respect to delayed payment of interest as provided in § 606.40.

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Part V

# Environmental Protection Agency

40 CFR 761

Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities; Proposed Rule

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR PART 761

[OPTS-62059; FRL-3396-9]

### Polychlorinated Biphenyls; Notification and Manifesting for PCB Waste Activities

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing amendments to its disposal and storage regulations for polychlorinated biphenyls (PCBs). This document proposes notification requirements for certain entities who handle PCB waste, requirements for certain entities to prepare and carry a manifest for purposes of tracking the disposal of PCB waste, and requirements that commercial storers of PCB waste obtain approvals from the EPA Regional Administrators, develop closure plans for their facilities, and demonstrate financial responsibility for closure. Also, this notice proposes amendments to the PCB recordkeeping requirements.

These amendments are proposed under section 6(e)(1) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(e)(1), which authorizes the EPA Administrator to promulgate rules prescribing methods of disposal for PCBs.

**DATES:** Written comments must be received by October 26, 1988. If persons request time for oral comment, EPA will hold an informal hearing in Washington, DC, on November 9, 1988. The exact time and location of the hearing will be made available by telephoning the TSCA Assistance Office at the telephone number listed under **FOR FURTHER INFORMATION CONTACT.** Written requests to participate in the informal hearing must be received by the TSCA Assistance Office or postmarked no later than October 26, 1988. For additional information on the hearing and the procedures for filing requests to participate, see Unit V of this preamble.

**ADDRESS:** Submit written comments, in triplicate, identified by the document control number OPTS 62059, by mail to: TSCA Public Docket Office (TS-793), Rm. NE G004, Office of Toxic Substances, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Information submitted in any comment concerning this proposed rule may be claimed confidential by marking any part or all of that information as "Confidential Business Information" (CBI). Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR Part 2. A copy of such a comment that does not contain the CBI should be submitted for inclusion in the public record. Information not marked confidential will be disclosed publicly by EPA by placing it in the public record without prior notice to the submitter. All written comments will be available for public inspection and copying at the TSCA Public Docket Office in Rm. NE G004, at the address given above, from 8 a.m. to 4 p.m., Monday through Friday, except legal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michael M. Stahl, Director, TSCA Assistance Office (TS-799), Office of Toxic Substances, Rm. EB-44, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, (202-554-1404), TDD: (202-554-0557).

**SUPPLEMENTARY INFORMATION:** In this document, EPA is proposing amendments to its PCB storage and disposal regulations, which are codified in Subpart D, 40 CFR 761.60 *et seq.*

The information collection requirements of this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1446) and a copy may be obtained from David DiFiore, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC. 20460. A copy may also be obtained by calling (202) 382-2744.

The public reporting burden for this collection of information is estimated to average 1.5 hours per response for the notification requirements, 3 hours per response for the Exception and Discrepancy Reporting requirements, and 325 to 460 hours per response for the financial assurance and closure requirements. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information.

Comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to the Chief, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. These comments should also be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked ATTENTION: Desk Officer for EPA. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

### I. Overview of This Proposed Rulemaking

EPA regulates the disposal and storage for disposal of PCBs under its TSCA section 6(e)(1) authority, rather than its authority to regulate the management of hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA), unless the PCB waste also meets the definition of RCRA hazardous waste. EPA has identified several areas where improvements are needed in its TSCA program for PCB wastes, and these improvements require the promulgation of additional disposal and storage requirements. EPA has concluded that the most pressing of the needed program improvements are the addition of an effective tracking system for PCB wastes and the addition of an approval mechanism for the commercial storers who act as intermediate storers of PCB wastes prior to their disposal.

This notice proposes to add to the PCB disposal requirements a tracking system for PCB wastes akin to the "cradle-to-grave" tracking system for hazardous wastes which EPA promulgated under RCRA Subtitle C. The proposal includes a requirement that certain entities among those who handle (generate, transport, store, or dispose) regulated PCB wastes must notify EPA of their PCB-waste activities, so that the Agency may obtain basic information about the nature, location, and extent of these activities. The proposal further requires that each such entity notifying EPA obtain from the Agency a unique identification number which will identify that entity in the shipping documents (manifests) and other records and reports that constitute the waste tracking system. The proposal also describes the manifest system that will be implemented to track the movement of PCB waste from the point of generation to the point of disposal, and it describes the recordkeeping and reporting requirements that complete the tracking system.

This notice further proposes to add to the PCB storage regulations an approval mechanism for the commercial storers of PCB wastes. The proposal would specifically require all commercial storers of PCB wastes to prepare closure plans for their facilities, and to demonstrate their financial

responsibility for the closure of their PCB storage areas. Storers of PCB wastes who cannot demonstrate compliance with the proposed rule's financial assurance for closure requirements would be required to cease operations and close their facilities.

## II. Authority

This proposed rule is issued pursuant to section 6(e)(1) of TSCA. Section 6(e)(1)(A) gives the Administrator the authority to promulgate rules prescribing the methods for disposal of PCBs. (15 U.S.C. 2605(e)(1)(A)). Furthermore, section 6(e)(1)(B) provides broad authority for EPA to promulgate rules that would:

> * * * (B) require polychlorinated biphenyls to be marked with clear and adequate warnings, and instructions with respect to their processing, distribution in commerce, use, or disposal or with respect to any combination of such activities." 15 U.S.C. 2605(e)(1)(B).

Consistent with this authority, EPA proposes to implement a waste tracking system for PCB wastes which would consist of shipping documents (manifests) and other records and reports which are described by the section 6(e)(1) language. Tracking requirements are necessary for effective management of PCB disposal by EPA, and they function as warnings and instructions to be followed by others in connection with the processing, transport, and disposal of PCB wastes. Therefore, the promulgation of the tracking system proposed today for PCB wastes is clearly authorized by the TSCA section 6(e)(1) language.

EPA also regulates the storage of PCB wastes prior to disposal under its TSCA section 6(e)(1) disposal authority for PCBs. The current requirements for PCB storage facilities are codified at 40 CFR 761.65. Therefore, the amendments proposed today to the § 761.65 storage regulations are also promulgated under section 6(e)(1) of TSCA.

## III. Background

### *A. Regulatory History*

TSCA, which became effective on January 1, 1977, includes in section 6(e) specific provisions which demonstrate Congress' intent that commercial activities involving PCBs be eliminated or restricted. In addition to requiring the implementation of a disposal program for PCBs (section 6(e)(1)), Congress established in sections 6(e)(2) and 6(e)(3) phased prohibitions on the new manufacture of PCBs, the use of PCBs, the processing of PCBs, and the distribution in commerce of PCBs. By the terms of the statute, the phase-in of the PCB prohibitions was to begin 1 year after the Act's effective date. However, the statute also conferred authority upon EPA to authorize certain "non-totally enclosed" uses of PCBs upon a showing that the uses would not present unreasonable risks of injury to health or the environment. (15 U.S.C. 2605(e)(2)(B)). Similarly, section 6(e)(3)(B) gives EPA authority to exempt activities from the statutory prohibitions on PCB manufacture, processing, and distribution in commerce. These exemptions, which are effective for 1 year if not renewed, require a showing that the activity will not pose an unreasonable risk of injury to health or the environment, and a showing that good faith efforts have been made to develop substitutes for the PCBs involved in the activity. (15 U.S.C. 2605(e)(3)(B)).

Since the enactment of TSCA, EPA has developed a comprehensive body of regulations implementing section 6(e). In a final rule issued on May 31, 1979 (44 FR 31514), EPA set forth a comprehensive approach to the implementation of the TSCA section 6(e) prohibitions on PCB activities. The May 31, 1979 regulation announced many of the core definitions and policies underlying the national PCB program. Furthermore, this regulation announced the Agency's initial policies and decisions on various requests for use authorizations and requests for exemptions from the statutory prohibitions on new manufacture, processing, and distribution in commerce. The May 31, 1979 regulation also amended and recodified the disposal requirements for PCB wastes, which EPA had originally issued in a regulation published on February 17, 1978 (43 FR 7150).

Since the enactment of TSCA in 1976, the disposal requirements for PCB wastes and the disposal requirements for RCRA "hazardous wastes" have been handled separately. TSCA and RCRA were enacted within several days of each other in October, 1976, and regulations implementing the RCRA hazardous waste management system were published on May 19, 1980 (45 FR 33119). Because Congress called for the creation of a PCB disposal program under TSCA section 6(e)(1) within months of TSCA's effective date, it was necessary for the Agency to initiate the PCB disposal program well before the implementation of the RCRA management system.

The existing PCB disposal regulations at 40 CFR 761.60 *et seq.*, prescribe specific disposal requirements for defined classes of PCB wastes. The classes of wastes are defined in terms of the source, physical state, and PCB concentration of the waste material. The PCB disposal requirements apply generally to PCB materials that contain PCBs at concentrations of 50 parts per million (ppm) or greater. The disposal regulations specify the disposal options available for the various species of "PCBs" and "PCB Items," as they are defined at 40 CFR 761.3. The most significant of the disposal requirements are those specified at 40 CFR 761.60(a) for PCB liquids (primarily, askarel dielectrics and mineral oil dielectrics) and the requirements specified for "PCB Articles," which include "PCB Transformers," "PCB Capacitors," and "PCB-Contaminated Electrical Equipment." (40 CFR 761.60(b)). These PCB liquids and PCB Articles account for the preponderance of all the PCBs that have been produced in the past, and they are the source of much of the PCB waste that is subject to the TSCA disposal regulations.

The PCB disposal regulations generally require that the regulated PCB wastes be disposed of in high-temperature incinerators that accomplish 99.9999 percent PCB destruction, or in alternative disposal processes that accomplish an equivalent level of performance (40 CFR 761.60(a)(1), 761.60(e)). Destruction in approved, high-temperature incinerators is the primary disposal method for PCBs, while disposal in approved chemical waste landfills (§ 761.75) and in alternative processes (alternative thermal, chemical destruction, physical separation, etc.) accounts for the disposition of a relatively small proportion of the total PCBs removed from service.

The PCB disposal regulations are aided by specific marking requirements for PCB Items at 40 CFR 761.40. Also, PCB storage requirements at 40 CFR 761.65 impose design, location, and containment requirements for the storage facilities used to store PCB wastes prior to disposal. The storage requirements are intended to minimize the potential for releases of stored PCBs to the environment, and that potential is further mitigated by the requirement that limits the storage of regulated PCB wastes to a period not exceeding 1 year (40 CFR 761.65(a)). Finally, the existing PCB regulations require that certain records be kept at facilities which use, store, or dispose of PCBs, and these records must include information documenting the use, transfer, and disposition of specific PCB Items (40 CFR 761.180).

*B. Generation of PCB Wastes*

In this proposal, the term generator of PCB waste is defined and used in order to maintain consistency with the RCRA tracking system for hazardous wastes, which forms the model for much of today's proposal. The generator concept is fundamental to the RCRA hazardous waste management system, and the term has gained such familiarity over the years among those connected with waste management, that its use in this proposed rule is virtually a necessity. However, the term "generator" itself nowhere appears in the current TSCA disposal regulations for PCBs, although the concept of generating waste applies as much to PCB wastes as to any other material.

For purposes of this proposal, "generator of PCB waste" would be defined as any person whose act or process produces PCBs that are regulated for disposal under TSCA, or whose act first causes a "PCB" or "PCB Item" to become subject to the Subpart D disposal requirements of 40 CFR Part 761. For example, the "owners" or "users" of the PCB fluids and PCB Items regulated for disposal under TSCA are, or will become, the typical generators of PCB wastes, at such time as they retire their regulated materials (50 ppm or greater) from service.

In other circumstances, the term generator connotes broader coverage than mere owner or user of PCBs or PCB Items. For example, a transporter who cleans up PCBs that spill from a transport vehicle may be a generator of PCB waste. Likewise, a disposal facility may at times be a generator of PCB waste, such as when it physically separates PCBs from dielectric fluids, and transports the separated phase (e.g., stillbottoms or sludges) containing PCBs to an approved incinerator for destruction. So, beyond the typical case where an owner or user of PCBs removes PCBs or PCB Items from service, PCB waste may also be "generated" by those who respond to PCB spills, those who drain PCB fluids from PCB Articles during servicing or disposal operations, those who process or distribute in commerce PCB wastes in a form other than that previously manifested, and those who remove PCBs from existing disposal sites, including disposal sites that pre-date the Subpart D disposal requirements for PCBs.

This definition is similar to the RCRA definition of "generator" at 40 CFR 260.10, but it differs from the RCRA definition in one important respect. In the context of this proposal, the term "generator of PCB waste" generally refers to the "person" (see 40 CFR 761.3) who creates PCB wastes, and not, as would be the case under RCRA, to the individual sites where particular PCBs or PCB Items were used before they became wastes.

Section 761.3 defines "person" to include individuals, government entities, corporations, and other business associations, so the effect of the proposed definition of "generator of PCB waste" generally would be to consolidate all of the PCB waste created by a given "person" under one generator identification, regardless of the number of sites that "person" might use, own, or control. The only exception is where another regulation expressly calls for a site-specific meaning of the term "generator of PCB waste." In such a case, the more specific requirement controls. The only site-specific reference to generator proposed here is the requirement that the users, owners, or processors of PCBs or PCB Items who maintain their own § 761.65(b) storage facilities for PCBs must submit unique generator notifications to EPA for each of their PCB storage facilities. In cases where the "generator" owns or operates storage facilities, each site of storage would be a unique "generator of PCB waste" for purposes of this regulation. As such, PCB wastes transported from the storage facilities would be manifested from the storage sites, and the manifests would reference the storage facilities' unique EPA identification numbers. The proposal to treat users' and owners' storage facilities as unique generators is discussed further in Unit IV.B.2. of this preamble. Otherwise, all PCB waste generated by a given individual or company would be identified with the one consolidated generator.

Defining "generator of PCB waste" in this manner for TSCA purposes departs from the RCRA Subtitle C approach. This distinction is made necessary by attributes of the PCB waste universe that set it apart from the RCRA universe. Under RCRA, the typical generator of hazardous waste is an industrial facility that regularly produces waste streams that are fairly predictable from the standpoint of both volumes generated and their composition. The generation of these waste streams is a regular occurrence associated with the manufacturing and processing activities engaged in at the specific facilities or sites. In this context, a site-specific definition of "generator" is sensible.

PCBs, on the other hand, are widely dispersed among millions of "sites" involving end use of electrical equipment and similar articles. In this context, a site-specific definition of "generator" would result in an unwieldy waste tracking system that would be neither workable nor cost-effective. For example, if each site where electrical equipment is used were to be treated as a unique generation site, the utilities could be required to submit unique notifications for each of the more than 12 million mineral oil-filled distribution transformers which they own or operate. This result would overwhelm both EPA and the regulated community. Requiring unique notifications would be inefficient administratively, since significant resource burdens would be associated with issuing for each site a unique identification number, which would be used only one time to track the movement of one item of waste.

The consolidated definition of "generator of PCB waste" proposed here will promote greater regulatory efficiency, without the loss of information that EPA would find highly useful. For example, under the proposal, the 12 million individual distribution transformers would be dispersed among 3,320 utility system generators, a far more reasonable and workable result than would be accomplished under a site-specific definition based on site of use. Greater regulatory efficiency is also anticipated for non-utility entities, such as the non-utility industrial users of PCB Transformers and PCB Capacitors, and those who use PCB Transformers in commercial building installations.

EPA requests specific comments on the extent of consolidation that the proposal will accomplish in terms of defining users or owners of PCBs as generators. To what extent will this proposed definition of "generator of PCB waste" reduce the actual number of generator notifications that EPA will receive under this rule? Further, how will the consolidated definition of generator of PCB waste affect the costs associated with manifesting waste shipments and records retention? Will the proposed definition cause conflicts with State hazardous waste programs that currently regulate PCBs, and if so, how could those conflicts be minimized? Alternative definitions of "generator" are also solicited by the Agency.

*C. The Universe of PCB Waste*

The PCB regulatory universe is not characterized to any significant degree by sites of new manufacture or processing of PCBs as a part of a facility's regular industrial operations. In fact, the amount of regulated PCB wastes associated with "new" manufacturing by chemical manufacturers and processors (see

"excluded manufacturing processes" definition at 40 CFR 761.3) has been estimated at approximately 10,000 to 40,000 pounds of PCBs, an amount which pales in comparison to the 312 million pounds of PCBs that are estimated to be dispersed among the nearly 30 million discrete units of electrical equipment that are potentially subject to TSCA disposal requirements. In terms of total volume, the PCB fluids in electrical equipment are estimated to amount to 1.46 billion gallons of material.

The PCB waste universe is in fact dominated by that component associated with the end use of electrical equipment products, which by design, contain dielectric fluids and insulating fluids. These fluids were laden with PCBs either by purposeful design, or by inadvertent cross-contamination through years of servicing and manufacture. PCBs were introduced into commerce in 1929. Prior to concerns being raised in the early 1970's about their toxicity and persistence, some 1.25 billion pounds were used in the United States by various industries that found PCBs advantageous in their products because of their chemical and thermal stability and their non-flammability.

In terms of intentional production, approximately 965 million of the 1.25 billion pounds of PCBs used in the United States were installed in the dielectric fluids of transformers and capacitors. Another 100 million pounds of PCBs were placed in service in the fluids of hydraulic and heat transfer equipment, while 45 million pounds were used as plasticizers in carbonless copy paper. In addition, there was heavy use (115 million pounds) of PCBs in dispersive applications such as uses as plasticizers in synthetic resins and rubbers, epoxy paints, and protective coatings. PCBs have also been used in machine-tool cutting oils; in high-vacuum oils, mining machinery oils, and the oils used in the compressors of natural gas pipelines; in specialized lubricants and gasket sealers; in printing inks, textile dyes, and synthetic adhesives; in sealers used as water-proofing compounds and putty; and as extenders in investment casting waxes and pesticides. Most of the latter uses dispersed PCBs to the environment years ago, and are no longer controllable by regulation. The "closed" uses such as electrical fluids and coolants are responsible for the greatest volumes of PCB wastes that are subject to the TSCA disposal regulations.

When EPA began its PCB regulatory program in 1978, the Agency estimated that the prior years of PCB usage had already caused some 150 million pounds of PCBs to have been released irretrievably to the environment. EPA estimated that another 290 million pounds of PCBs had been placed in landfills and dumps prior to the enactment of the regulations controlling PCB disposal. However, at the outset of the program, EPA estimated that the great bulk of intentionally produced PCBs, that is some 758 million pounds, was still in service in products, with the use in electrical equipment (transformers, capacitors, etc.) accounting for 750 million pounds of the in-service quantities.

Transformers have a useful life of 30 to 40 years, while capacitors typically have a 15- to 20-year average life. The relatively long life of this equipment suggests that the PCB disposal program will be active for several decades, since most of the PCB-containing electrical equipment has been authorized under the existing regulations for the remainder of its useful life (40 CFR 761.30(a)). However, the fact that the 750 million pounds originally estimated to be in service in electrical equipment has been reduced in 10 years to approximately 310 million pounds indicates that the disposal of PCBs is progressing at an accelerated pace.

This development is due in part to several mandatory equipment phase-outs that were announced in the Electrical Equipment Rule of August 25, 1982 (47 FR 37357) and the more recent PCB Fires Rule of July 17, 1985 (50 FR 29170). The Electrical Equipment Rule required that "PCB Transformers" installed at food and feed facilities be eliminated by October, 1985, while PCB Capacitors at these same facilities must be eliminated by October, 1988. More significantly, this rule requires that nearly one-half of the more than 2.8 million Large PCB Capacitors that were estimated to be in service in 1984 be eliminated from use by October, 1988, unless they are situated in restricted access substation or industrial locations. Finally, by the terms of the July 17, 1985 PCB Fires Rule, a significant number of the nearly 100,000 PCB Transformers that are not located in utility substations may be designated for disposal because of restrictions announced in that rule for PCB Transformers in or near commercial buildings. That rule requires the phaseout of transformers with certain specifications by October, 1990, and the installation of enhanced electrical protection on other units by the same date.

Because of these mandatory phaseout requirements and restrictions, EPA expects that the next 3 years will be a peak period for PCB disposal. Electrical fluids and equipment are expected to account for the preponderance of PCB waste volume, although significant amounts may also be derived from contaminated natural gas pipeline condensates and wastes, hydraulic and heat transfer equipment fluids that are not yet in compliance with the 50 ppm cut-off on authorized use, and PCB-contaminated materials and debris associated with remedial actions at Superfund sites, sites of PCB spills, or pre-TSCA disposal sites.

*D. Evaluation of the PCB Disposal Program*

1. Background

For a period extending more than 3 years prior to the issuance of this proposal, EPA and the Congress have examined issues and incidents that concern the management of PCB waste disposal under TSCA. Congressional oversight committees have held during this period several hearings which have probed incidents which the committee members believe cast some doubt upon EPA's ability to ensure that PCB wastes are in fact being properly disposed at permitted PCB disposal facilities. In conjunction with this high level of Congressional interest, EPA has itself conducted a thorough evaluation of its PCB disposal program, with a view to identifying those areas where improvements are needed.

The significance of the PCB disposal program evaluation cannot be overstated, since EPA has decided to retain its disposal program for PCBs under TSCA authority for the foreseeable future, rather than proceed with a rulemaking listing PCBs as hazardous wastes subject to RCRA management standards. The Agency found that after 10 years of experience with and adaptation to the TSCA disposal requirements, a wholesale transfer of the program to RCRA would be far more complex and potentially disruptive than originally anticipated. EPA concluded that the administrative process alone (i.e., the listing rulemaking and the necessity of numerous amendments to the RCRA system to accommodate PCBs) would be extremely resource intensive and time consuming with little, if any, additional benefit to health or the environment.

Moreover, EPA does not believe that the necessary regulatory amendments to RCRA could be accomplished in time to deal with the expected peak demand for PCB disposal which EPA anticipates will occur during the next several years, as the mandatory phaseouts for certain electrical equipment become effective.

Indeed, EPA was very concerned that the pendency of a listing regulation during the peak period of PCB disposal would have a disruptive influence on the orderly disposal of large quantities of PCB waste, since some PCB users might be inclined to change their position by accelerating their rate of PCB waste generation, to avoid the costs of RCRA's more burdensome administrative requirements. From the Agency's standpoint, the pendency of a rule bringing PCB disposal under RCRA would essentially preempt any momentum for pursuing the needed amendments to the TSCA program that might be undertaken in time to meet the peak disposal period.

2. Program Evaluation Findings

While a number of Congressional proceedings and reports have probed various aspects of the PCB disposal program, the most significant of these proceedings were hearings conducted by the Subcommittee on Environment, Energy, and Natural Resources, a subcommittee of the Committee on Government Operations in the House of Representatives. The Subcommittee held hearings on August 13, 1986, and again on April 6, 1987. At each of these hearings, Subcommittee members probed incidents which were alleged to reflect permitting and enforcement lapses at TSCA-permitted disposal facilities. At each proceeding, the Subcommittee concluded that there were serious deficiencies in the TSCA program's ability to track the movement of PCB waste from generators to disposers. The lack of a manifest system for PCB wastes was specifically addressed as a significant deficiency in the PCB disposal program. The Subcommittee probed allegations of storage and disposal violations at several permitted disposal facilities, and it found especially troubling the lack of any Agency tracking or permitting oversight over the activities of the transporters and off-site, intermediate storers who may function as commercial "brokers" of disposal services with respect to others' PCB wastes. The inability of disposal program managers to identify definitively the intermediate handlers (commercial storers, brokers, transporters) of PCB wastes was highlighted as a fundamental shortcoming in the current national program, particularly with regard to those entities which operate outside the TSCA disposal permitting program. The PCB program was further criticized because none of the intermediate storers operating outside the disposal permitting process are required to undergo any kind of review that evaluates their qualifications or their financial responsibility for properly closing and cleaning up their facilities.

In response to the findings of the Subcommittee, EPA conducted its own evaluation of its Regional and Headquarters permitting and enforcement functions relating to PCB disposal. This evaluation concluded that there was an urgent need to adopt a means of tracking the movement of PCB waste to its ultimate disposition, and a need to develop definitive data on who, other than permitted disposers, is handling PCB waste, and where it is being handled. The lack of this very basic information is a serious handicap because it contributes to EPA's inability to track the disposal of PCB waste, and the Agency's inability to target PCB storers and brokers for compliance inspections. In addition, EPA's evaluation identified a need to enhance EPA's approval oversight of the disposers currently subject to approvals (permits), and the commercial storers for which there is not currently an approval process.

The program improvements called for in the Subcommittee proceedings and in the Agency's own evaluation constitute an ambitious agenda. The urgency of this agenda is accentuated by the recent decision to retain the PCB disposal program under TSCA, and the imminence of the peak period of PCB disposal. EPA is working on several fronts to develop the needed guidance or rules to cure the deficiencies which the Agency and Congress have identified. However, EPA concludes that the absence of a PCB waste tracking system and the absence of approval authority over the commercial storers of PCB wastes represent the most urgent of the program's deficiencies. Therefore, EPA has focused upon these subjects as the scope of this proposed rule, so that the regulation may be promulgated on an expedited basis.

## IV. Discussion of the Proposed Rule

### *A. Purpose of Proposed Tracking System*

The proposed tracking system for PCB wastes serves several objectives aimed at improving the management and enforcement of the national disposal program for PCBs. First, the notification requirement will provide EPA with basic information on the location of and activities engaged in by many of those persons who handle (generate, store, transport, or dispose) PCB wastes.

Second, the collection of this information will facilitate compliance monitoring and enforcement under TSCA by EPA inspectors. A data base of PCB waste handlers will provide EPA with a basis for targeting facilities for site inspections.

Third, the submission of notifications by PCB waste handlers will be a prerequisite to the issuance by EPA of identification numbers to the notifying entities. Upon receipt of notifications, EPA will issue unique identification numbers to all entities required to notify under this rule, unless they have previously been issued numbers by EPA or by State agencies under RCRA hazardous waste authority. The use of the EPA identification numbers will be required in the manifests and the associated reports which together constitute the waste tracking system. When this rule is effective, generators of PCB waste may only turn over their waste to commercial storers, transporters, and disposers of PCB waste who have notified EPA of their PCB waste activities and received EPA identification numbers and any required approvals. Likewise, commercial storers, transporters, and disposers of PCB waste may only accept PCB waste from other commercial storers, transporters, and disposers who have notified EPA of their PCB waste activities.

Fourth, by implementing the notification and manifesting requirements, EPA will be able to track shipments of PCB wastes from the point of generation, through the commercial storage facilities and other intermediate waste handlers, to the TSCA permitted disposal units. This tracking device creates clear lines of accountability among PCB waste handlers. While owners and operators of storage and disposal facilities are required under the current PCB regulations to keep some records on their overall disposition of PCB wastes, the preparation and retention of manifests among facilities' records will provide more uniform and detailed information on the handling of particular waste shipments as they make their way to disposal sites.

Fifth, the use of a manifest system will foster the proper handling of PCB wastes while they are in transport for disposal. The information on the manifest will augment the marking and placarding requirements for containers and transport vehicles in the existing PCB regulations. The information recorded in the manifest will promote protection of health and the environment by serving a notice function for persons handling PCB waste as well as emergency response personnel.

*B. Notification*

1. Background

Under today's proposal, certain persons who generate, store commercially, transport, or dispose of regulated PCB wastes would file a notification of such activities with EPA and receive an EPA identification number. This notification requirement would apply to brokers of PCB disposal services to the extent that they qualify as transporters or disposers, or as storers of PCB waste subject to the storage facility requirements of 40 CFR 761.65.

The notification requirement proposed today is similar to the notification process which EPA proposed for hazardous waste activities on July 11, 1978 (43 FR 29908). The notification process under RCRA section 3010 was finalized with the publication of a hazardous waste activity notification form on February 26, 1980 (45 FR 12746). The RCRA notification program was based on a direct statutory requirement within section 3010 of RCRA. This section of RCRA requires any person who generates or transports hazardous waste or who owns or operates a facility for the treatment, storage, or disposal of hazardous wastes to notify EPA, or States having authorized hazardous waste programs under RCRA, of their hazardous waste activity. This statutory requirement has enabled EPA to develop a computer database on the hazardous waste handlers who constitute the RCRA-regulated universe. Based upon the evaluation of the PCB disposal program by EPA and the Congress, EPA has determined that a database on the activities of PCB waste handlers is equally necessary. The Agency has further concluded that the creation of this information collection is within TSCA's section 6(e) statutory authority.

Similar to RCRA, EPA is proposing that the TSCA notification process be linked to manifesting under TSCA, which is another subject of this proposal. Upon notification, persons would be issued a unique EPA identification number. On the date 120 days after the effective date of the final rule, it would be illegal to receive regulated PCB wastes from a person who does not have an EPA identification number. Likewise, on this same date, it would be illegal to deliver any regulated PCB waste to another waste handler who does not have an identification number. Generators of PCB waste who are exempted from notification requirements under proposed § 761.205(c)(1) would be deemed as having received by rule the identification number "40 CFR Part 761." In the event a person has notified EPA within the 60-day period provided in the proposed rule, and EPA has not issued or confirmed an identification number for that person, the person would be entitled to use either the number "40 CFR Part 761" or a specific number assigned to that person by EPA or a state under RCRA, until EPA assigns or confirms the use of an identification number under this rule.

EPA proposes that a standard form be used for PCB waste activity notifications under TSCA. The proposed form is set out at § 761.205(a)(3) of this proposed rule, and it is based on existing EPA Form 8700–12, "Notification of Hazardous Waste Activity" (43 FR 12745, as revised 11/85). The form has been tailored to the requirements specified under this rule for notification under TSCA. However, the general format of the Hazardous Waste Activity form has been preserved as far as possible, to facilitate compliance and data entry.

2. Who Must File Notifications

This proposal would require certain generators and all disposers, transporters, and commercial storers of regulated PCB waste to file a notification form identifying their PCB waste facilities and activities. Each generator, transporter, disposer, and commercial storer of PCB waste who notifies under this rule would receive from EPA a unique identification number identifying each facility involved with the handling of PCB wastes. The only generators who would notify EPA as unique facilities under this proposal would be generators who store the PCB wastes they generate at storage facilities which they own or operate, and which are subject to § 761.65(b) storage facility standards.

Generators, commercial storers, transporters, and disposers of PCB waste would check the appropriate box on the form identifying their type of PCB waste activity.

a. *Facilities that have notified previously under RCRA.* In instances where facilities have previously been issued RCRA identification numbers, the facility would indicate on the space provided in Item III of the form their RCRA identification numbers. EPA will use for TSCA purposes the same identification numbers previously issued to facilities by EPA or states under RCRA. However, EPA emphasizes that facilities which have previously notified under RCRA would be required to notify again for purposes of identifying under TSCA the location and nature of their PCB waste activities, as well as their identification numbers previously issued to them.

b. *Notification by generators.* This proposal adopts a different approach than under RCRA regarding the notification requirements that apply to generators of PCB waste. EPA has concluded that it would not be efficient to require separate notifications by all persons who generate PCB waste. The universe of PCB waste generators is dominated by many thousands of end users of PCB electrical equipment. For example, there are about 3,320 utility companies that use and store significant numbers of PCB Items, and there may be as many as 117,000 nonutility facilities that use PCB-containing electrical equipment. While some of these users may possess substantial inventories of PCBs and PCB Items, and therefore routinely generate PCB wastes, many of these users possess only a few PCB articles that would potentially be subject to TSCA disposal requirements. The administrative burden of notification on both EPA and these many end users would be unreasonable where the notification would facilitate the tracking of only one, or a very few articles of PCB waste. The utility to the Agency of a data base that contained information on the one-time or sporadic generators of PCB waste would be far outweighed by the costs of submitting and processing the information.

Therefore, EPA is proposing a notification requirement for generators that focuses upon the larger volume users, owners, and processors of PCBs who store the PCB wastes which they generate at their own § 761.65(b) storage facilities. These are the generators who may be expected to utilize PCB disposal services on a fairly regular or large-scale basis, and for whom it is administratively efficient to require particular information about their PCB waste generation activities. Such generators would not construct and operate their own PCB storage facilites unless they generated PCB wastes with the frequency and volume that would merit incurring the costs of construction and maintenance of these facilities. It is appropriate that these generator/storers be a part of the Agency's database of regular handlers of PCB waste.

In submitting their notifications to EPA, members of this class of generator/storers would submit a notification form for each of their storage areas that is subject to § 761.65(b). EPA would issue a unique identification number to each notifying storage facility, and this identification number would correspond to the physical location of the facility. EPA

anticipates that this class of generators will consist primarily of utilities and other heavy industrial users of PCB electrical equipment. These users typically operate storage and maintenance yards where PCB wastes are likely to be generated or consolidated prior to off-site disposal. Also, members of the transformer service and repair industry would be likely members of this class, because of the significant volumes of PCB waste which they may generate during the routine servicing, rebuilding, repairing, retrofilling, or salvaging of electrical equipment.

c. *Generators who need not notify.* Other generators of PCB waste who do not maintain storage areas subject to the § 761.65(b) storage facility standards would be exempt from the requirements to notify EPA and obtain unique identification numbers. These exempt generators would instead use the generic identification number "40 CFR PART 761" on their manifests in lieu of a unique facility identification number.

This exemption would operate only as an exemption from the generator notification requirement; it would not exempt these generators from the obligation to prepare manifests to accompany their shipments of PCB wastes. As explained more fully in Unit IV.C, this proposed rule would require that all shipments involving PCB wastes be fully manifested, if any part of the shipment contains PCBs at levels equal to or exceeding 50 ppm. Any generator initiating such a waste shipment would initiate a manifest under this proposal.

d. *Other definitions. For the purpose of today's proposed regulation:*

"Commercial Storer of PCB waste" would mean the owner or operator of a storage facility which is subject to the storage facility standards of 40 CFR 761.65(b), and which engages in storage activities involving PCB wastes generated or owned by others. Commercial storers of PCB waste generally perform waste storage services in exchange for a fee or other compensation, but the receipt of compensation would not be necessary to qualify a storage facility as a commercial storer of PCB wastes. It would be sufficient that the facility stores PCB wastes generated or owned by others. Commercial storers of PCB waste would be required to comply with the § 761.65(b) facility standards, the storage facility approval requirements of § 761.65(d), the recordkeeping requirements of § 761.180(b), and the applicable requirements of the tracking system for PCB wastes proposed in this document.

"Transfer facility" would be defined as any transportation related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. PCB storage areas at transfer facilities would be required to comply with the storage facility standards of § 761.65, but they would be exempt from the approval requirements of § 761.65(d), unless the same PCB wastes are stored at such facilities for longer than 10 consecutive days after they receive PCB wastes. Transport vehicles would not be transfer facilities within the meaning of this definition, unless the transport vehicle is being used for the storage of PCB wastes, rather than for actual transport activities.

The proposed rule also contains definitions of "designated facility," "disposer of PCB waste," "EPA identification number," "manifest," "off-site," " PCB waste," and "transporter of PCB waste."

EPA invites comment on the proposed definitions, and the scope of the notification requirement proposed in this rule. In particular, comments are requested on these subjects:

i. The feasibility of assigning by rule a generic identification number (e.g., "40 CFR PART 761") to be used in manifests by those generators who would be exempted from notification by the proposal, but still subject to Federal manifesting requirements. Will transporters, commercial storers, and disposers of PCB wastes have reservations about accepting wastes and manifests with non unique generator identification numbers?

ii. The appropriateness of designating generators having storage facilities subject to § 761.65(b) facility standards for PCB storage as the class of PCB waste generators who must submit notifications to EPA, and treating each of their storage facilities as unique generators. Is this the most effective criterion for identifying the PCB users, owners, and processors who generate PCB waste with the frequency and in the quantities that warrant inclusion in the Agency's facility-specific database of PCB waste handlers? Are there alternative criteria that would identify other generators of concern without overwhelming the database with many thousands of end users who may individually hold only a small amount of PCB material, or who may generate PCB waste very infrequently?

iii. The feasibility of including PCB storage areas at transfer facilities among the storage facilities subject to the § 761.65 facility standards for the storage of PCB wastes. This proposal would, however, exempt storage at transfer facilities from the approval requirements that apply to commercial storers of PCB waste, unless PCB waste is stored at such facilities for periods exceeding 10 days. This 10-day approval exemption is consistent with the similar exemption under RCRA for storage of hazardous wastes at transfer facilities. The Agency requests comment on the appropriateness of the proposed 10 day exemption from storage approval requirements.

3. Notification Process

EPA is proposing a sample notification form and instructions for all those who may be required to notify. EPA will try to inform those affected by this proposal of the rule's contents, so that the effort to reach the regulated community of PCB waste handlers can have maximum effect. Specifically, EPA will contact relevant industry associations, including associations representing the utilities and the other large non-utility manufacturing industries that are likely to be the heaviest generators of PCB waste. The Agency will also work closely with the several groups who have expressed interest in the issues involved with this regulation, and have indicated their willingness to provide lists of their members to facilitate notification.

Failure of the EPA's outreach efforts to reach any affected person will not, however, relieve that person of the legal requirement to notify under the final rule. Members of the public affected by the final rule are therefore encouraged to obtain or make copies of the rule and included sample Notification Form, and distribute them to the other generators, commercial storers, transporters, and disposers with whom they deal so that all may be in compliance with the requirement to file a notification form within 60 days of the final rule's effective date.

4. When To Notify

Because of the urgency involved in implementing the waste tracking system in time to meet the imminent peak in PCB disposal demand, EPA will promulgate this rule on an expedited basis. This proposed rule announces a public comment period for written comments of only 30 days, and commentors are asked to submit their comments forthwith so that they may be considered in preparing the final rule. EPA intends to promulgate and make effective a final rule under an expedited schedule. The final rule will only

provide for a 60-day period after the rule's effective date for notifications to be received by the Agency. EPA believes that this expedited rulemaking schedule is reasonable in light of the fact that the regulation adopts in large part the existing RCRA tracking system with which most affected persons are already familiar.

EPA recognizes that this expedited schedule poses some potential for confusion among the generators desiring to procure PCB disposal services, as they will need to be certain that they are dealing with transporters, commercial storers, and disposers who have in fact complied with the notification requirements. Therefore, to facilitate an orderly notification process, EPA recommends that entities who perceive that they are likely to be affected by these proposed notification requirements notify EPA during the 90-day period immediately after publication of this proposed rule. The sample notification form proposed in this notice may be used to submit an early notification to EPA. EPA will process these early notifications as soon as possible by issuing identification numbers. Entities which notify early will be assured of receiving the most rapid turnaround in the processing of their notifications. These entitites should have no difficulty in demonstrating to their customers compliance with the requirement to submit a notification no later than 60 days after the final rule's effective date.

EPA emphasizes that the entities who elect to notify early will not waive any objections or other comments which they may wish to submit during the public comment period. The submission of an early notification is entirely independent of the right to comment on the proposal, and no one will be prejudiced by submitting an early notification.

EPA would return to each notifier an acknowledgment of receipt of the notification form, which would include the notifier's EPA identification number. EPA believes that it will be able to process most of the notifications within 120 days of the final rule's effective date. However, EPA may not be able to issue all identification numbers within the 120-day period. Accordingly, EPA is proposing that, in the event a person has notified EPA within the 60-day period provided in the proposed rule, and EPA has not issued or confirmed an identification number for that person within the 120-day period provided, the person would be entitled to use either the number "40 CFR Part 761" or a specific number previously assigned to that person by EPA or a state under RCRA. The person would be entitled to use this number only until EPA assigns or confirms the use of an identification number under this rule. Thus, no person who has notified EPA in a timely fashion will be prevented from continuing its PCB waste activities for lack of an identification number.

In addition, any non-exempt generator, commercial storer, transporter, or disposer of PCB waste who begins PCB waste activities after the effective date of the final regulation would be required, prior to handling any PCB waste, to notify EPA and receive an EPA identification number in accordance with this proposed rule. Such new entrants into the regulated community would not be allowed to operate until they receive an identification number. In the case of disposers of PCB waste and commercial storers of PCB waste, new entrants into these businesses would be required to obtain both EPA identification numbers and final approvals before they could commence disposal or storage operations. The Agency recommends that applicants for TSCA disposal or storage approvals submit their notification forms during the period of review of their disposal or storage approval applications. The Agency emphasizes that in no case would the requirements to notify and obtain identification numbers excuse compliance by any entity with the 1-year limit on storage prior to disposal under 40 CFR 761.65(a).

5. When To Notify

There are numerous Federal officials responsible for distinct pieces of the PCB disposal program, and some states also regulate PCB disposal under their own regulatory programs. EPA believes that the notification process can only work if administered centrally. Therefore, EPA proposes that notifications by PCB waste handlers be submitted to EPA Headquarters at the following address: Chief, Chemical Regulation Branch, Office of Toxic Substances (TS–798), Rm. NE–117, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

6. Information Required for Notification

The proposed notification form is set out at § 761.205(a)(3) of this proposed rule; however, the form will not appear in the Code of Federal Regulations when the final rule is published. This section of the preamble describes the information required on the proposed notification form.

An area at the top of the form is labelled "For Official Use Only." This unnumbered section is to be completed by EPA officials and should be disregarded by the notifier. In this space, EPA will enter any comments, the notifier's EPA identification number, an approval code, and the date on which EPA receives the notification form.

Items to be filled out by the respondent are numbered I through VII. The name of the facility submitting the notification would be indicated in Item I, and if the facility has already received an EPA identification number under RCRA, that number would be supplied in Item II.

Item III would contain the mailing address of the respondent, while Item IV would contain the actual location of the installation, since the location (a physical address) may not be the same as the mailing address. Where mobile disposal facilities are involved, the respondent would be instructed to write "mobile" on the space in Item IV, and to supply on the space in Item III, the mailing address of the facility's installation contact identified in Item V.

Item V, Installation Contact, would contain the name of an individual at the facility who can be contacted by EPA to clarify information on the notification form or provide information in the event of a spill or other emergency. The individual's telephone number would be specified here as well.

Item VI, Type of PCB Waste Activity, would ask the respondent to indicate whether the facility to which the notification applies is a generator, commercial storer, transporter, or approved disposer of PCB waste. "Commercial storer of PCB waste" here would refer to those storage facilities which store PCB wastes owned or generated by others. The term would not apply to the storage sites maintained by the owners or users of PCBs who initially generate PCB waste when they remove PCBs from service. Where transporters and disposers also maintain storage facilities for PCB waste subject to 40 CFR 761.65(b), they would need to check both the commercial storer box and the relevant transporter or disposer box in this section.

The final section of the form, Item VII, Certification, would be signed and dated by the owner, operator, or authorized representative of the installation. An "authorized representative" is a person responsible for the overall operation of the facility.

In preparing this notification form, EPA modified the existing form used under RCRA (EPA Form 8700–12, Rev. 11/85) for notification of hazardous waste activities. EPA believes that this form as modified is adequate for the

purposes of PCB notification under TSCA, considering the similarity of the intent of RCRA hazardous waste activity notification and TSCA PCB notifications. EPA welcomes any comments on this form; however, to the extent that changes to the form are made in the final rule, EPA assures those who elect to notify during the pendency of the rulemaking that they will not be asked to notify anew because of any such changes.

7. Claims of Confidentiality

TSCA section 14 addresses the confidentiality of business information reported to EPA, or otherwise obtained by EPA, in administering TSCA. (15 U.S.C. 2613(a)). EPA's rules implementing section 14 appear in 40 CFR Part 2.

While information submitted in a reporting form may ordinarily be claimed as confidential, EPA has purposely designed the proposed notification form so that its preparation will not require the submission of any data that EPA believes would be confidential business information (CBI) under TSCA. The form would merely ask for the most basic of information regarding the name, location, and general description of PCB waste handling activities engaged in by notifying entities. It does not ask for information on quantities processed, customers, technical processes, financial information, or for any other information which, when linked to a company's name, could adversely affect a company's competitive position.

EPA has determined that the following information will not be treated as confidential business information: The name of the facility, other EPA identification numbers issued to the facility, the facility's mailing address, information about the facility's ownership, the location of the facility, the facility's installation contact, or the type of PCB activities engaged in at the facility. The reasons for this determination are:

(1) The information is reasonably available from other sources.

(2) If disclosed, it is unlikely to affect adversely the submitter's competitive position.

(3) The information is neither commercial nor financial information protected from disclosure under TSCA or the Freedom of Information Act.

This information will be disclosed to the public without further notice to the submitter unless the submitter provides a written justification (submitted with the notification information) which demonstrates extraordinary reasons why the information is entitled to confidential treatment.

8. EPA Identification Number

To maintain consistency with the RCRA notification procedures already in place, and to avoid subjecting those who may already possess RCRA identification numbers to the burden of being assigned multiple numbers, EPA proposes to use the numbering system adopted under RCRA for today's proposal under TSCA.

The RCRA numbering system currently assigns each notifier a 12-digit number. The first 2 characters indicate the State in which the facility is located; the remaining 10 characters are the Dun and Bradstreet Data Universal Numbering (DUN) system numbers. The DUN system provides the most nearly complete listing of U.S. businesses. Federal agencies, which are not included in the DUN system, would be assigned their General Services Administration Real Property Number. State and local government installations would also be assigned unique numbers. Where notifications are submitted by mobile disposal facilities, the identification number that EPA assigns would correspond to the business' corporate headquarters or other business location identified in Item III of the notification form. EPA requests comments on the use of this proposed numbering system. Where there are problems identified with the proposal, EPA requests that alternatives be suggested that would be more workable or efficient.

9. Relationship to CERCLA Notifications

In addition, EPA emphasizes that the notification requirements contained in this proposed rule are in no way related to and would not affect the independent notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended. The proposed rule would not alter the responsibilities of a person in charge of an onshore or offshore facility or vessel to notify the National Response Center of the release of a reportable quantity (RQ) or more of PCBs or any other hazardous substance as defined under CERCLA.

Under CERCLA sections 103 (a) and (b), any person in charge of an offshore or onshore facility or vessel is required to report to the National Response Center as soon as he or she has knowledge of any release of a hazardous substance that is equal to or greater than the RQ. However, as stated in a final rule published on April 4, 1985 (50 FR 13461) regarding RQs, disposal of hazardous substances at a disposal facility in accordance with EPA regulations is not subject to the CERCLA notification requirements. Thus, if PCB wastes are properly disposed of in a TSCA approved facility, and this is properly documented through manifests and other records, CERCLA notification is not required. However, spills and accidents which occur during disposal activities, and which result in releases of an RQ or more of PCB waste, must be reported to the National Response Center. Additionally, any PCB releases (as opposed to disposal) of an RQ or more from a TSCA storage or disposal facility must be reported under CERCLA.

*C. Manifesting*

1. Background on RCRA Manifesting System

When Congress enacted RCRA in 1976, it included in section 3002 of the Act an express mandate to create a manifest system to assure that hazardous wastes are designated for and in fact arrive at approved treatment, storage, and disposal facilities. On February 26, 1980, EPA issued a rule published in the **Federal Register** which announced the creation of the RCRA manifest system (45 FR 12722). The manifest system is the centerpiece of the "cradle-to-grave" tracking system which EPA and the States rely upon to ensure that hazardous waste designated for off-site management actually reaches its destination. The manifest acts as a control and shipping document that accompanies the waste from its point of generation to its point of destination. The manifest also acts as a record which remains in the files of waste handlers, and from which information may be culled for periodic reports summarizing overall waste activities.

EPA first proposed manifest requirements for hazardous wastes on December 18, 1978 (43 FR 58969). The original manifest regulation of February 26, 1980 designated the information that was required to accompany waste shipments, but it did not prescribe a standard form. At the time, EPA believed that there was greater benefit in a flexible approach to manifesting, fearing that the creation of a standard form would be too rigid a means of reconciling the various requirements of EPA, the States, and the Department of Transportation (DOT).

Shortly after the initiation of the manifest system, EPA received a number of requests to reconsider its decision rejecting a standard form manifest. These petitioners pointed out

that there had arisen among the States a multitude of manifest forms, and that compliance with these differing State forms had created a burden on generators, transporters, and the State programs. The use of varying manifest forms complicated enforcement activities, prevented generators from adopting standard manifesting procedures, and forced transporters to carry multiple manifests for the States through which they moved. EPA responded to these requests by issuing a proposed rule requiring the use of a uniform national manifest (43 FR 9336, March 4, 1982). The final rule adopting the uniform national manifest (49 FR 10490, March 20, 1984) was developed jointly by EPA and DOT, and the uniform manifest has been a RCRA requirement since September 20, 1984.

EPA is proposing in this document to require the use of the Uniform Hazardous Waste Manifest (Uniform Manifest) form by the handlers of PCB wastes. The use of the Uniform Manifest for PCB waste shipments will facilitate compliance with both TSCA and RCRA, and it will avoid the confusion and expense that would arise from the requirement of any other document. EPA believes that the Uniform Manifest can be adapted fairly easily to PCB wastes, with only slight interpretive changes, and a slight change in the copy distribution requirements.

2. EPA's Rationale for Proposing a Manifest System

The most frequently cited deficiency in the TSCA disposal program for PCBs is the absence of sufficient program oversight to assure that regulated PCB wastes are in fact being disposed of at permitted disposal sites. The Agency believes there is some merit in these concerns and has determined that a tracking system based on the Uniform Manifest system requirements can play a valuable role in addressing these concerns.

A valuable attribute of manifesting is that the manifest system shifts some part of the waste tracking "enforcement" burden to the generators of waste. The generator bears the responsibility for demonstrating that the waste which it ships actually arrives at the designated off-site storage or disposal site. The paper trail established by the manifest confirms the physical delivery of waste to commercial storers, transporters, and designated disposers, thereby providing for checks and balances on the activities of waste handlers. In addition, the several reporting requirements allied with the manifest system operate as "red flags" triggering Agency attention when anomalies develop. By documenting the progress of waste from the site of generation to the site of commercial storage or disposal, the routing of the manifest in effect acts as a surrogate for the inspection of each phase of waste handling.

EPA is aware that a manifest system is not infallible. A system that substitutes surveillance of shipping documents for surveillance of actual waste handling is vulnerable to abuse. In a 1985 report entitled "Illegal Disposal of Hazardous Waste: Difficult to Detect or Deter," the General Accounting Office (GAO) highlighted the fact that the RCRA manifest system has not been an altogether successful tool for *detecting* instances of illegal hazardous waste disposal. The GAO report concluded that manifesting was effective in *deterring* illegal disposal practices, but that the unscrupulous waste handler bent on noncompliance could circumvent the existing tracking system.

The GAO report found that many of the waste handlers implicated in investigations of illegal disposal had not notified EPA or the State in accordance with the law. The report also disclosed a lack of diligence by generators in verifying the receipt of waste by disposers, as well as fraud by transporters (e.g., forging the disposer's signature on manifests) as two of the more prevalent shortcomings revealed in the enforcement records that the GAO examined. In today's proposal, EPA includes additional safeguards which are intended to address the concerns identified in the GAO report.

Clearly, a manifest system will not achieve the same level of oversight possible in the ideal world, where enforcement inspectors would be on the scene to verify every aspect of waste handling. That ideal is simply not achievable, and EPA must rely upon more feasible means of monitoring the movement of waste that depends to some extent on cooperation and compliance by the great majority of waste handlers, especially generators. In short, EPA is not aware of a feasible alternative that accomplishes a greater level of oversight and deterrence than the manifest system. Therefore, EPA is proposing a tracking system for PCB wastes modeled after the RCRA Uniform Manifest system. EPA invites comment on the appropriateness of this system for the tracking of PCB waste disposal.

3. Who Must Originate a Manifest

A manifest is a shipping document and record that verifies the disposition of PCB waste after its generation. The manifest requirement proposed today would require all generators of PCB waste at concentrations of 50 ppm or greater to manifest their waste shipments, regardless of whether the generator was required to notify EPA under the proposed notification provision discussed in Unit IV.B. of this document. Where PCB waste shipments consist solely of PCB wastes below 50 ppm, this rule would not require generators to prepare a manifest. Manifests for waste shipments under 50 ppm would be required, of course, if such manifests are required under the laws of a State which regulates PCB disposal.

EPA has rejected the use of any "small quantity generator" exclusion based on volume of PCBs or numbers of PCB Items held by a generator. The frequency with which PCB disposal may occur can be very sporadic for individual generators, and the volumes of waste generated over specified periods of time may vary dramatically because of differences in fluid capacities among individual PCB articles. So, the designation of a small quantity cutoff would be likely to produce arbitrary results. While the utilities would be expected to aggregate their wastes in quantities which exceed any small quantity cutoff, there is a large segment of the total universe of regulated PCBs that is distributed among many end users who own only a few pieces of PCB equipment. It would defeat the purpose of the proposed tracking system if the small quantity cutoff had the effect of so fragmenting the PCB universe that only the waste owned by the utilities and the large industrial users was tracked to disposal. In addition, adopting for PCB wastes the RCRA 100 kg/month small quantities cutoff would be essentially meaningless, since the shipment of even one small PCB Transformer (40 gallons or 235 kg dielectric) would exceed such a cutoff. EPA solicits comment on this aspect of the proposal.

EPA is proposing to require manifests for shipments containing regulated PCB wastes at the 50 to 500 ppm level, as well as for shipments containing higher concentration PCB wastes at the 500 ppm or greater level. The inclusion of the 50 to 500 ppm wastes would extend the coverage of the manifesting requirement to about 129 million gallons of PCB waste, compared to the 42.5 million gallons that would be covered under an option limiting the manifest to the 500 ppm or greater wastes. While one might conclude that the proposed option involves an incremental burden that is about three times that associated with manifesting only the 500 ppm or

greater wastes, EPA has concluded that the actual incremental burden associated with the proposed option is not significant.

EPA consulted with States which regulate PCB disposal and with the operators of TSCA approved disposal facilities. EPA found that each of the approved disposal facilities required a manifest to accompany any shipment of regulated PCB waste, regardless of PCB concentration. These disposal firms require manifests for the PCB wastes they accept as a means of preserving records of firms potentially responsible for contributing toward any remedial actions which might arise at the disposal site. Also, among the 18 States that currently require a manifest to accompany PCB wastes, all but one require a manifest for wastes containing PCBs at the 50–500 ppm level. Because current practice appears to be consistent with the proposed 50 ppm trigger for manifesting, there would not appear to be a significant incremental burden to industry associated with the proposed option.

EPA also considered whether tracking the movement of 50 to 500 ppm PCB wastes would be cost-effective from the Agency's standpoint. The economic analysis supporting this rulemaking projects that the 50 ppm manifesting threshold would subject nearly twice as many manifested PCB waste shipments to EPA's tracking system. Ordinarily, EPA would not actually receive and review this additional volume of manifests. Manifest copies generally would not be submitted to EPA, except when an irregularity in a waste shipment gives rise to the filing of a Discrepancy or Exception Report with EPA. The economic analysis considered the additional number of waste shipments being tracked under the proposed 50 ppm option, and based on several years of experience under RCRA, predicted that fewer than 1% of these shipments would trigger a Discrepancy or Exception Report to EPA. The economic analysis concluded that the number of such reports would number between 65 and 109 annually. The annual incremental costs to EPA of filing and reviewing these reports (assuming $21.75 cost per report) would be nominal.

EPA requests comment on the appropriateness of the proposed 50 ppm trigger for manifesting PCB wastes. In particular, the Agency invites comments which would verify or refute EPA's findings about the extent to which manifesting is already occurring with respect to PCB wastes at the 50 ppm or greater level. EPA also invites comments on the alternative option that would trigger manifesting for Federal purposes only at the 500 ppm PCB level or greater. A regulation that required manifesting for wastes contaminated with PCBs at 500 ppm or greater would theoretically control about 98 percent of the total pounds of "pure" PCBs dispersed among the regulated PCB wastes, while extending coverage to about one-third of the total volume of waste materials. Would this alternative option in fact avoid any significant economic impacts, or does current practice among the States (which this regulation would *not* preempt) and the disposal industry effectively preclude any savings that might be realized under this alternative? EPA would consider including this alternative option (manifesting only at 500 ppm or greater) in the final regulation if comments submitted to EPA rebut the presumption that there are no significant incremental costs associated with the 50 ppm option. Such comments would need to convince the Agency: (1) That a 500 ppm trigger for manifesting would result in a significant reduction in the real costs of manifesting PCB waste; (2) that the adoption of a 500 ppm trigger for manifesting would not be rendered moot by the existing requirements of States and the current practice of disposal firms; and (3) that excluding the 50 to 500 ppm wastes from a Federal manifesting requirements would not create confusion or, because of inconsistencies with State requirements, encourage non-compliance with the States' more stringent requirements.

This proposal would require the manifest to be prepared by the generator at that point in time when the PCB waste is first introduced into commerce in a manner that will cause the waste to leave the generator's control. This latter condition would generally be triggered when the generator turns its waste over to a transporter for delivery to an off-site storage or disposal facility. The condition would also be satisfied when the waste is placed on the generator's own transport vehicle for shipment to a commercial off-site storage or disposal facility, since the waste is then being introduced into commerce in a manner that will cause the generator to lose control of the waste. A manifest need not accompany the shipment via transport vehicle of PCB wastes to a storage facility owned or operated by the end user of PCBs and PCB Items, because these generators have not yet relinquished control over the PCB waste. This exception would apply to both transport via the generator's vehicles and transport by an independent transporter, since, in the latter case, the transporter is presumed to be acting pursuant to the generator's instructions. Apart from the exception for shipments between the end user's own facilities, EPA would construe the provision regarding when PCB waste leaves the generator's control strictly, so that the manifest requirements will have the broadest possible scope. EPA invites comment on using the "loss of control" concept as the criterion for when generators must initiate a manifest. EPA also solicits comment on the appropriateness of the exception for shipments between the end user's own storage facilities.

The Agency emphasizes that this proposal affects only the Federal manifesting requirements for the transport of the PCB wastes that are regulated for disposal under TSCA. No provision or exception contained in this proposal would be construed to alter or limit the applicability of any requirement in existing DOT regulations pertaining to the transport of hazardous materials, including PCBs.

4. Information Required in the Manifest

The manifest which generators would originate is designed to include only the information necessary to identify accurately the persons handling the PCB waste, and the nature and quantity of the waste. These information requirements consist essentially of the Federal Information Requirements described in the March 20, 1984 regulation which announced the adoption of a Uniform Manifest (49 FR 10497). Use of the manifest would not supercede any other requirements for PCB wastes under 40 CFR Part 761.

a. *Manifest document number.* The manifest document number would consist of the generator's EPA 12 digit identification number, plus a unique suffix of up to 5 digits which the generator would add to ensure the uniqueness of the manifest document number for each shipment from each site of generation during a calendar year. The 12 digit identification number would consist of the generator's unique identification number issued after notification to EPA, or the 12 digit reference "40 CFR PART 761" for those generators who would not be required to notify specifically under this rule.

b. *Page number.* Generators would be required to identify on the first page of a manifest the total number of pages in that manifest, i.e., the first page (EPA Form 8700–22) plus the number of continuation sheets, if any. For example, if the manifest consists of only one page, and there is no continuation sheet, then

the correct entry would be "Page 1 of 1." If the manifest consists of one front page (Form 8700–22) and one continuation sheet, the correct entry is "Page 1 of 2."

c. *Generator name and address.* The address to be entered here would be the mailing address of the generator to which the designated storage or disposal facility must return promptly a completed copy of the manifest. The generator would enter the mailing address of the location that will administer the returning manifest forms, which could be the company's billing office, corporate headquarters, or the site of generation. While the address entered here need not identify the particular site of generation, the generator's manifest records would be maintained so that unique waste shipments (identified by the unique manifest document number assigned by the generator) can be identified with the actual sites of generation.

d. *Generator's telephone number.* This would be the number of a person who can provide information about the shipment in the event of an emergency, such as when a transporter cannot deliver the PCB waste to the designated disposer or commercial storer.

e. *Transporter #1: Company name and EPA ID number.* The name and U.S. EPA 12 digit identification number of the initial transporter of the waste would be entered.

f. *Transporter #2: Company name and EPA ID number.* The name and U.S. EPA 12 digit identification number of the second transporter, if applicable, would be entered. Space for additional intermediate transporters is provided on the continuation sheet for entry in the order they are used.

g. *Designated facility name, site address, and U.S. EPA ID number.* The generator would enter the name, site address, and EPA 12 digit identification number of the off-site commercial storage or disposal facility which the generator has designated to receive its PCB waste. The site address is necessary to inform the transporter where the shipment must be delivered. The designated facility should always be an approved facility for the disposal of PCBs, or an off-site commercial storage facility with either interim or final approval under § 761.65(d). Ordinarily, transfer facilities and other temporary storage facilities used by transporters for storage of waste during ordinary transport would not be listed here as designated facilities, unless the PCB waste will remain in storage at such a site for greater than ten days. Likewise, an end user's own storage facility would not ordinarily be listed here as the designated facility, unless the laws of a State or local government require manifests for shipments between the generator's own facilities.

h. *Container number and type.* The generator would indicate both the number of containers, and, using the instructions in Table 1 of the form instructions, the type of containers for each shipment.

i. *U.S. DOT Description (Including: Proper shipping name, hazard class, and ID number).* The generator would complete this section consistent with DOT's regulations at 49 CFR 172.201. The generator would enter the assigned DOT identification number, which consists of a four-digit number preceded by the United Nations (UN) designation for PCBs. The generator would also enter here the total quantity and unit of measure (volume or weight) of the shipment. This measurement would be gross weight when the waste container is to be discarded (e.g, a drum containing waste), and net weight when it is not discarded (e.g., bulk shipments by tank truck). The quantity description would not include fractions.

j. *Special handling instructions and additional information—date of removal from service.* This section would be used by the generator for several purposes. For example, ICC Bill of Lading information, placarding and marking information required by EPA or DOT, or emergency response telephone numbers may be included on this space. However, the primary purpose of this space for the purpose of this proposed rule is to record the date of removal from service for the PCBs and PCB Items contained in the waste shipment. If this space is not adequate for entering all the relevant dates, the generator would attach a typewritten continuation sheet to the manifest. The continuation sheet would list the PCBs and PCB Items contained in the shipment and their dates of removal from service.

k. *Generator certification.* The generator would be required to read, sign, and date the certification statement at the initiation of each waste shipment. To the extent that the form requires a generator of PCB waste to certify to waste minimization efforts, the requirement would be satisfied as long as the generator has not increased the volume of waste by any act that contravenes the dilution prohibition of the PCB disposal regulations. Generators who are "excluded manufacturing processes" or "recycled PCB processes" could certify as long as they are in compliance with the PCB release restrictions set forth for these processes at 40 CFR 761.3.

l. *Acknowledgment of acceptance by transporter.* A transporter would be required to acknowledge on the manifest the acceptance of the waste shipment by signing the manifest and recording the date of acceptance.

m. *Discrepancy indication space.* The Discrepancy Indication Space would be used for recording significant discrepancies, as defined below, between the PCB waste described on the manifest and the PCB waste actually received by the designated PCB storage or disposal facility.

n. *Acknowledgment of acceptance by designated facilities.* The owner or operator of the designated commercial storage or disposal facility would be required to acknowledge here the acceptance of the waste shipment by signing the manifest and recording the date of acceptance.

o. *Optional information required by States.* In addition, the Uniform Manifest form includes optional information spaces to meet the basic information requirements which States have the option of imposing. The optional State information items appear at the upper right portion of the manifest form, and they are shaded and headed by letters (rather than numbers) to set them apart.

5. Copies of the Form

EPA will not print copies or sets of the manifest form for public use. Generators and others needing copies of the form should first contact their State office to determine if their State has printed copies available. If forms are not available from the State, camera-ready copies of the form for printing purposes can be obtained from the State, or the EPA Regional Office, or EPA Headquarters.

6. Use of the Manifest

The manifest under RCRA consists of at least the number of copies which will provide the generator, each transporter, and the owner or operator of the designated storage or disposal facility with one copy each for their records, and another copy to be returned to the generator. EPA proposes that manifests for PCB wastes under TSCA would also include sufficient copies for the generator, the initial transporter, each intermediate transporter, the designated commercial storage or disposal facility, and another copy to be returned to the generator by the designated facility.

In addition, this proposal would require that generators of PCB waste prepare one additional copy of the manifest. The generator would send this additional copy directly to the designated facility by Registered Mail, Return Receipt Requested, immediately

after the consignment of the waste to the initial transporter. This advance manifest copy would be sent to the designated facility independently of the delivery of the waste. Under this proposal, the generator's obligation to send an advance copy of the manifest to the designated facility would be a non-delegable obligation which only the generator of PCB waste may perform.

EPA is proposing this additional copy requirement on generators as a means of ensuring further the integrity of the manifest system. As previously indicated, the GAO report on detection of illegal hazardous waste disposal activities highlighted several instances in which transporters had forged the designated facility's copy of the manifest and returned it to the generator. The return of the forged copy signified to the generator that the waste had arrived at the designated facility, when in fact, the transporter had dumped the waste or otherwise handled it improperly. The transporter profited by retaining both the shipping fee and the disposal fee, rather than passing the disposal fee on to the designated disposal facility.

The submission of an advance copy of the manifest directly to the designated facility may deter transporters or brokers from acting improperly with respect to the waste. Disposers and commercial storers would be alerted to expect the delivery of the waste, and generators would obtain a preliminary verification (the signed Return Receipt) of the disposal arrangements from the designated facility that is independent of the transporter's efforts. EPA requests comment on the appropriateness and feasibility of this additional verification requirement.

Otherwise, the manifest system proposed here for PCB wastes parallels the operation of the manifest under the RCRA tracking system for hazardous waste. The generator would sign the manifest certification by hand, and obtain the handwritten signature of the initial transporter (who would have an EPA ID Number) and the date of acceptance on all copies of the manifest. The generator would retain a copy of the manifest for its records, and give the remaining copies of the manifest to the initial transporter. The generator also would send by registered mail, return receipt requested, one advance copy of the manifest to the designated commercial storage or disposal facility.

The transporter then would carry the manifest with the waste to the designated facility. If delivery to the designated facility is not possible, the transporter would contact the generator for further instructions, which would be entered in the space provided for additional instructions. If intermediate transporters are involved, an additional copy of the manifest would be prepared by the generator for each additional transporter that will handle the waste. The initial transporter would deliver the entire quantity of waste to the designated subsequent transporter, and he would obtain the subsequent transporter's signature and the date of delivery on the manifest. A copy of the manifest would be retained as a record by the initial transporter, and the remaining copies would accompany the waste. The subsequent transporter would deliver the entire quantity of waste to the designated storage or disposal facility, or to the next transporter, according to the instructions on the manifest. Until the signature of the designated facility or subsequent transporter is obtained, the waste would be considered to be in the custody of the transporter who last signed the manifest.

When the waste is finally delivered to the designated PCB storage or disposal facility, the owner or operator of the designated facility (or his agent) would sign and date each copy of the manifest to certify that the PCB waste covered by the manifest was received at the facility. In addition, the designated facility would note on each copy of the manifest any significant discrepancies between the quantity or type of waste identified on the manifest and the quantity or type of waste received at its facility. For bulk waste, significant discrepancies would be variations greater than 10 percent in weight, and for batch waste, any variation in piece count, such as a discrepancy on one drum or other article in a truckload. Proposed significant discrepancies in type are obvious differences which may be discovered by inspection or analysis, such as when soil or other solids are substituted for liquids, or when waste greater than 500 ppm is substituted for waste below 500 ppm.

The designated facility would keep one copy of the manifest for its records, and it would immediately give the transporter at least one copy of the signed manifest. Within 30 days after the delivery, the designated facility would send a copy of the signed manifest to the generator at the mailing address indicated on the manifest. This transmission of the signed copy of the manifest to the generator would signify the proper completion of the disposal delivery transaction.

Consistent with RCRA requirements, for shipments of PCB wastes within the United States solely by water (bulk shipments only), the generator would send three copies of the manifest, dated and signed, to the owner or operator of the designated PCB facility. Copies of the manifest would not be required for each transporter.

For shipments of PCB wastes by rail within the United States that originate at the site of generation, the generator would send at least three copies of the manifest, dated and signed, to the next non-rail transporter, if any, or the designated facililty, if transported solely by rail.

The manifest requirements for shipments by rail or water are intended to parallel existing RCRA manifest requirements for these industries. The rail and water transporters were exempted from manifesting under RCRA to avoid confusion and duplication of effort, since both industries have their own complex tracking systems that render additional tracking documentation unnecessary.

The preparation of sufficient copies of the manifest would be the responsibility of the generator who initiates the waste shipment. All copies of the manifest supplied by the generator would be required to be legible; it would be a violation of these requirements to ship PCB wastes accompanied by a manifest or continuation sheet for which any copy or part is not legible.

These proposed TSCA provisions for manifesting PCB wastes vary slightly from the current RCRA manifest requirements. Promulgation of final TSCA manifest requirements should in no way alter the existing RCRA manifest provisions.

7. Recordkeeping and Reporting

While notification and manifesting requirements form the core of the waste tracking system, the tracking function is aided by several recordkeeping and reporting requirements. The Agency is proposing today that PCB waste handlers comply with recordkeeping and reporting requirements which are based largely upon the existing TSCA and RCRA requirements.

a. *Retention of manifests as records.* The originator of the manifest (generator) would keep its copy of each manifest until it receives the signed copy from the designated facility that received the PCB wastes. This signed copy would be retained as a record for at least 3 years from the date the PCB wastes were accepted by the initial transporter who took the PCB wastes off-site from the generator. If, however, the generator is subject to the § 761.180(a) annual document requirement, it would retain its signed copies of manifests for the same period

required under § 761.180(a) for its annual document records. The generator would retain its manifest records at the business location identified for records retention on its manifests. This location would also be the site where the generator keeps its § 761.180(a) annual documents, since the preparation of the annual documents will be aided to a great extent by manifest information.

Likewise, the transporter would keep among its records a copy of the manifest signed by the generator and either the next transporter, if applicable, or the commercial PCB storage or disposal facility that is designated for the delivery of the waste. The transporter would retain this copy among its records for at least 3 years from the date that the PCB wastes were accepted by the initial transporter.

The owner or operator of the designated commercial storage or disposal facility would likewise retain at its facility copies of its manifests. The manifest copies would be retained for the same periods as required under § 761.180(b) for the facility's annual document records. These records would be retained at the same location where the facility maintains its annual documents. In this notice, EPA solicits comments as to whether the 5-year record retention requirement for § 761.180(a) and § 761.180(b) should be changed to a 3-year recordkeeping requirement, which would conform with Paperwork Reduction Act guidelines.

In addition, the Agency is proposing that the periods of retention for manifests by all PCB waste handlers be automatically extended during the course of any unresolved enforcement action regarding the regulated activity.

b. *Exception reporting.* Following the RCRA model, today's proposal would require Exception Reporting by all generators who must manifest their PCB waste. Any time a generator does not receive a copy of the manifest signed by the authorized representative of the designated storage or disposal facility within 35 days of the date the waste was accepted by the initial transporter, the generator would be required to contact the transporter and/or the owner or operator of the disposal facility to determine the status of the PCB wastes. If the problem is not reconciled within 45 days from the date the waste was accepted by the initial transporter, the generator would file an Exception Report with the EPA Regional Administrator for the Region in which the waste generation site is located. The Exception Report would be filed if the generator has not received within the prescribed period a copy of the manifest signed by the authorized representative of the designated facility. The Exception Report would include:

(i) A legible copy of the manifest for which the generator does not have confirmation of delivery.

(ii) A cover letter signed by the authorized representative of the generator explaining the efforts taken to locate the PCB wastes and the results of those efforts.

EPA requests comments on this proposal to include Exception Reporting for PCB wastes. In particular, the Agency requests comments on whether there should be further tightening of the generator's recordkeeping requirements to ensure that generators do in fact perform their essential oversight role concerning the operation of the manifest system. The February, 1985 GAO Report on problems with detection of illegal disposal of hazardous waste found that there had been very few Exception Reports filed by generators under RCRA. The GAO concluded that the infrequency with which Exception Reporting has occurred is due largely to non-compliance by generators with the requirement to match their filed manifest copies with the signed copies they later receive from commercial storers and disposers. The Report found that some generators were collecting both copies of the manifest, but not keeping the copies in the same file locations, or otherwise physically matching the manifest copies. The GAO Report also suggested that the miniscule number of Exception Reports may be attributed to a reluctance on the part of generators to "turn in" the low-bid transporters who haul away their waste.

In this notice, EPA solicits comment as to whether the proposed recordkeeping and Exception Reporting requirements applicable to generators are adequate to ensure that the manifest system receives the attention from generators that is necessary to keep the system credible. Should EPA substitute for the proposal another option, such as one that would require the generators to attach the signed designated facility copy to the generator's original copy, and retain the matched copies in its files for 3 years as proof that the transaction was indeed verified? Should EPA require some other record that would demonstrate that the essential manifest matching role has in fact been performed by generators. EPA requests comment on the proposed option and the appropriateness of any alternative approach to generator verification.

c. *One-year exception reporting.* Indefinite storage of waste at approved commercial storage facilities is not an acceptable form of PCB waste management. Section 761.65(a) of the TSCA storage rules for PCB wastes limits the storage of PCB wastes prior to disposal to a period of 1 year. Under the Agency's existing compliance monitoring policies, the 1-year storage period is allocated between storage at approved disposal facilities and storage prior to receipt at the approved disposal facility. The initial generators of PCB waste (i.e., the PCB user, owner, or processor who first removes PCBs or PCB Items from service) are presumed to be in compliance with the 1-year limit on storage if they can show that the storage period prior to delivery to a disposal facility did not exceed 9 months.

EPA is proposing today an additional tracking device that will facilitate the Agency's ability to track compliance with the 1-year storage restriction for PCB wastes.

First, generators would be required to record the dates when their PCBs or PCB Items were removed from service on the manifests that accompany their PCB wastes to commercial storage and disposal facilities. The date when PCBs were removed from service is an existing record requirement in the § 761.180(a) annual document for such generators. The proposal would require that the date of removal from service for each PCB or PCB Item contained in a waste shipment be recorded on the section of the manifest reserved for "Special Handling Instructions and Additional Information." If this space is not adequate for entry of all the relevant dates, the generator would be required to attach to the manifest a typewritten continuation sheet containing this information. This information would then accompany the waste until it reaches the designated facility, thereby providing notice to waste handlers of the time by which lawful disposal must occur.

When manifested PCB waste is received by commercial storers of PCB waste, the commercial storer would note the dates of removal from service in its § 761.180(b) records. At such time as the commercial storer initiates a waste shipment containing the PCBs or PCB Items to another storage or disposal facility, it would prepare a manifest which includes the dates of removal from service for the affected PCBs or PCB Items. In this manner, the PCB waste would ultimately arrive at an approved disposal facility accompanied by the essential information on removal from service. The disposer of PCB waste would then enter the date of removal from service for each PCB or PCB Item among its § 761.180(b) records, which

also require the recording of the date of disposal.

This proposal would require the submission of One-year Exception Reports under two types of circumstances. First, disposers would submit such Exception Reports when they receive PCBs or PCB Items on a date more than 9 months after their removal from service, as indicated on the manifest cover or continuation sheet, and because of other disposal commitments, the disposer cannot (or has not been able to) dispose of the affected PCBs or PCB Items within 1 year of their removal from service.

Second, generators and commercial storers of PCB waste who transfer PCBs or PCB Items directly to disposers would file One-year Exception Reports under other circumstances. Such a Report would be submitted when the generator or commercial storer has transferred PCBs or PCB Items to a disposer prior to the expiration of 9 months from their date of removal from service, but has not received a Certificate of Disposal confirming the disposal of the affected PCBs or PCB Items within 13 months of their removal from service. The proposal specifies a 13-month period in this instance out of recognition that disposers are allowed 30 days from the date of disposal to forward their Certificates of Disposal. So, generators or commercial storers may receive confirmation of proper disposal as late as 1 year and 30 days after the date the waste items were removed from service. Also, such an Exception Report would be required when a Certificate of Disposal confirms a date of disposal for PCBs or PCB Items more than 1 year from their removal from service.

EPA requests comments on the requirement to submit "One-year Exception Reports" in the manner proposed here. Is it feasible to require the dates of removal from service to be included on the manifest or on a separate continuation sheet attached to the manifest? Are there potential difficulties associated with commercial storers having to relay dates of removal from service from the manifests they receive to the manifests they prepare for the waste shipments they later initiate? Are there alternatives that are more feasible than the proposed option? For example, would it be more feasible to let the return copy of the manifest signed by the disposal facility serve as the Certificate of Disposal. Under this option, the disposer of PCB waste would not return the signed copy of the manifest to the generator until disposal of the waste has occurred, and the date of disposal would be placed on the signed manifest copy. EPA requests comments on the relative merits and drawbacks associated with the alternative options.

d. *Certificates of Disposal.* EPA further proposes and requests comments on a requirement that disposal facilities prepare written Certificates of Disposal. EPA is aware that many disposal facilities are already providing such certificates as a service to their PCB disposal clients. Such certificates provide assurances to PCB waste generators, who desire the certificates to rebut any suggestions that they have not acted properly with respect to their PCB wastes. Generators of PCB wastes do not extinguish totally their potential liability for PCB disposal violations by entering into contracts with disposers for disposal services. However, a document containing the disposal facility's certification that disposal of specific wastes has occurred may be relevant in establishing the good faith of the generator's conduct.

This proposal would make the Certificate of Disposal a uniform feature of the PCB disposal regulations. In addition to specifying the content of a proper Certificate, this proposal would make the Certificate of Disposal the final step in the PCB waste tracking system. In particular, the Certificate of Disposal would be returned by the disposal facility to the generators or commercial storers responsible for manifesting the waste shipment to the disposer. While the disposer's return copy of the manifest confirms only the fact of arrival of PCB waste at a disposal facility, the Certificate of Disposal would confirm the fact of disposal itself. Thus, the Certificate of Disposal would be the final element in the tracking loop to ensure that disposal occurs within 1 year from the date that PCBs or PCB Items are removed from service. The Certificate of Disposal would be the basis for One-year Exception Reporting by generators and commercial storers, and it would remain as a record of disposal in the record collections of the disposers and the facilities that receive them.

e. *Discrepancy reporting.* Today's proposal would also require that PCB commercial storage and disposal facilities that receive off-site shipments of PCB waste comply with a Discrepancy Reporting requirement. Manifest discrepancies are differences between the quantity or type of PCB wastes designated on the manifest and the quantity or type of PCB wastes that a designated facility actually receives. These discrepancies were described above in the discussion in unit IV.C.6. of this preamble dealing with the use of the manifest. The Agency is proposing that, upon the discovery of a significant discrepancy by a designated storage or disposal facility, the owner or operator of the designated facility would attempt to reconcile the discrepancy with the appropriate party (e.g., generator or transporter). If the discrepancy is not resolved within 15 days after receiving the PCB wastes, the owner or operator of the designated facility would immediately submit to the Regional Administrator in the Region where its facility is located a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest at issue.

The Agency requests comments about the appropriateness of the Discrepancy Reporting requirement as a component of the PCB waste tracking system.

f. *Unmanifested waste reporting.* The Agency is also proposing to incorporate into this rule another feature of the RCRA tracking system—the Unmanifested Waste Report. This proposal would require a report from the owner or operator of a designated PCB storage or disposal facility whenever the designated facility receives from an off-site source any PCB wastes that are subject to manifesting requirements but which are not accompanied by the required manifest. This proposal would require the owner or operator to submit a copy of the report to the Regional Administrator within 15 days after receiving the waste. The Unmanifested Waste Report would include the following information:

i. The EPA identification number, name, and address of the designated facility.

ii. The date the facility received the PCB waste.

iii. The EPA identification number, name, and address of the generator, transporter, if available.

iv. A description of the quantities and types of PCB waste included in the unmanifested shipment.

v. The method of storage or disposal for the PCB wastes.

vi. The certification signed by the owner or operator of the designated facility or his authorized representative.

vii. A brief explanation of why the PCB wastes were unmanifested, if known.

EPA emphasizes that the preparation of an Unmanifested Waste Report should not be a frequent event for these facilities, since this proposed regulation would otherwise prohibit the acceptance by any transporter, off-site commercial storer, or disposer of any unmanifested PCB waste for which these regulations

require a manifest to accompany the waste.

g. *Annual documents and reports.* The existing PCB regulations impose annual document requirements on facilities that use and store their own PCBs or PCB Items (40 CFR 761.180(a)) and on disposal and storage facilities (40 CFR 761.180(b)). The users' annual documents provide a summary for each calendar year of the amounts of PCBs that were either in use or designated for disposal, as well as information about where and when PCB wastes were shipped. For the storage and disposal facilities, the annual document constitutes a summary of the types and quantities of PCB wastes received during the previous calendar year, the sources of the waste, and the dates the wastes were received and either disposed of at the facility or transferred to another facility. The current regulations require each facility to have available by July 1 of each year, the annual document summarizing the previous calendar year's (January to December) PCB activity. The documents are currently retained at the facilities, and thus are only available to EPA during facility inspections.

EPA is proposing today several amendments to the annual document requirements. These amendments are intended to facilitate the tracking of PCB wastes, to foster consistency with the RCRA tracking system for hazardous wastes, and to provide EPA with up-to-date information on the quantities and types of PCBs that are in service or in commerce for disposal. Significantly, the proposal would require that commercial storers and disposers of PCB waste submit copies of their § 761.180(b) annual documents by July 15 of each year, to the Regional Administrator in the EPA Region where the facility is located. This proposal should have a minimal impact on the regulated facilities. These facilities are already required to prepare and retain the documents on-site, and the only additional cost incurred under this proposal would be the cost of copying the Report and mailing it to the Agency. These minimal costs are greatly outweighed by the value of the information which EPA will have available each year and cumulatively about the PCB waste universe.

i. *Amendments to 40 CFR 761.180(a).* The existing regulation at 40 CFR 761.180(a) requires records and annual documents from certain facilities which use or store at one time PCBs and PCB Items in amounts exceeding any of these thresholds: (1) 45 kilograms (99.4 pounds) of PCBs contained in PCB Containers; (2) one or more PCB Transformers; or (3) 50 or more PCB Large High or Low Voltage Capacitors. This provision applies both to the PCB user's sites of use, and to the sites where the owner or user of PCBs chooses to store its PCBs for use or disposal. The latter type of storage facility could be located at or contiguous to the site of use, or it could be located away from the site of use.

The § 761.180(a) annual document is a distinct written document that must be prepared by the owner or operator of the facility by July 1 of each year, and it must summarize specific information about the previous calendar year's PCB use and PCB waste activity. With regard to PCB waste, § 761.180(a)(1) requires that the annual document include the dates when PCBs and PCB Items are removed from service, are placed into storage for disposal, and are placed into transport for disposal. The quantities reported are required to be broken down by weight in kilograms of PCBs in any PCB Containers or PCB Transformers, as well as the number of PCB Transformers and PCB Large High or Low Voltage Capacitors.

EPA proposes several amendments to 40 CFR 761.180(a). First, the annual document would be required to clearly identify the facility by name, owner, EPA identification number, and address. The owner or operator of multiple facilities could still elect to keep the annual documents for all of its facilities at one facility which it designates and identifies at each facility. The owner or operator who elects to maintain all of its annual documents at one facility is reminded that this option does not allow it to aggregate all of its use and storage data in one document; a distinct, written annual document would be prepared and maintained for each distinct facility. Also, where an owner or operator of multiple facilities designates one location for the retention of its annual documents, it would designate the same location identified as the location of its manifest records.

Second, § 761.180(a) would be amended so that the information required in the document includes the EPA identification number, name, and address of each PCB disposal facility and commercial storage facility to which PCB waste was shipped off-site during the year. This information would be supplied for each PCB or PCB Item identified as removed from service.

Third, the proposed amendments would also require that users who generate PCB wastes and transfer them directly to disposers record the date of disposal for each PCB or PCB Item, as indicated on the Certificate of Disposal returned to them by disposers of PCB waste. These generators would also keep copies of the Certificates of Disposal among their § 761.180(a) records collections, as an aid to verifying disposal and tracking violations of the 1-year limit on storage of PCB wastes.

Also, the annual document would include the name and EPA identification number of each transporter used during the calendar year for off site shipments of PCBs and PCB Items to disposal facilities or commercial storage facilities.

EPA requests comment on the proposed amendments to the annual document requirements for the users of PCBs that generate and/or store their PCB wastes. EPA requests particular comments on the appropriateness of the new information that would be required to be included in the annual documents, and the incremental burdens associated with the proposed amendments.

ii. *Amendments to 40 CFR 761.180(b).* The annual document requirement of § 761.180(b) applies to the owners and operators of storage facilities and approved PCB disposal facilities. The proposal would retain the basic information requirements already specified at § 761.180(b) for PCB wastes received at each disposal or storage facility. The proposed amendments would require several additional items of information to facilitate the waste tracking function, and would rearrange the information requirements into groupings that would allow one to more easily track the storage and disposal histories of specific PCBs and PCB Items handled as waste during the calendar year.

First, the annual document would be required to clearly identify the disposal or storage facility by EPA identification number, name, owner, and address. The calendar year covered by the document would also be identified.

Second, in identifying any facility (generator, commercial storer, other disposer) from which a PCB or PCB Item was received during the previous calendar year, the facility would be identified by its name, owner, and EPA identification number.

Third, where § 761.180(b) currently requires the owner or operator of a facility to identify any PCBs or PCB Items that were transferred to other storage or disposal facilities, the identification of the other storage or disposal facilities would include the facilities' names, addresses, and EPA identification numbers. The identity of the PCBs and PCB Items transferred

would be clearly stated, along with the dates of the transfers.

Fourth, facilities subject to § 761.180(b) would record for each PCB or PCB Item handled as waste during the calendar year the date of removal from service as indicated on the manifest cover or continuation sheet that accompanied the waste when it was delivered to the facility. This record entry would enable commercial storage facilities to reenter this important information on the manifests which they prepare when the affected PCBs or PCB Items are later transferred to another storage or disposal facility. Disposal facilities would likewise enter the dates of removal from service among their § 761.180(b) records. These dates of removal from service could then be compared with the dates of disposal to determine compliance with the l-year limit on storage of PCB wastes. These record entries, in addition to the requirement to retain copies of Certificates of Disposal, would provide the basis for the submission of One-year Exception Reports by commercial storers and disposers of PCB wastes.

The proposed amendments to § 761.180 are intended to clear up some of the ambiguity in the structure of the existing annual document requirements that apply to storage facilities. The existing regulation imposes an annual document requirement at § 761.180(a) on PCB users, who are required to record information on both PCB use and storage at their facilities. Section 761.180(b), however, requires a distinct annual document to be prepared by storage and disposal facilities. Clearly, one annual document should suffice to summarize the PCB waste activities of the PCB users who store their PCBs at their own facilities for disposal. However, the existing regulation is not clear in specifying which types of storage facilities are subject to § 761.180(a), and which storage facilities are covered under § 761.180(b).

This proposal would clarify the scope of the annual document requirements by limiting the coverage of § 761.180(b) to disposal facilities and commercial storage facilities. The amendment proposed here would codify the distinction between the PCB user's storage facilites (which are "generators of PCB waste") and commercial storage facilities that store PCB wastes owned by others. The user's storage sites would be subject only to § 761.180(a), whether the user chooses to store at or contiguous to the site of use, or, at one of its storage facilities located off-site from the site of use. The commercial storage facilities ("Commercial storers of PCB waste") would be subject to the § 761.180(b) annual document requirements. Examples of the commercial storage facilities are storage facilities owned or operated by disposers, transporters, waste brokers, and electrical equipment service companies that drain PCBs from equipment which others own.

The annual document required of commercial storage and disposal facilities under § 761.180(b) would be a distinct written document which summarizes the facilities' PCB waste activities during the previous calendar year (January to December). The document would be prepared by July 1 of each year, and under this proposal, storage and disposal facilities would be required to submit a copy of their annual documents to the Regional Administrator by no later than July 15 of each year. The obligation to submit annual documents would continue until the submission of the annual document for the calendar year during which the facility ceases PCB storage or disposal operations.

Because some data contained in these annual documents may qualify as TSCA CBI, this proposal would require that submitters follow the procedures set forth at 40 CFR 704.7 for asserting CBI claims with respect to their annual documents. Significantly, these procedures would require the submission of a complete copy (for internal use) indicating those parts claimed to be CBI, and a second copy from which any material alleged to be CBI has been deleted.

EPA requests comments on the proposed amendments to the § 761.180(b) annual document requirements, and the proposal to require their submission to the Regional Administrators. Where the proposed requirement to submit annual documents is concerned, the Agency requests comment on the merits of a mandatory, automatic submission requirement versus an option under which annual documents would be submitted to EPA upon request.

*D. Approvals for Commercial Storers of PCB Wastes*

1. Background

The existing PCB storage and disposal regulations do not contain any permitting or approval authority for commercial PCB storage facilities. This situation has been the subject of Congressional criticism, particularly as it relates to the brokers and other intermediate handlers of PCB wastes who engage in off-site, commercial storage of PCB waste prior to the delivery of the waste to approved disposal facilities. Also, in the case of the storage areas associated with approved PCB disposal facilities, there are not in place specific approval conditions and closure plans relating to their commercial storage operations.

While the commercial storers of PCB wastes are subject to the storage facility requirements of 40 CFR 761.65, they are not subject to the additional oversight that is possible through an approval process, which would enable the Agency to both pass on the qualifications of the facility's principals, and impose appropriate facility standards in the facility's conditions of approval. Particularly, there is no practical means by which EPA may grant or withhold authority to conduct commercial storage operations on the basis of a facility's ability to properly close its commercial PCB storage sites, or to ensure that adequate funds will be available to meet the anticipated closure costs. Likewise, the ability of such facilities to operate outside of a permitting process eliminates the permit revocation and suspension sanctions which may operate as deterrents to regulatory and permit violations. Under these circumstances, facilities which fail can and have become the subject of remedial actions that require the expenditure of public funds, rather than the funds of those responsible for establishing and operating the facilities. EPA can no longer countenance these circumstances.

The August 13, 1986 hearings before the Subcommittee on Environment, Energy, and Natural Resources highlighted the shortcomings in EPA's ability to oversee effectively the activities of the commercial storers of PCB waste under the existing regulations. These proceedings culminated with the enactment by the House of Representatives of a bill that would require an approval process for intermediate handlers of PCB wastes, and compliance by each approved facility with financial assurance requirements that currently apply only to RCRA hazardous waste treatment, storage, and disposal facilities.

This proposal incorporates an approval mechanism for commercial storers that would enable the Agency to evaluate the qualifications and financial responsibility of those entities who engage in the commercial storage of PCB wastes. On the effective date of the final rule, the existing "commercial storers of PCB wastes" would be deemed to have interim approvals to conduct storage activities. The interim authorization would expire 180 days after the rule's

effective date, unless the owner or operator of the commercial storage facility has applied for a final approval prior to the expiration of the 180-day period. For a facility that files a timely application, the period of interim approval would be extended until such time as EPA determines to grant or deny the application for final approval.

The commercial storer who applies for final approval would be required to demonstrate to the Regional Administrator that it is qualified to operate a storage facility in accordance with the PCB storage requirements of § 761.65. In passing upon an applicant's qualifications, the relevant considerations would include not only the technical qualifications of the principals, but also the previous experience (including any enforcement history) of the principals in connection with any PCB waste handling or hazardous waste activity. Also, § 761.65(d) would require that a commercial storer of PCB waste prepare an acceptable closure plan for its storage facility, and that it demonstrate the financial resources necessary to close the facility in accordance with its closure plan. The content of closure plans and the necessary demonstration of financial responsibility are set out in proposed paragraphs (e), (f), and (g) of § 761.65.

2. *Closure Plans*

Closure refers to the period in a facility's existence that begins when wastes are no longer accepted for storage, and during which the owners or operators of the storage facility are required to remove all PCB waste from the facility and decontaminate their equipment, structures, and property. Under this proposal, facility owners or operators would be required to prepare detailed closure plans that identify the steps necessary to bring about final closure. The closure plan will be an essential condition of approval for those facilities that apply for and receive a final storage approval. These closure plans would identify in detail the means the facility will use to close in a manner that will eliminate or minimize the post-closure escape of PCBs to the environment.

The preparation of a detailed closure plan is necessary to ensure that owners and operators analyze their future closure responsibilities and bring their present operating practices into line with those responsibilities. Further, a detailed closure plan is essential to ensure accurate cost estimates and adequate financial assurance. Experience with closure plans under RCRA has instructed the Agency that poorly detailed plans have been accompanied by inadequate cost estimates. Thus, acceptable closure plans would be required to contain sufficient detail so that a third party could conduct closure in accordance with the plan in the event the owner or operator fails to do so.

The closure plan contents specified in this proposal are derived from the RCRA experience and regulations. The RCRA closure plan standards were first published on January 12, 1981 (46 FR 2851), and amended in regulations issued by EPA and published in the **Federal Register** on May 2, 1986 (51 FR 16422). The 1986 amendments were a response to litigation and several years experience under the existing Subpart G closure standards of 40 CFR Parts 264 and 265. The purpose of the 1986 amendments was to clarify the required content of closure plans for RCRA facilities. EPA believes that the revised RCRA closure plan standards are an appropriate framework for the closure plan standards that this proposal would require as part of the TSCA approval process for commercial storers of PCB wastes.

The core requirements of acceptable closure plans are specified in § 761.65(e)(1). The closure plan would describe with particularity the means by which the PCB storage areas of the facility will be closed in a manner that eliminates the potential for post-closure releases of PCBs to the environment which would present unreasonable risks. This threshold requirement is essentially the performance standard that governs all closure operations. Closure may occur with respect to the entire facility or with respect to distinct storage areas contained in the facility. Where distinct storage areas are closed, but not an entire storage facility, the closure is referred to as partial closure.

Second, the extent of projected PCB storage activities during the facility's active life would be identified. The active life of a facility would extend until the time when the completion of closure is certified to the Regional Administrator under § 761.65(e)(7).

For each PCB storage area, and the facility overall, the owner or operator would identify the extent of PCB storage that will occur relative to other wastes, and the maximum projected inventory of PCB wastes that will ever be handled at one time. This information is essential, because it bears upon the facility being able to demonstrate that it in fact has the capacity to store PCB wastes in accordance with the § 761.65 storage requirements. Further, the maximum projected inventory of PCB wastes forms the basis for designating a maximum rated storage capacity for the facility, and for estimating the costs of closure. Financial assurance would be demonstrated in an amount sufficient to close the facility when closure costs would be at a maximum, and that eventually would usually correspond to the maximum allowed inventory of stored PCB waste.

Third, the facility owner or operator would identify in detail the methods and arrangements that will be used during closure for actually removing PCB waste from the facility, and providing for its transportation off-site to other commercial storage or disposal facilities. The commercial storer of PCB waste that removes PCBs in accordance with its closure plan would then be a generator of PCB waste.

Fourth, the closure plan would identify with particularity the steps that the owner or operator will follow during closure to remove PCB residues presenting unreasonable risks from the facility's equipment and structures, as well as to remove residual PCBs, if any, from the soil surrounding the facility. Unlike RCRA closure plans, where decontamination goals and sampling methods are to be developed as elements of the closure plan, the commercial storer of PCB waste under TSCA would identify the steps needed (cleanup methods, cleanup goals, sampling methods) to accomplish compliance with the risk-based, nationwide PCB Spills Cleanup Policy, which EPA issued for publication in the **Federal Register** of April 2, 1987 (52 FR 10688). This description would include any other activities, e.g., ground-water monitoring, run-on and run-off control, facility security, that will be necessary during closure to ensure compliance with the closure performance standard.

In addition, for each § 761.65(b) PCB storage area at a commercial storage facility, the closure plan would include a schedule for closure that identifies the total time required to complete closure, and the time required for the various intervening activities entailed by final closure. If a closure trust fund is selected by the facility as its financial assurance mechanism, the closure plan would identify the expected year that final closure will occur. This requirement would bear upon the calculating of the "pay-in" period for funding the trust, since trust funds would be funded in annual installments paid into the trust each year until the year of closure.

Finally, the proposal includes provisions specifying the criteria and procedures for modifying a facility's

closure plan, which action may be initiated by either the facility owner or operator, or, the Regional Administrator when cause exists to believe that changed circumstances will affect the closure plan, the time for closure, or the closure costs. The changed circumstances that would justify a closure plan modification are discribed at 40 CFR 761.65(e) (3) and (4).

The proposal also includes a timetable for when certain closure events must occur and when required notices must be given. Generally, the commencement of closure would be preceded by written notice to the Regional Administrator at least 60 days prior to the date when final closure is expected to begin. The date when closure is expected to begin would ordinarily be no later than 30 days after the receipt of the last shipment of PCB waste for storage at the facility. This date could be extended for good cause.

The timetable in § 761.65(e)(5) would require that all PCB wastes that were in commercial storage at the facility be removed in accordance with the closure plan within 90 days of the receipt of the last quantities of PCB waste. All closure activities would be completed within 180 days, and the facilities would certify the completion of closure (or partial closure) in a written notice to the Regional Administrator within 60 days of the date that closure is completed. The certification that closure has been completed in accordance with the closure plan would be signed by an independent professional engineer, as well as the facility's owner or operator. The deadlines in § 761.65(e)(5) would be extended by the Regional Administrator for reasonable periods where good cause for the delay is shown.

3. *Financial Assurance of Closure*

The proposal includes at § 761.65(f) a procedure for preparing a written estimate of the cost in current dollars of closing the PCB storage areas of the facility in accordance with the closure plan. The current closure cost estimate which would be kept at the facility is the closure cost estimate adjusted annually for the effects of inflation and any approved modifications to the closure plan. The closure cost estimate would assume that closure occurs during that point in time when the closure costs would be most expensive, and it would assume closure by a third party not related to the commercial storer, using current market costs for disposal, storage, and decontamination.

The proposal would require that the commercial storers of PCB waste demonstrate financial responsibility for closure by passing specific financial tests or by acquiring specific financial instruments that will make available adequate funds to meet the closure cost estimates. The proposal would allow owners or operators to choose from a number of mechanisms, including trust funds, surety bonds, letters of credit, corporate guarantees, insurance policies, as well as the financial test. The Agency believes that there is ample justification for imposing these requirements, based upon the several instances in which facilities that have gone out of business or that have been forced to close have been found not to have sufficient resources at the time of closure to provide for adequate cleanup. If the expenditure of public resources is to be avoided, it is incumbent that owners and opertors of approved facilities make provision for closure funds during the active life of their facilities.

In this notice, EPA is proposing that closure plans and financial assurance requirements be established for all commercial PCB storage facilities and storage facilities of permitted PCB disposers. This provision assures the public that cleanup can be achieved after closure of the facility. EPA solicits comments on whether closure plans and financial assurance requirements are necessary, particularly since the manifest system included in this regulation will provide a means to track the generation and transfer of PCBs (including the length of time held in storage) and may provide an incentive for generators to ensure the proper and timely disposal of PCBs. Generators should recognize this incentive, since they could be held responsible for the cleanup costs at abandoned sites. EPA also solicits comments on: (1) Any information and data on the costs and impacts of these provisions, particularly on small commercial storage facilities; and (2) what alternatives to these provisions may exist to ensure cleanup of abandoned sites (e.g., requiring storage facilities to disclose closure and financial plans during contract negotiations.

The financial assurance mechanisms proposed today for commercial storers of PCB wastes are essentially the same as the mechanisms allowed under RCRA regulations at Subpart H of 40 CFR Parts 264 and 265. The development of these mechanisms and the specifics of their operation have been discussed in numerous RCRA-related rule documents which EPA has issued and published in the **Federal Register**. The reader is referred to the following **Federal Register** documents for a detailed discussion of these mechanisms: 45 FR 33260 (May 19, 1980); 46 FR 2821 (January 12, 1981); 47 FR 15032 (April 7, 1982); and 51 FR 16422 (May 2, 1986). For brevity, this preamble provides only a brief description of the proposed financial mechanisms, with particular attention to any changes from the RCRA mechanisms. Comments may, however, address EPA's reasoning in adopting the financial responsibility requirements included in the cited **Federal Register** documents.

i. *Financial test.* The financial tests consist of criteria that compare the closure cost estimate to specific ratios composed of net worth, net income, total liabilities, current assets and liabilities, net working capital, and current bond issuance ratings. Once the elements are identified in the firm's financial statements, the calculation of the test ratios is straightforward. The demonstration is presented in a letter from the firm's chief financial officer, which would be supported by reports from the firm's independent certified public accountant. The financial test is not intended as a test of potential insolvency; rather, it is designed to ensure that those who pass the test will have adequate resources to establish one of the alternative forms of assurance should he later fail the test.

EPA here proposes the same financial test criteria that are currently in effect for hazardous waste facilities under 40 CFR 264.143(f). Also, the demonstration of financial assurance would be satisfied by a letter from the firm's chief financial officer containing wording similar to that specified at 40 CFR 264.151(f). The only variations proposed from the RCRA requirements are language changes intended only to make the provisions conform to TSCA statutory and regulatory authorities.

The financial test mechanism would be satisfied when a parent corporation which meets the test's criteria guarantees that it will perform closure or establish a closure trust fund in the event that its subsidiary corporation fails to perform in accordance with its closure plan. In addition to meeting the financial test criteria, the guarantor corporation would submit a written corporate guarantee with the wording specified at 40 CFR 264.151(h), modified only to conform to the TSCA statutory and regulatory authorities.

ii. *Closure trust fund.* Under this mechanism, the owner or operator of the commercial PCB storage facility would enter into a written trust agreement appointing a trustee to manage a fund established by the owner or operator for the benefit of EPA. The fund would be established to meet the costs of closure, and the trust instrument would set forth

the powers and obligations of the trustee with respect to the management and use of the fund. When instructed by the Regional Administrator, the trustee would reimburse the owner or operator, or other persons, for expenditures made in closing the facility, in the amounts directed by the Regional Administrator. The "corpus" of the trust would consist of the annual payments which the owner or operator makes to the fund during the "pay-in" period, and these amounts would be invested or otherwise managed by the trustee.

EPA proposes here that owners or operators of commercial PCB storage facilities may satisfy their financial assurance obligations by establishing a closure trust fund under the conditions described in 40 CFR 264.143(a), utilizing a trust instrument with the wording specified at 40 CFR 264.151(a). This proposal would modify the RCRA language to the extent of conforming it to TSCA statutory and regulatory authorities.

In addition, EPA proposes that the "pay-in" period for commercial storers of PCB waste be limited to a period not exceeding 3 years. This proposed "pay-in" period differs from the ten-year period used under RCRA because of the difference between the types of storage facilities regulated under RCRA and under this rule. Under RCRA, storage facilities for the management of hazardous wastes can include land disposal units (e.g., landfills or surface impoundments), while under the TSCA PCB rules, PCB storage facilities are places where PCB Articles and PCB Containers are kept for less than one year prior to disposal. RCRA trust funds allow for an extended pay-in period because of a concern for the substantial costs associated with such measures as capping and securing the facility at closure, as well as the continuing costs of conducting long-term ground water monitoring for a closed landfill or surface impoundment. In the case of closing a PCB storage area, however, One need not take into account the post-closure care associated with these types of land disposal units. Once the PCB storage facility has been closed, there are no long-term costs. Thus, there is no compelling case for extending the "pay-in" period for the 10 or more years allowed for "pay-in" under RCRA, and the Agency believes that 3 years represents a sufficient period of time to fund a commerical storage facility's closure trust fund. EPA solicits comments on this proposed three-year pay-in period for closure trust funds. EPA requests comments as well on the relative merits of an alternative option that would adopt the RCRA ten-year closure trust pay-in period for PCB storage facilities' closure trust funds.

iii. *Surety bonds.* This proposal also incorporates two additional RCRA financial assurance mechanisms that allow surety companies to act as guarantors of closure obligations. The first is a surety bond that guarantees the payment of the "penal sum of the bond" into a standby closure trust fund, in the event the owner or operator of the facility fails to perform the guaranteed closure obligations. The second is a surety bond under which the surety company guarantees that upon the owner's or operator's breach of its closure obligations, it will either perform closure as guaranteed by the bond, or, deposit the amount of the "penal sum of the bond" into a standby trust fund.

EPA proposes here that commercial storers of PCB waste under TSCA may satisfy their financial assurance obligations by obtaining surety bonds conforming to the requirements of either 40 CFR 264.143(b) (guaranteeing payment into trust funds) or 40 CFR 264.143(c) (guaranteeing performance of closure). The only modifications proposed to the RCRA language are those necessary to cause the requirements and instruments to conform to TSCA statutory and regulatory authorities.

iv. *Closure letter of credit.* Consistent with § 264.143(d) and § 264.151(d) of the RCRA regulations, EPA proposes that commercial storers of PCB waste under TSCA may choose to demonstrate financial assurance for closure by obtaining an irrevocable letter of credit from their bank or other financial institution. The irrevocable letter of credit instrument assures that the financial institution that issues it will make available a specific sum of money over a specific time period on behalf of its customer (the facility owner or operator) for the benefit of the party in whose favor the letter is written. The beneficiary can draw on the credit by presenting the sight drafts or other documents specified in the letter. Under this proposal, the financial institution would issue the letter in favor of the appropriate Regional Administrator, and the facility owner or operator would establish the account in the amount of the current closure cost estimate. The funds would be paid into a standby closure trust fund from which closure expenditures would be reimbursed.

EPA proposes that irrevocable letters of credit for closure under TSCA would comply with the requirements specified for these instruments under RCRA, modified only to the extent of causing them to conform to TSCA statutory and regulatory authorities.

v. *Closure insurance.* To the extent such insurance is available to cover PCB storage facilities' closure obligations, EPA proposes to allow closure insurance, as decribed at 40 CFR 264.143(e), as another means of satisfying today's proposed financial responsibility obligations under TSCA. The proposal includes only those modifications to the § 264.143(e) and § 264.151(e) language as are necessary to cause the requirements to conform with TSCA statutory and regulatory authorities. As required under RCRA, the face amount of the policy would equal at least the current closure cost estimate, and the policy would guarantee the availability of funds up to the face amount to cover closure expenditures. The insurer would reimburse persons who present itemized bills to the Regional Administrator for closure expenditures which are determined by the Regional Administrator to be in accordance with the closure plan or otherwise justified.

vi. *Combination of mechanisms.* Under today's proposal, the owner or operator of a commercial PCB storage facility could meet its financial assurance obligations by establishing more than one mechanism for his facility. The combination would be limited to trust funds, letters of credit, and insurance policies, and surety bonds guaranteeing payment into trusts. The combined instruments would meet the financial responsibility requirements of TSCA if the combination of mechanisms provides financial assurance in an amount at least equalling the current closure cost estimate. The Regional Administrator could look to any or all of the instruments to provide for closure of the facility.

### *E. Relationship to State Law*

Unlike the RCRA program for hazardous wastes, the TSCA section 6(e)(1) disposal program for PCB wastes is fundamentally a Federal program, administered by the EPA Regional Administrators and the Assistant Administrator for Pesticides and Toxic Substances. The enforcement of the Federal program has been delegated to the Regional Administrators, while the authority to issue approvals for PCB disposal processes is currently shared by the Regional Administrators and the Assistant Administrator for Pesticides and Toxic Substances. At the same time, the States may concurrently regulate PCB disposal within their jurisdictions, without supplanting the Federal

requirements. To date, at least 18 States have elected to regulate various aspects of PCB disposal, often pursuant to their authorized RCRA hazardous waste programs.

A major component of this proposed rule is the requirement imposed on certain generators, transporters, commercial storers, and disposers of PCB waste to notify EPA of their PCB waste handling activities and obtain identification numbers to use on their manifests and other records. This TSCA requirement would be independent of any requirement under state or local law or under a state-administered RCRA program. Thus, a generator exempt from the notification requirements imposed by this proposed rule may be independently required to obtain and use a unique identification number by a state or local government. Any such state or local requirement would not be preempted by these Federal requirements.

Persons subject to this proposed rule and to state-administered RCRA programs would be able to use the same identification number for the manifesting and recordkeeping requirements of both programs. The identification numbers to be used under this proposed rule, as well as those used under state-administered RCRA programs, are the Dun and Bradstreet Data Universal Numbering (DUN) system numbers. Persons subject to notification under this proposed rule who have already been issued an identification number under a state-administered RCRA program would be required to supply EPA with the previously issued number in their TSCA notifications. EPA will verify that these numbers are unique and conform to the DUN system, and authorize as far as possible the use for TSCA purposes of previously issued identification numbers. Under this process, regulated persons will benefit from the administrative convenience of using the same number for both state and TSCA purposes. EPA will issue such persons a distinct TSCA identification number only in those cases where a previously issued number does not conform to the DUN system, or is not unique.

This rule also requires PCB waste handlers to comply with manifesting requirements for the regulated PCB wastes which they handle. This proposed rule would utilize the RCRA Uniform Manifest to facilitate implementation of this requirement throughout the United States. The Uniform Manifest includes optional information spaces to meet basic information requirements which states have the option of imposing. The optional state information items appear at the upper right portion of the manifest form, and they are shaded and headed by letters (rather than numbers) to set them apart.

As required by Department of Transportation (DOT) regulations issued under section 112 of the Hazardous Materials Transportation Act, 49 U.S.C. 1811(a), states are not permitted to require any information on the space of the Uniform Manifest specified for "special handling instructions and additional information," on the back of the form, or on any continuation sheet, as a condition of transportation.

Since PCB waste generators may obtain pre-printed or camera-ready copies of the Uniform Manifest from State agencies, it should be noted that the instructions which may accompany these manifests may not reflect all the requirements which EPA may include in the final rule. Specifically, the following elements of the proposed PCB waste tracking system under TSCA would not be covered on the pre-printed instructions accompanying the Uniform Manifest: (1) The transmittal by the generator (registered mail, return receipt requested) of an advance copy of the manifest to the commercial storer or disposer of PCB wastes; (2) One-Year Exception Reporting and the related requirement to note dates of removal from service of PCBs and PCB Items on manifests; and (3) requirements related to Certificates of Disposal for PCB wastes.

It is essential that all PCB waste handlers understand fully any deviations from the RCRA tracking requirements that appear in the final rule, since reliance upon pre-printed instructions issued by states with the Uniform Manifest will not excuse the responsibility to comply fully with TSCA requirements for PCB wastes.

This proposed rule also would impose new TSCA approval requirements for commercial storers of PCB wastes who store PCB wastes owned or generated by others at storage facilities subject to Federal facility standards specified at 40 CFR 761.65. The proposed rule would require, among other things, that commercial storers of PCB wastes develop closure plans and financial responsibility mechanisms similar to those required of facilities which manage hazardous waste under RCRA. In those states which regulate PCB storage and disposal practices under their state-administered RCRA programs, the new TSCA approval requirements for commercial storers would be independent of the state requirements. Thus, the fact that a facility storing PCB wastes commercially may have a RCRA permit or RCRA interim status would not excuse the requirement to obtain a Federal approval to store PCB wastes commercially. Likewise, the fact that such a facility is aleady covered by a state's RCRA closure plan and financial responsibility requirements would not excuse the new TSCA requirements to develop closure plans and demonstrate financial responsibility for closure. However, the burden of these concurrent State and Federal approval requirements should be mitigated, since in many cases, compliance with the RCRA closure and financial responsibility standards should be highly persuasive evidence of compliance with the similiar TSCA approval standards.

*F. Economic Impact*

EPA analyzed the economic impacts associated with the notification, manifesting, recordkeeping and reporting, and storage approval requirements proposed in this rulemaking. The Regulatory Impact Analysis is available for review in the public docket. This unit will summarize the economic impacts of compliance with the provisions of the proposed rule, as presented in the Regulatory Impact Analysis. EPA welcomes comments regarding the economic impacts of this proposed rule.

1. Notification

This rule proposes that storers, transporters, and disposers handling PCBs at concentrations at or above 50 ppm must notify EPA of their PCB activities. EPA estimates that 5,651 facilities will be required to notify the Agency at a cost to industry of $290,000.

2. Manifesting

In development of the proposed manifest requirements, EPA consulted with States which regulate PCB disposal and with the operators of TSCA approved disposal facilities. EPA found that each of the approved disposal facilities required a manifest to accompany any shipment of regulated PCB waste, regardless of PCB concentration. These disposal firms require manifests for the PCB waste they accept as a means of preserving records of firms potentially responsible for contributing toward any remedial actions which might arise at the disposal site.

Also, among the 18 states that currently require a manifest to accompany PCB wastes, all but one

require a manifest for wastes containing PCBs at the 50 to 500 ppm level. Because current practice appears to be consistent with the proposed 50 ppm trigger for manifesting, there would not appear to be a significant incremental burden to industry associated with the proposed option.

3. Submission of Annual Reports

EPA currently requires that annual reports be maintained by generators, storers, and disposal firms handling PCB wastes. This proposal requires commercial storers (as defined under section 761.3) and disposers handling PCBs at concentrations at or above 50 ppm to submit these annual reports to the Agency. The number of firms expected to comply with this provision of the proposed rule is 130. The incremental costs of submitting these reports to the Agency is estimated to be minimal.

4. Storage Approvals

EPA is also proposing that all commercial storers of PCB wastes obtain EPA approval. To obtain approval, commercial storage firms must, among other things, develop closure plans for their facilities and meet financial assurance requirements.

EPA estimates that the cost to industry for the development and submission of the closure plan and cost of closure will be $35,000 for a facility that is not permitted under RCRA and $25,000 for a facility with a RCRA permit.

EPA estimates that the costs for financial assurance to be about $270,000 per typical facility. A typical facility was assumed to have a laboratory, a truck facility, a storage building, and two storage tanks.

5. Total Economic Impacts

EPA esimates that the total costs to industry associated with this proposed rule would be between $23.28 million and $23.37 million, of which, $22.85 million represents the total cost to industry of complying with the proposed approval requirements for commercial storers of PCB wastes. EPA also estimates that the total costs to the U.S. Government would be between $0.85 million and $1.37 million.

## V. Hearing Procedures

If persons request time for oral comment, EPA will hold informal hearings in Washington, DC. Any informal hearing will be conducted in accordance with EPA's "Procedures for Conducting Rulemaking Under section 6 of the Toxic Substances Control Act" (40 CFR Part 750). Persons or organizations desiring to participate in the informal hearing must file a written request to participate. The written request to participate must be sent to the TSCA Assistance Office at the address listed under **"FOR FURTHER INFORMATION CONTACT."** The written request to participate must include: (1) A brief statement of the interest of the person or organization in the proceeding; (2) a brief outline of the points to be addressed; (3) an estimate of the time required; and (4) if the request comes from an organization, a nonbinding list of the persons to take part in the presentation. Organizations are requested to bring with them, to the extent possible, employees with individual expertise in and responsibility for each of the areas to be addressed. Organizations which do not file main comments in the rulemaking will not be allowed to participate at the hearing, unless the Record and Hearing Clerk grants a waiver of this requirement in writing.

The date for the hearing and the date for the receipt of the written request to participate in the hearing are set forth in the **"DATES"** section of the preamble to this document.

## VI. Official Rulemaking Record

In accordance with the requirements of section 19(a)(3) of TSCA, EPA is issuing the following list of documents, which constitutes the record of this proposed rulemaking. This record includes basic information considered by the Agency in developing this proposal, including appropriate **Federal Register** notices, reports prepared by the General Accounting Office (GAO), testimony from Congressional committee hearings, communications before proposal, and economic analyses of the proposal and other regulatory options. A supplementary list or lists may be published any time on or before the date the final rule is issued.

A full list of these materials is available for inspection and copying in the TSCA Public Docket Office. However, any Confidential Business Information (CBI) that is a part of the record for this rulemaking is not available for public review. A public version of the record, from which CBI has been deleted, is available for inspection.

*A. Previous Rulemaking Records*

(1) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs); Disposal and Marking Rule," Docket No. OPTS-68005, 43 FR 7150, February 17, 1978.

(2) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions Rule," 44 FR 31514, May 31, 1979.

(3) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Equipment," Docket No. OPTS-62015, 47 FR 37342, August 25, 1982.

(4) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Exclusions, Exemptions, and Use Authorizations," Docket No. OPTS-62032A, 49 FR 28172, July 10, 1984.

(5) Official Rulemaking Record from "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Transformers," Docket No. OPTS-62035D, 50 FR 29170, July 17, 1985.

*B. Federal Register Notices*

(1) 43 FR 7150, February 17, 1978, USEPA, "Polychlorinated Biphenyls (PCBs); Disposal and Marking."

(2) 43 FR 31514, May 31, 1979, USEPA, "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions."

(3) 47 FR 37342, August 25, 1982, USEPA, "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Equipment."

(4) 49 FR 28172, July 10, 1984, USEPA, "Polychlorinated Biphenyls (PCBs); Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Exclusions, Exemptions, and Use Authorizations."

(5) 50 FR 19170, July 17, 1985, USEPA, "Polychlorinated Biphenyls in Electrical Transformers; Final Rule."

(6) 52 FR 10688, April 2, 1987, USEPA, "Polychlorinated Biphenyls Spill Cleanup Policy."

(7) 43 FR 29908, July 11, 1978, "Preliminary Notification of Hazardous Waste Activities; Proposed Procedures."

(8) 43 FR 58946, December 18, 1978, USEPA, "Hazardous Waste; Proposed Guidelines and Regulations and Proposal on Identification and Listing."

(9) 45 FR 12722, February 26, 1980, USEPA, "Hazardous Waste Management: Overview and Definitions; Generator Regulations; Transporter Regulations."

(10) 45 FR 33140, May 19, 1980, USEPA, "Standards Applicable to Generators of Hazardous Waste."

(11) 45 FR 33150, May 19, 1980, USEPA, "Standards Applicable to Transporters of Hazardous Waste."

(12) 45 FR 33154, May 19, 1980, USEPA, "Standards and Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities."

(13) 45 FR 33260, May 19, 1980, USEPA, "Proposal to Modify 40 CFR Part 265—Subpart H—Financial Requirements."

(14) 46 FR 2802, January 12, 1981, USEPA, "Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Consolidated Permit Regulations."

(15) 47 FR 15032, April 7, 1982, USEPA, "Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Financial Requirements."

(16) 49 FR 10490, March 20, 1984, USEPA, "Hazardous Waste Management System: General; Standards for Generators of Hazardous Waste; State Hazardous Waste Program Requirements."

(17) 51 FR 16422, May 2, 1986, USEPA, "Standards Applicable to Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Closure/Post-Closure and Financial Responsibility Requirements."

*C. Support Documents*

(1) USEPA, OPTS, ETD, Regulatory Impact Analysis of Proposed Options For Notification and Manifesting of PCB–Containing Wastes, Final Report, ICF, Inc., February 22, 1988.

(2) USEPA, OPTS, ETD, Regulatory Flexibility Analysis in Support of the Proposed PCB Notification and Manifest Rule, June 22, 1988.

(3) USGAO, February 22, 1985, Report to the Subcommittee on Investigations and Oversight, House Committee on Public Works and Transportation, "Illegal Disposal of Hazardous Waste: Difficult to Detect or Deter."

(4) USGAO, May 20, 1987, Report to the Chairman, Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, "Toxic Substances: Abandonment of PCBs Demonstrates Need for Program Improvements."

(5) USGAO, February 26, 1988, Report to the Chairman, Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, "PCB Enforcement in Kansas City Region Substantiates Need for Further Program Improvements."

(6) USEPA, Region VII, Testimony of Morris Kay, Regional Administrator, before the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, August 13, 1986.

(7) USEPA, OPTS, Testimony of Dr. John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, before the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, April 6, 1987.

(8) U.S. Congress, House of Representatives, 100th Congress, 1st Session; HR 3070: "The PCB Regulatory Improvements Act of 1987."

(9) USGAO, Testimony of Mr. Hugh Wessinger, Senior Associate Director, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(10) USEPA, OPTS, Testimony of Dr. John A. Moore, Assistant Administrator for Pesticides and Toxic Substances, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(11) Ohio EPA, Testimony of G. Richard Carter, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(12) Edison Electric Institute, Testimony of Thomas E. Siedhoff, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(13) Chemical Manufacturers Association and the National Electrical Manufacturers Association, Joint Statement, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(14) Hazardous Waste Treatment Council, Testimony of Robert A. Mitchell, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(15) Natural Resources Defense Council, Testimony of Jacqueline M. Warren, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(16) Testimony of Francis Brillhart, Mayor of Holden, Missouri, before the Subcommittee on Transportation, Tourism, and Hazardous Materials, House Committee on Energy and Commerce, December 9, 1987.

(17) USEPA, OPTS, EED, Final Report on National Evaluation Plan; PCB Disposal Program Evaluations.

(18) PCB Consensus Group, Letter to Charles L. Elkins, Director, OTS, USEPA, August 14, 1987.

(19) PCB Consensus Group, Letter to Lee M. Thomas, Administrator, USEPA, June 12, 1987.

(20) Chemical Manufacturers Association, Letter to Marcia E. Williams, Director, OSW, USEPA, from representatives of the Chemical Manufacturers Association, the Utility Solid Waste Activities Group, the National Electric Manufacturers Association, the Hazardous Waste Treatment Council, Westinghouse Electric Corp., PPM, Inc., ENSCO, Inc., and the American Paper Institute, April 28, 1987.

(21) Environmental Defense Fund and the Natural Resources Defense Council, Letter to Marcia E. Williams, Director, OSW, USEPA, April 24, 1987.

(22) PCB Consensus Group submission: "Attachment II; Draft Regulatory Language to Amend the TSCA PCB Disposal Rules," August 14, 1987.

(23) ICF Inc., Memo to Ed Coe, ETD, OPTS, USEPA, "Methodology for Determining the Number of Hours for a PCB Offsite Commercial Storage Facility to Prepare a Closure Plan and Financial Assurance Estimate", February 25, 1988.

(24) USEPA, OSW, States Which Currently Regulate PCBs Under RCRA, undated.

(25) USEPA, EED and EDT, Memo to Rulemaking Record, "Estimate of Costs to Government Associated with Approving Commercial Storers of PCB Waste," August 18, 1988.

## VII. Other Regulatory Requirements

*A. Executive Order 12291*

Under Executive Order 12291, issued February 17, 1981, EPA must judge whether a rule is a "major rule" and therefore, subject to the requirement that a Regulatory Impact Analysis be prepared. EPA has determined that this proposed rule is not a major rule as the term is defined in section 1(b) of the Executive Order.

EPA has concluded that the proposed rule is not "major" under the criteria of section 1(b) because the annual effect of the rule on the economy will be less than $100 million; it will not cause a major increase in costs or prices for any section of the economy or for any geographic region; and it will not result in any significant adverse effects on competition or on the ability of the United States enterprises to compete with foreign enterprises in domestic or foreign markets.

This proposed rule may in fact result in substantial economic benefits in the long run. The purpose of the rule is to ensure proper disposal of PCB wastes. There have been historical cases of improper storage or disposal of PCB wastes which have resulted in the creation of Superfund sites. Because the cleanup of these sites is often extremely expensive, this rule has the potential to benefit the economy as well as the environment.

This proposed rule was submitted to the Office of Management and Budget (OMB) prior to publication as required by the Executive Order.

*B. Regulatory Flexibility Act*

Section 603 of the Regulatory Flexibility Act (the Act) (15 U.S.C. 8091 et seq. Pub. L. 96–534, September 19, 1980), requires EPA to prepare and make available for comment a regulatory flexibility analysis in connection with rulemaking. The initial regulatory flexibility analysis must describe the impact of the proposed rule on small business entities. If, however, a regulation will not have a significant impact on a substantial number of small entities, no such analysis is required.

EPA lacks information about the universe of PCB generators, storers, transporters, and disposers. This lack of information is a major reason for issuing the proposed rule. Because EPA lacks such knowledge, it could not determine whether a regulatory flexibility analysis was necessary. EPA performed a regulatory flexibility analysis and used the information which is currently available.

EPA does not have sufficient information to identify all the small businesses which would be affected by the rule. Because Congress is currently considering a bill that would impose requirements similar to those in the regulation, EPA analyzed, to the extent

possible, the effects of this proposal and the effects of the proposed bill.

*C. Paperwork Reduction Act*

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 et seq. authorizes the Director of OMB to review certain information collection requests by Federal agencies. EPA has determined that the recordkeeping and reporting requirements of this proposed rule constitute a "collection of information" as defined at 44 U.S.C. 3502(4).

The information collection requirements of this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1446) and a copy may be obtained from David DiFiore, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. A copy may also be obtained by calling (202) 382-2744.

The public reporting burden for this collection of information is estimated to average 1.5 hours per response for the notification requirements, 3 hours per response for the Exception and Discrepancy Reporting requirements, and 325 to 460 hours per response for the financial assurance and closure requirements. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information.

Comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to the Chief, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC, 20460. These comments should also be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked ATTENTION: Desk Officer for EPA. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

**List of Subjects in 40 CFR Part 761**

Environmental protection, Hazardous materials, Labeling, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: September 13, 1988.

**Lee M. Thomas,**

*Administrator.*

Therefore, it is proposed that 40 CFR Part 761 be amended as follows:

1. The authority citation for Part 761 is revised to read as follows:

**Authority:** 15 U.S.C. 2605, 2607, 2611, 2614, and 2616.

2. In § 761.3 by adding and alphabetically inserting definitions for "certification," "commercial storer of PCB waste," "designated facility," disposer of PCB waste," "EPA identification number," "generator of PCB waste," "manifest," "off-site," "PCB waste," "transfer facility," and "transporter of PCB waste" to read as follows:

**§ 761.3 Definitions**

* * * * *

"Certification" means a written statement regarding a specific fact or representation that contains the following language:

Under the civil and criminal penalties of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001), I certify that the information contained in or accompanying this document is true, accurate, and complete. As to the (those) identified section(s) of this document for which I cannot personally verify its (their) truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate, and complete.

* * * * *

"Commercial storer of PCB waste" means the owner or operator of a facility which is subject to the PCB storage facility standards of § 761.65(b), and which engages in storage activities involving PCB wastes generated or owned by others. The receipt of a fee or other compensation for storage services is not necessary to qualify as a commercial storer of PCB waste; it is sufficient under this definition that the facility stores PCB wastes generated or owned by others.

* * * * *

"Designated facility" means the off-site disposer or commercial storer of PCB waste designated on the manifest as the facility that will receive a manifested shipment of PCB waste.

* * * * *

"Disposer of PCB waste" means any person who owns or operates a facility approved by EPA for the disposal of PCB wastes which are regulated for disposal under the requirements of Subpart D of this part.

* * * * *

"EPA identification number" means the number assigned to a facility by EPA upon notification under § 761.205.

* * * * *

"Generator of PCB waste" means any person whose act or process produces PCBs that are regulated for disposal under Subpart D of this part, or whose act first causes a PCB material to become subject to Subpart D disposal requirements. Unless another provision of this part specifically requires a site-specific meaning, "generator of PCB waste" includes all of the sites of PCB waste generation owned or operated by the person who generates PCB waste.

* * * * *

"Manifest" means the shipping document EPA form 8700-22 and any continuation sheet attached to EPA form 8700-2, originated and signed by the generator of PCB waste in accordance with the instructions included with the form and Subpart K of this Part.

* * * * *

"Off-site," means, when used to refer to an activity involving the handling of PCB waste, an activity conducted at a site other than the site where the PCB waste was generated.

* * * * *

"PCB waste" means those PCBs and PCB Items that are subject to the disposal requirements of Subpart D of this part.

* * * * *

"Transfer facility" means any transportation related facility including loading docks, parking areas, storage areas, and other similar areas where shipments of PCB waste are held during the normal course of transportation. Transport vehicles are not transfer facilities under this definition, unless they are used for the storage of PCB wastes, rather than for actual transport activities. Storage areas for PCB wastes at transfer facilities are subject to the storage facility standards of § 761.65, but they are exempt from the approval requirements of § 761.65(d), unless they store the same PCB wastes for more than 10 consecutive days.

* * * * *

"Transporter of PCB waste" means, for the purposes of Subpart J of this part, any person engaged in the off-site transportation of regulated PCB waste by air, rail, highway, or water.

* * * * *

3. In § 761.65 by adding paragraphs (d), (e), (f), (g), and (h) to read as follows:

**§ 761.65 Storage for disposal.**

* * * * *

(d) *Approval of commercial storers of PCB wastes.* (1) All commercial storers of PCB waste, as defined in § 761.3, shall have interim approval to operate commercial facilities for the storage of PCB wastes until [insert date 180 days after effective date of the final rule]. Commercial storers of PCB waste are prohibited from storing any PCB wastes at their facilities after [insert date 180 days after effective date of the final rule] unless they have submitted by [insert date 180 days after effective date of the final rule] a complete application for a final storage approval under paragraph (d)(2) of this section. The period of interim approval shall be extended to include the period during which EPA considers an applcation submitted in accordance with this paragraph.

(2) The Regional Administrator for the region in which the storage facility is located shall grant a written, final approval to engage in the commercial storage of PCB wastes upon a determination by the Regional Administrator that:

(i) The principals and key employees responsible for the establishment or operation of the commercial storage facility are qualified to engage in the business of commercial storage of PCB wastes.

(ii) The facility possesses the capacity to handle the quantities of PCB wastes which the owner or operator of the facility has estimated will be the maximum quantities of PCB waste that will be handled at any one time at the facility.

(iii) The owner or operator of the facility has certified compliance with the storage facility standards in paragraph (b) of this section.

(iv) The owner or operator has developed a written closure plan for the facility that is deemed acceptable by the Regional Administrator under the closure plan standards of paragraph (e) of this section.

(v) The owner or operator has included in the application for final approval a demonstration of financial responsibility for closure that meets the financial responsibility standards of paragraph (g) of this section.

(3) *Application.* Applicants for final storage approvals shall submit a written application that includes any relevant information bearing upon the qualifications of the facility's principals and key employees to engage in the business of commercial storage of PCB wastes. This information shall include, but is not limited to:

(i) The identification of the principals or key employees who are or will be responsible for the operation of the facility.

(ii) Information concerning the principals' or key employees' technical qualifications and experience in handling PCB wastes or other wastes.

(iii) Information concerning any past State and Federal environmental violations involving the same business or another business with which the principals or key employees were affiliated.

(iv) A list of all companies currently owned or operated in the past by the principals or key employees.

(v) The owner's or operator's estimate of maximum PCB waste quantities to be handled at the facility.

(vi) A written statement certifying compliance with paragraph (b) of this section and containing a certification as defined in § 761.3.

(vii) A written closure plan for the facility, as described in paragraph (e) of this section.

(viii) The current closure cost estimate for the facility, as described in paragraph (f) of this section.

(ix) A demonstration of financial responsibility to close the facility, as described in paragraph (g) of this section.

(4) The written approval issued by the Regional Administrator shall include:

(i) The determination required under paragraph (d)(2) of this section, including a statement of the basis for the determination.

(ii) A condition incorporating the closure plan submitted by the facility owner or operator and approved by the Regional Administrator.

(iii) A condition imposing a maximum rated PCB storage capacity which the facility shall not exceed during its PCB waste storage operations. The maximum rated storage capacity imposed under this condition shall not be greater than the estimated maximum inventory of PCB wastes included in the owner's or operator's application for a final approval.

(iv) Such other conditions as deemed necessary by the Regional Administrator to ensure that the operations of the PCB storage facility will not pose an unreasonable risk of injury to health or the environment.

(5) Storage areas at transfer facilities are exempt from the requirement to obtain final approvals under this paragraph, unless the same PCB wastes are stored at these facilities for greater than 10 consecutive days.

(e) *Closure.* (1) A commercial storer of PCB waste, as defined in § 761.3, must have a written closure plan that identifies the steps that the owner or operator of the facility must take to close its PCB waste storage facility in a manner that eliminates the potential for post-closure releases of PCBs to the environment which may present an unreasonable risk. An acceptable closure plan must include, at a minimum.

(i) A description of how the PCB storage areas of the facility will be closed in a manner that eliminates the potential for post-closure releases of PCBs to the environment.

(ii) An identification of the maximum extent of storage operations that will remain unclosed during the active life of the facility, including an identification of the extent of PCB storage operations at the facility relative to other wastes that will be handled at the facility.

(iii) An estimate of the maximum inventory of PCB wastes that will ever be handled at one time at the facility over its active life, and a detailed description of the methods or arrangements to be used during closure for removing, transporting, storing, or disposing of the facility's inventory of PCB wastes, including an identification of any off-site facilities that will be used.

(iv) A detailed description of the steps needed to remove or decontaminate PCB waste residues and contaminated containment system components, equipment, structures, and soils during closure in accordance with the PCB Spills Cleanup Policy in Subpart G of this Part, including a description of the methods for sampling and testing of surrounding soils, and the criteria for determining the extent of removal or decontamination.

(v) A detailed description of other activities necessary during the closure period to ensure that any post-closure releases of PCBs to the environment will not present unreasonable risks. This includes activities such as groundwater monitoring, run-on and run-off control, and facility security.

(vi) A schedule for closure of each area of the facility where PCB wastes are stored or handled, including the total time required to close each area of PCB waste storage or handling, and the time required for any intervening closure activities.

(vii) An estimate of the expected year of closure of the PCB waste storage areas.

(2) A written closure plan found to be acceptable by the Regional Administrator under this section shall become a condition of any approval granted under paragraph (d) of this section.

(3) The commercial storer of PCB waste shall submit a written request to

the Regional Administrator for a modification to its storage approval to amend its closure plan, whenever:

(i) Changes in ownership, operating plans, or facility design affect the existing closure plan.

(ii) There is a change in the expected date of closure, if applicable.

(iii) In conducting closure activities, unexpected events require a modification of the approved closure plan.

(4) The Regional Administrator may request modifications to the existing closure plan under the conditions described in paragraph (e)(3) of this section.

(5) Commercial storers of PCB waste shall comply with the following closure schedule:

(i) The commercial storer shall notify the Regional Administrator in writing at least 60 days prior to the date on which final closure of its PBC storage facility is expected to begin.

(ii) The date when a commercial storer of PCB waste "expects to begin closure" shall be no later than 30 days after the date on which the storage facility received its final quantities of PCB waste. For good cause shown, the Regional Administrator may extend the date for commencement of closure for an additional 30-day period.

(iii) Within 90 days after receiving the final quantity of PCB waste for storage, a commercial storer of PCB waste shall cause all PCB wastes in storage at the facility to be removed from the facility in accordance with the approved closure plan. For good cause shown, the Regional Administrator may approve a reasonable extension to the period for removal of the PBC waste.

(iv) A commercial storer of PCB waste shall complete closure activities in accordance with the approved closure plan and within 180 days after receiving the final volume of PCB wastes for storage at the facility. For good cause shown, the Regional Administrator may approve a reasonable extension to the closure period.

(6) During the closure period, all contaminated equipment, structures, and soils shall be disposed of in accordance with the disposal requirements of Subpart D of this part, or, if applicable, decontaminated in accordance with the PCB Spills Cleanup Policy at Subpart G of this part. When PCB wastes are removed from the facility during closure, the owner or operator becomes a generator of PCB waste subject to the generator requirements of Subpart J of this part.

(7) Within 60 days of completion of closure of each facility for the storage of PCB wastes, the commercial storer of PCB wastes shall submit to the Regional Administrator, by registered mail, a ceritification, as defined in § 761.3, that the PCB storage facility has been closed in accordance with the approved closure plan. The certification shall be signed by the owner or operator and by an independent registered professional engineer.

(f) *Closure cost estimate.* (1) A commercial storer of PCB wastes shall have a detailed estimate, in current dollars, of the cost of closing its facility in accordance with its approved closure plan. The closure cost estimate shall be in writing, and certified to by the person preparing it, using the certification defined in § 761.3, and shall comply with the following criteria:

(i) The closure cost estimate shall equal the cost of final closure at the point in the PCB storage facility's active life when the extent and manner of PCB storage operations would make closure the most expensive, as indicated by its closure plan.

(ii) The closure cost estimate shall be based on the costs to the owner or operator of hiring a third party to close the facility, and the third party shall not be either a corporate parent or subsidiary of the owner or operator.

(iii) The owner or operator shall include in the estimate the current market costs for off-site commercial disposal of its maximum estimated inventory of PCB wastes, except that on-site disposal costs may be used if on-site disposal capacity will exist at the facility at all times over the life of the PCB storage facility.

(iv) The closure cost estimate may not incorporate any salvage value that may be realized with the sale of wastes, facility structures or equipment, land, or other assets associated with the facility at the time of closure.

(v) The closure cost estimate may not incorporate a zero cost for PCB wastes that might have economic value.

(2) During the active life of the PCB storage facility, the commercial storer of PCB waste shall adjust the closure cost estimate for inflation within 60 days prior to the anniversary date of the establishment of the financial instruments used to demonstrate financial responsibility for closure, except that owners or operators who use the financial test or corporate guarantee shall adjust their closure cost estimates for inflation within 30 days after the close of the storer's fiscal year. The adjustment may be made by recalculating the maximum costs of closure in current dollars, or by using an inflation factor derived from the most recent Implicit Price Deflator for Gross National Product published by the U.S. Department of Commerce in its *Survey of Current Business*. The Implicit Price Deflator for Gross National Product is included in a monthly publication titled *Economic Indicators*, which is available from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. The inflation factor used in the latter method is the result of dividing the latest published annual Deflator by the Deflator for the previous year. The adjustment to the closure cost estimate is then made by multiplying the most recent closure cost estimate by the latest inflation factor.

(3) Where the Regional Administrator approves a modification to the facility's closure plan, and that modification increases the cost of closure, the owner or operator shall revise the closure cost estimate no later than 30 days after the modification is approved. Any such revision shall also be adjusted for inflation in accordance with paragraph (f)(2) of this section.

(4) The owner or operator of the facility shall keep at the facility during its operating life the most recent closure cost estimate, including any adjustments resulting from inflation or from modifications to the closure plan.

(g) *Financial assurance for closure.* A commercial storer of PCB waste shall establish financial assurance for closure of each PCB storage facility that it owns or operates. In establishing financial assurance for closure, the commercial storer of PCB waste may choose from the following financial assurance mechanisms:

(1) The "closure trust fund," as specified in § 264.143(a) of this chapter, except for paragraph (a)(3) of § 264.143. For purposes of this paragraph, the following provisions also apply:

(i) Payments into the trust fund shall be made annually by the owner or operator over the remaining operating life of the facility as estimated in the closure plan, or over 3 years, whichever period is shorter; this period is hereafter referred to as the "pay-in period."

(ii) For a new facility, the first payment into the closure trust fund shall be made before the initial receipt of PCB waste for commercial storage. A receipt from the trustee shall be submitted by the owner or operator to the Regional Administrator before this initial delivery of PCB waste. The first payment shall be at least equal to the current closure cost estimate, except as provided in paragraph (g)(7) of this section for multiple mechanisms, divided by the number of years in the pay-in period. Subsequent payments shall be made no later than 30 days after each anniversary date of the first payment.

The amount of each subsequent payment shall be determined by subtracting the current value of the trust fund from the current closure cost estimate, and dividing this difference by the number of years remaining in the pay-in period.

(iii) If an owner or operator of a facility existing on the effective date of this paragraph establishes a trust fund to meet the financial assurance requirements of this paragraph, and the value of the trust fund is less than the current closure cost estimate when a final approval is granted for the facility, the amount of the current closure cost estimate still to be paid into the trust fund shall be paid in over the pay-in period as defined in paragraph (g)(1)(i) of this section. Payments shall continue to be made no later than 30 days after each anniversary date of the first payment made into the trust fund. The amount of each payment shall be determined by subtracting the current value of the trust fund from the current closure cost estimate, and dividing this difference by the number of years remaining in the pay-in period.

(iv) The submission of a trust agreement with the wording specified in § 264.151(a)(1) of this chapter, including any reference to hazardous waste management facilities, shall be deemed to be in compliance with the requirement to submit a trust agreement under this subpart.

(2) The "surety bond guaranteeing payment into a closure trust fund," as specified in § 264.143(b) of this chapter, including the use of the surety bond instrument specified at § 264.151(b) of this chapter and the standby trust specified at § 264.143(b)(3) of this chapter. The use of the surety bonds, surety bond instruments, and standby trust agreements specified in §§ 264.143(b) and 264.151(b) of this chapter shall be deemed to be in compliance with this Subpart.

(3)(i) The "surety bond guaranteeing performance of closure," as specified at § 264.143(c) of this chapter, except for paragraph (c)(5) of § 264.143. The submission and use of the surety bond instrument specified at § 264.151(c) of this chapter and the standby trust specified at § 264.143(c)(3) of this chapter shall be deemed to be in compliance with the requirements under this Subpart relating to the use of surety bonds and standby trust funds.

(ii) For the purposes of this paragraph, and under the terms of the bond, the surety shall become liable on the bond obligation when the owner or operator fails to perform as guaranteed by the bond. Following a final administrative determination pursuant to section 16 of TSCA that the owner or operator has failed to perform final closure in accordance with the closure plan and other approval or regulatory requirement when required to do so.

(4)(i) The "closure letter of credit" specified in § 264.143(d) of this chapter, except for paragraph (d)(8) of § 264.143. The submission and use of the letter of credit instrument specified at § 264.151(d) of this chapter and the standby trust specified in § 264.143(d)(3) of this chapter shall be deemed to be in compliance with the requirements of this Subpart relating to the use of letters of credit and standby trust funds.

(ii) For the purposes of this paragraph, the Regional Administrator may draw on the letter of credit following a final administrative determination pursuant to section 16 of TSCA that the owner or operator has failed to perform final closure in accordance with the closure plan and other approval or regulatory requirement when required to do so.

(5) "Closure insurance," as specified in § 264.143(e) of this chapter, utilizing the certificate of insurance for closure specified at § 264.151(e) of this chapter. The use of closure insurance as specified in § 264.143(e) of this chapter and the submission and use of the certificate of insurance specified in § 264.151(e) of this chapter shall be deemed to be in compliance with the requirements of this Subpart relating to the use of closure insurance.

(6) The "financial test and corporate guarantee for closure," as described in § 264.143(f) of this chapter, including a letter signed by the owner's or operator's chief financial officer as specified at § 264.151(f) of this chapter and, if applicable, the written corporate guarantee specified at § 264.151(h) of this chapter. The use of the financial test and corporate guarantee specified in § 264.143(f) of this chapter, the submission and use of the letter specified in § 264.151(f) of this chapter, and the submission and use of the written corporate guarantee specified at § 264.151(h) of this chapter shall be deemed to be in compliance with the requirements of this Subpart relating to the use of financial tests and corporate guarantees.

(7) The use of multiple financial mechanisms, as specified in § 264.143(g) of this chapter.

(h) *Release of owner or operator.* Within 60 days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the Regional Administrator will notify the owner or operator in writing that the owner or operator is no longer required by this section to maintain financial assurance for final closure of the facility, unless the Regional Administrator has reason to believe that final closure has not been in accordance with the approved closure plan. The Regional Administrator shall provide the owner or operator a detailed written statement of any such reason to believe that closure has not been in accordance with the approved closure plan.

**Subpart J—[Amended]**

4. By revising the heading for Subpart J to read: "Subpart J—General Records and Reports."

5. By revising paragraphs (a) and (b) of § 761.180 to read as follows:

**§ 761.180 Records and monitoring.**

* * * * *

(a) *PCBs and PCB Items in service or projected for disposal.* Beginning July 2, 1978, each owner or operator of a facility, other than a commercial storer of PCB waste, using or storing at one time at least 45 kilograms (99.4 pounds) of the PCBs contained in PCB Container(s) or one or more PCB Transformers, or 50 or more PCB Large High or Low Voltage Capacitors shall develop and maintain written records on the disposition of the PCBs and PCB Items. These records shall form the basis for a distinct, written annual document prepared for each facility by July 1 covering the previous calendar (January to December) year. The records and documents shall be maintained for at least 5 years after the facility ceases using or storing PCBs and PCB Items in the prescribed quantities. The following information for each facility shall be included in the written annual document:

(1) The name, address, and EPA identification number of the facility covered by the annual document, and the calendar year covered by the document.

(2) For each PCB or PCB Item identified as removed from service:

(i) The identity of the PCB or PCB Item including:

(A) The serial number or other means of identifying specifically each PCB Article, PCB Container, PCB Article Container, or other PCB Item.

(B) A description of the contents of each PCB Container and PCB Article Container, and the total weight in kilograms of any PCBs and PCB Items in each PCB Container and PCB Article Container.

(ii) The date removed from service, the date placed into storage for disposal, the date placed into transport for off-site

storage or diposal, and, if available from a Certificate of Disposal, the date of disposal.

(iii) The name, address, and EPA identification number of the transporter which transported PCB waste off-site for storage or disposal, and the name, address, and EPA identification number of the disposal or commercial storer of PCB waste to which the PCB waste was transported.

(3) Total quantities of PCBs and PCB Items remaining in service at the end of the calendar year.

(4) Total quantities of PCBs or PCB Items removed from service, placed into storage for disposal, and placed into transpart for off-site storage or disposal during the calendar year.

(5) In recording total quantities of PCBs and PCB Items in paragraphs (a)(3) and (4) of this section, the quantities shall be recorded using the following breakdown:

(i) Total weight in kilograms of any PCBs or PCB Items in PCB Containers and PCB Article Containers, including the identification of container contents such as liquids or capacitors.

(ii) Total number of PCB Transformers and total weight in kilograms of any PCBs contained in the transformers.

(iii) Total number of PCB Large High or Low Voltage Capacitors.

(b) *Disposers and commercial storers of PCB waste.* Each owner or operator of a facility (including high efficiency boiler operations) used for the commercial storage or disposal of PCBs and PCB Items shall by July 1, 1979 and each July 1 thereafter prepare and maintain a written annual document that includes the information required by paragraphs (b)(1) through (4) of this section for PCBs and PCB items that were handled as PCB waste at the facility during the previous calendar (January to December) year. The annual document shall be retained at each facility for at least 5 years after the facility is no longer used for the storage or disposal of PCBs and PCB Items except that in the case of chemical waste landfills, the annual document shall be maintained at least 20 years after the chemical waste landfill is no longer used for the disposal of PCBs and PCB Items. The documents shall be available at the facility for inspection by authorized representatives of the Agency. If the facility will cease commercial PCB storage or disposal operations, the owner or operator of such facility shall provide at least 60 days advance written notice to the Regional Administrator for the region in which the facility is located of the date the facility intends to begin closure. The notice shall also specify where the annual documents that are required to be maintained by this paragraph are located. Each annual document shall contain the information described in paragraphs (b)(1) through (4) of this section.

(1) The EPA identification number, name, owner, and address of the storage or disposal facility, and the calendar year covered by the document.

(2) For each PCB or PCB Item received by the facility for storage or disposal:

(i) The identity of the PCB or PCB Item received, including:

(A) The serial number or other means of identifying specifically each PCB Article, PCB Container, or other PCB Item.

(B) A description of the contents of each PCB Container, and the weight in kilograms of any PCBs and PCB Items in each PCB Container.

(ii) The name, EPA identification number (if any), and address of the owner or operator of the facility from which each PCB or PCB Item was received.

(iii) The date received, the date of removal from service, the date disposed of at the facility, or, if applicable, the date transported off-site to another disposal or storage facility.

(iv) The name, address, and EPA identification number of any transporter who transported PCB waste off-site to another disposal or storage facility, and the name, address, and EPA identification number of the disposal or storage facility to which the PCB or PCB Item was transported.

(3) A summary of the total quantities of PCBs and PCB Items handled at the facility during the previous calendar year, including totals for each of the following categories:

(i) PCBs or PCB Items received during the year.

(ii) PCBs or PCB Items transferred to other facilities during the calendar year.

(iii) PCBs or PCB Items retained at the facility at the end of the year.

(4) When summarizing the total quantities of PCBs and PCB Items for purposes of paragraph (b)(3) of this section, the total quantities shall be recorded using the following breakdown:

(i) Total weight in kilograms of PCBs in containers and PCB Items in containers.

(ii) Total weight in kilograms of PCBs in PCB Articles.

(iii) Total number of PCB Transformers and other PCB Articles, PCB Articles not in PCB Containers, and PCB Equipment not in PCB Containers.

(5)(i) The owner or operator of a PCB disposal or commercial storage facility shall submit a copy of the annual document required under paragraph (b) of this section to the Regional Administrator by July 15 of each year, beginning with the first July 15 that occurs after [insert effective date of final rule].

(ii) An owner or operator of a PCB commercial storage or disposal facility may assert a business confidentiality claim covering parts of the annual document. In such cases, the owner or operator shall follow the procedures for asserting business confidentiality claims described in § 704.7 of this chapter, including the requirement of § 704.7(c) that persons asserting a claim of business confidentiality submit a second copy of the annual document that is complete except that the data claimed to be confidential has been deleted.

(iii) The requirement to submit annual documents to the Regional Administrator continues until the submission of the annual document for the calendar year during which the facility ceases PCB storage or disposal operations. Storage operations have not ceased until all PCB wastes, including any PCB wastes generated during closure, have been removed from the facility.

(6) Whenever a commercial storer of PCB waste accepts PCBs or PCB Items at its storage facility, and transfers the PCB wastes off-site to another facility for storage or disposal, the commercial storer of PCB waste shall:

(i) Initiate a manifest under Subpart K of this Part for the transfer of PCBs or PCB Items to the next storage or disposal facility, and include on the manifest or continuation sheet, the date(s) of removal from service for each PCB or PCB Item.

(ii) Include in its annual document (§ 761.180(b)) records for each PCB or PCB Item transferred from the facility during the calendar year, the date of removal from service, as indicated on the manifest or continuation sheet that accompanied the PCB waste to the storage facility.

(iii) Include in its annual document (§ 761.180(b)) records for each PCB or PCB Item transferred to a disposal facility during the calendar year, the confirmed date of disposal, as indicated by a Certificate of Disposal.

6. By adding a Subpart K to read as follows:

**Subpart K—PCB Waste Disposal Records and Reports**

Sec.

## Subpart K—PCB Waste Disposal Records and Reports

### § 761.202 EPA identification numbers.

(a) *General.* Any generator, commercial storer, transporter, or disposer of PCB waste who is required to have an EPA identification number under this Subpart, but has not received one, may obtain one by applying to the Agency using the notification procedures and form described in § 761.205.

(b) *Prohibitions.* (1)(i) A generator of PCB waste shall not process, store, dispose of, transport, or offer for transportation PCB waste without having received an EPA identification number from the Agency. Generators of PCB waste who are exempted from notification under § 761.205(c)(1) shall be regarded as having received from the Agency the EPA identification number "40 CFR PART 761."

(ii) A generator of PCB waste shall not offer the PCB waste to transporters, disposers or commercial storers of PCB waste who have not received an EPA identification number.

(2)(i) A transporter of PCB waste shall not transport PCB waste without having received an EPA identification number from the Agency.

(ii) A transporter of PCB waste shall not deliver PCB waste to transporters, disposers, or commercial storers of PCB waste that have not received an EPA identification number.

(3) A commercial storer of PCB waste shall not accept any PCB waste for storage without having received an EPA identification number from the Agency.

(4) A disposer of PCB waste shall not accept any PCB waste for disposal without having received an EPA identification number from the Agency.

(c) *PCB waste handled prior to effective date of this Subpart.* Generators (other than generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who are required to have EPA identification numbers under this Subpart, and who were engaged in PCB waste handling activities on or prior to [insert effective date of the final rule], are not subject to the prohibitions of paragraph (b) of this section if they have applied for an EPA identification number in accordance with the applicable § 761.205 notification procedures. Such persons shall use the EPA identification number "40 CFR Part 761," or a number assigned to the persons by the Agency or a state under RCRA, until the Agency issues them a specific identification number under § 761.205(a), (b), or (c).

(d) *PCB waste first handled after effective date of this Subpart.* Generators (other than generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who are required to have EPA identification numbers under this Subpart, and who first engage in PCB waste activities after [insert effective date of the final rule], are subject to the prohibitions in paragraph (b) of this section until they receive their EPA identification numbers.

### § 761.205 Notification of PCB waste activity.

(a)(1) All commercial storers, transporters, and disposers of PCB waste who were engatged in PCB waste handling activities on or prior to [insert effective date of the final rule] must notify the Agency of their PCB waste activities by filing EPA Form 7710–53, set out at paragraph (a)(3) of this section, with the Agency by no later than [insert effective date of the final rule]. Upon receiving the notification form, the Agency will assign an EPA identification number to each entity that notifies.

(2) All generators (other than generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who first engage in PCB waste handling activities after [insert effective date of the final rule], must notify the Agency of their PCB waste activities by filing EPA Form 7710–53 with the Agency prior to engaging in PCB waste handling activities.

(3) Any person required to notify EPA under this section shall file with the Administrator the following form, denoted as EPA Form 7710–53.

Note: Form 7710–53 is included for the purpose of notice and comment, but it will not physically appear in the final rule. An availability statement for the form and the descriptive information included in paragraph (a)(4) of this proposed rule will appear in place of the full-text copy of the form and instructions.

BILLING CODE 6560–50–M

EPA

United States Environmental Protection Agency
Washington, DC 20460

# Notification of PCB Activity

Form Approved
OMB No xxxx-xxxx
Approval expires xx-xx-xx

**No information on this form may be claimed as TSCA CBI.**

Return To:

Chemical Regulation Branch
Office of Toxic Substances TS-798
U.S. Environmental Protection Agency
401 M St., SW
Washington, DC 20460

For Official Use Only

TSCA PCB ID Number

I. Name of Facility

II. EPA Identification Number *(if already assigned under RCRA)*

III. Facility Mailing Address *(Street or PO Box, City, State, & ZIP Code)*

IV. Location of Facility *(No. & Street, City, State, & ZIP Code)*

DRAFT

V. Installation Contact *(Name and Title)*

Telephone Number *(Area Code and Number)*

VI. Type of PCB Activity *(Mark 'X' in appropriate box. See Instructions.)*

- ☐ A. Generator with onsite storage facility
- ☐ B. Storer *(Commercial)*
- ☐ C. Transporter
- ☐ D. Permitted Disposer

VII. Certification

Under civil and criminal penalty of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001 and 15 U.S.C. 2615), I certify that the information contained in this document is true, accurate, and complete. As to the identified section(s) of this document for which I cannot personally verify truth and accuracy, I certify as the company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that their information is true, accurate, and complete.

| Signature | Name and Official Title *(Type or print)* | Date Signed |
|---|---|---|
| | | |

EPA Form 7710-53 (6-88)

# Item-by-Item Instructions for Completing EPA Form 7710-53

Return completed form to:

Chemical Regulation Branch
Office of Toxic Substances
TS-798
U.S. Environmental Protection Agency
401 M St., SW
Washington, DC 20460

No information on the form may be claimed confidential.

Type or print in black ink all items, except Item VII, "Certification." If you must use additional sheets, indicate clearly the number of the item on the form to which the information on the separate sheet applies.

**Item I — Name of facility:** Enter name of the facility.

**Item II — EPA identification number** *(if already assigned under RCRA):* Enter the identification number the facility was assigned under the RCRA hazardous waste notification regulations. If no identification number has been assigned, leave this space blank.

**Items III and IV — Facility mailing address and location:** Complete Items III and IV. Please note that the address you give in Item IV, "Location of Facility," must be a physical address, not a post office box or route number. If the mailing address and physical location are the same, you may enter "Same" in Item IV. If the facility is a mobile incinerator, you may enter "mobile" in Item IV, and provide the mailing address for the installation contact in Item III.

**Item V — Installation contact:** Enter the name, title, and business telephone number of the person who should be contacted regarding information submitted on this form.

**Item VI — Type of PCB activity:** Mark the appropriate box(es) to show which PCB activities are taking place at this facility.

**A. Generator with onsite storage facility:** You are a generator with an onsite storage facility under this notification requirement if you are a user, owner, or processor of PCBs or PCB items and you maintain your own storage facilities subject to CFR 761.65(b) for PCBs. If you are a generator with an onsite storage facility, mark an "X" in this box.

**B. Commercial storer:** You are a commercial storer if you own or operate a storage facility which is subject to the storage facility standards of 40 CFR 761.65(b), and which engages in offsite storage activities involving the PCB wastes owned by others. Most commercial storers of PCB waste perform waste storage services in exchange for a fee or other compensation, but the receipt of compensation is not necessary for your storage facility to qualify as a commercial storer of PCB wastes under this notification requirement. It is sufficient that your facility stores PCB wastes owned by others. If you are a commercial storer, mark an "X" in this box.

**C. Transporter:** If you move PCBs by air, rail, highway, or water, then mark an "X" in this box.

**D. Permitted disposer:** If you currently hold a valid EPA permit to dispose of PCBs in concentrations exceeding 50 ppm in a landfill, through alternative technology or incineration, mark an "X" in this box.

**Item VII — Certification:** This certification must be signed by the owner, operator, or an authorized representative of the facility. An "authorized representative" is a person responsible for the overall operation of the facility (i.e., a plant manager or superintendent, or a person of equal responsibility). All notifications must include this certification to be complete.

BURDEN BOX

The information collection requirements of this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An Information Collection Request document has been prepared by EPA (ICR No. 1446) and a copy may be obtained from David DiFiore, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC. 20460. A copy may also be obtained by calling (202) 382-2744.

The public reporting burden for this collection of information is estimated to average 1.5 hours per response for the notification requirements, 3 hours per response for the Exception and Discrepancy Reporting requirements, and 325 to 460 hours per response for the financial assurance and closure requirements. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the needed data, and completing and reviewing the collection of information.

Comments regarding the burden estimate or any other aspect of this collection of information should be submitted to the Chief, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW., Washington, DC. 20460. These comments should also be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC. 20503, marked ATTENTION: Desk Officer for EPA. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

BILLING CODE 6560-50-C

(4) The following information shall be provided to EPA on Form 7710–53:

(i) The name of the facility.

(ii) EPA indentification number, if any, previously issued to the facility.

(iii) The facility's mailing address.

(iv) Ownership information about the facility.

(v) The location of the facility.

(vi) The facility's installation contract.

(vii) The type of PCB waste activity engaged in at the facility.

EPA has determined that the above information is not entitled to be treated as confidential business information. This information will be disclosed to the public without further notice to the submitter unless the submitter provides a written justification (submitted with the notification form) which demonstrates extraordinary reasons why the information should be entitled to confidential treatment.

(b) Generators (other than those generators exempt from notification under § 761.205(c)(1)), commercial storers, transporters, and disposers of PCB waste who have previously notified the Agency or a State of hazardous waste activities under RCRA shall notify EPA of their PCB waste activities under this part by filing EPA Form 7710–53 with the Agency by no later than [insert date 60 days after effective date of the final rule]. The notification shall include the EPA indentification number previously issued by the Agency or the State, and upon receiving the notification, the Agency will acknowledge the use of the previously issued indentification number for PCB waste activities.

(c)(1) Generators of PCB waste need not notify the Agency and receive unique EPA indentification numbers under this section, unless their PCB waste activities are described in paragraph (c)(2) of this section. Generators exempted from notifying under this paragraph shall use the generic indentification number "40 CFR PART 761" on the manifests, records, and reports which they shall prepare under this Subpart, unless they elect to use a unique EPA indentification number previously assigned to them under RCRA by the Agency or a State.

(2) Generators of PCB waste who use, own, service, or process PCBs or PCB Items shall notify the Agency of their PCB waste activities only if they own or operate PCB storage facilities subject to § 761.65(b) storage requirements. Such generators shall notify EPA in the following manner:

(i) Generators currently storing PCB wastes subject to § 761.65(b) storage requirements shall notify EPA by filing EPA Form 7710–53 with the Agency by no later than [insert date 60 days after the effective date of the final rule].

(ii) Generators who desire to commence storage of PCB waste after the effective date of this Subpart shall notify the Agency and receive an EPA indentification number before they may commence storage of PCBs at their new § 761.65(b) facilities.

(iii) A separate notification shall be submitted for each PCB storage facility owned or operated by generators of PCB waste. Upon receiving these notifications, the Agency will assign generators unique EPA identification numbers for each storage facility notifying under this section.

(d) Persons required to notify under this section shall file EPA Form 7710–53 with the Agency by mailing the form to the following address: Chief, Chemical Regulations Branch (TS–798), Office of Toxic Substances, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

(e) The requirements under this section to notify the Agency and obtain EPA indentification numbers shall in no case excuse compliance by any person with the 1-year limit on storage prior to disposal under § 761.65(a).

**§ 761.207 The manifest—general requirements.**

(a) A Generator who relinquishes control over PCB wastes by transporting, or offering for transport, PCB wastes for commercial off-site storage of off-site disposal shall prepare a manifest on EPA Form 8700–22, and if necessary, a continuation sheet. The Agency does not maintain supplies of printed copies of Form 8700–22 for public use, although printed copies of the manifest may be available from State offices. Camera-ready copies of the form are available for printing purposes from State offices, and from the EPA Regional Offices and EPA Headquarters.

(b) A generator shall designate on the manifest one off-site storage or disposal facility approved under this part for the storage or disposal of the PCBs described on the manifest.

(c) If the transporter is unable to deliver the PCB waste to the designated disposer or commerical storer, the transporter must contact the generator for instructions. The generator shall either designate another approved disposer or commercial storer, or instruct the transporter to return the PCB waste.

(d)(1) The manifest which accompanies the PCB waste shall consist of at least the number of copies which will provide the generator, the initial transporter, each subsequent transporter, and the owner or operator of the designated storage or disposal facility with one legible copy each for their records and another legible copy to be returned by the designated facility to the generator.

(2) The generator shall prepare one additional legible copy of the manifest, to be used as an advance notice from the generator to the facility designated for delivery of the shipment of PCB waste, as required under § 761.208(a)(2)(i).

(e) The requirements of this section do not apply to PCB wastes with PCB concentrations below 50 ppm, unless the PCB concentration below 50 ppm was the result of an act of dilution prohibited under § 761.1(b), or the result of cleanup of a spill involving material with a PCB concentration greater than 50 ppm.

**§ 761.208 Use of the manifest.**

(a)(1) The generator of PCB waste shall:

(i) Sign the manifest certification by hand.

(ii) Obtain the handwritten signature of the initial transporter and date of acceptance on the manifest.

(iii) Retain one copy among its records in accordance with § 761.209(a).

(iv) Give to the transporter the remaining copies of the manifest that will accompany the shipment of PCB waste.

(2) Immediately after delivering the PCB waste and manifest to the initial transporter, the generator shall send to the designated storage or disposal facility by Registered Mail, Return Receipt Requested, the advance copy of the manifest described in § 761.207(e)(2).

(3) For bulk shipments of PCB waste within the United States solely by water, the generator shall send three copies of the manifest dated and signed in accordance with this section to the owner or operator of the designated storage or disposal facility. Copies of the manifest are not required for each transporter.

(4) For rail shipments of PCB waste within the United States which originate at the site of generation, the generator shall send at least three copies of the manifest dated and signed in accordance with this section to:

(i) The next non-rail transporter, if any.

(ii) The designated storage or disposal facility if transported solely by rail.

(b)(1) A transporter shall not accept PCB waste from a generator unless it is accompanied by a manifest signed by the generator in accordance with paragraph (a)(1) of this section, except

that a manifest is not required if one of the following conditions exists:

(i) The shipment of PCB waste consists solely of wastes with PCB concentrations below 50 ppm, which concentrations were not the result of prohibited dilution, or the result of the cleanup of a spill involving materials with PCB concentrations greater than 50 ppm.

(ii) The PCB waste is accepted by the transporter for transport only to storage facility owned or operated by the generator of the PCB waste.

(2) Before transporting the PCB waste, the transporter shall sign and date the manifest acknowledging acceptance of the PCB waste from the generator. The transporter shall return a signed copy to the generator before leaving the generator's property.

(3) The transporter shall ensure that the manifest accompanies the PCB waste.

(4) A transporter who delivers PCB waste to another transporter, or to the designated commercial storer or disposer of PCB waste, shall:

(i) Obtain the date of delivery and handwritten signature of the subsequent transporter of PCB waste, or of the owner or operator of the designated storage or disposal facility on the manifest.

(ii) Retain one copy of the manifest in accordance with § 761.209(b).

(iii) Give the remaining copies of the manifest to the accepting transporter of PCB waste, or to the designated storage or disposal facility.

(5) The requirements of paragraphs (b)(3), (4), and (6) of this section shall not apply to water (bulk shipment) transporters if:

(i) The PCB waste is delivered by water (bulk shipment) to the designated storage or disposal facility.

(ii) A shipping paper containing all the information required on the manifest (excluding EPA identification number, generator certification, and signatures) accompanies the PCB waste.

(iii) The delivering transporter obtains the date of delivery and handwritten signature of the owner or operator of the designated storage or disposal facility on either the manifest or the shipping paper.

(iv) The person delivering the PCB waste to the initial water (bulk shipment) transporter obtains the date of delivery and signature of the water (bulk shipment) transporter on the manifest and forwards it to the designated facility.

(v) A copy of the shipping paper or manifest is retained by each water (bulk shipment) transporter in accordance with § 761.209(b).

(6) For shipments involving rail transportation, the requirements of paragraph (b)(3), (4), and (5) of this section shall not apply. Instead, the requirements described at § 263.20(f) of this title for the rail transportation of hazardous waste apply to such shipments. The rail transporter shall retain one copy of the manifest or rail shipping paper in accordance with § 761.209(b).

(7) The transporter shall deliver the entire quantity of PCB waste which he has accepted from a generator or transporter to either of the following designations:

(i) The designated storage or disposal facility listed on the manifest.

(ii) The next designated transporter of PCB waste.

(8) If the PCB waste cannot be delivered in accordance with paragraph (b)(7) of this section, the transporter shall contact the generator for further directions and shall revise the manifest and/or return the waste according to the generator's instructions.

(9) No provision of this section shall be construed to affect or limit the applicability of any requirement applicable to transporters of PCB waste under regulations issued by the Department of Transportation (DOT) and set forth at 49 CFR 171 *et seq.*

(c)(1) If a commercial storage or disposal facility receives an off-site shipment of PCB waste accompanied by a manifest, the owner or operator, or his agent, shall:

(i) Sign and date each copy of the manifest to certify that the PCB waste covered by the manifest was received.

(ii) Note any significant discrepancies in the manifest (as defined in § 761.210(a)(1)) on each copy of the manifest.

(iii) Immediately give the transporter at least one copy of the signed manifest.

(iv) Within 30 days after the delivery, send a copy of the manifest to the generator.

(v) Retain a copy of each manifest among the facility's records in accordance with § 761.209(d).

(2) If a commercial storage or disposal facility receives, from a rail or water (bulk shipment) transporter, PCB waste accompanied by a shipping paper containing all the information required on the manifest except the EPA identification numbers, generator's certification, and signatures, the owner or operator, or his agent, shall:

(i) Sign and date each copy of the manifest or shipping paper, if applicable, to certify that the PCB waste covered by the manifest or shipping paper was received.

(ii) Note any significant discrepancies in the manifest or shipping paper, if applicable, on each copy of the manifest or shipping paper.

(iii) Immediately give the rail or water transporter at least one copy of the manifest or shipping paper, if applicable.

(iv) Within 30 days after the delivery, send a copy of the signed and dated manifest to the generator; however, if the manifest has not been received within 30 days after delivery, the owner or operator shall send a copy of the shipping paper signed and dated to the generator.

(v) Retain at the storage or disposal facility a copy of the manifest and shipping paper, if signed in lieu of the manifest, in accordance with § 761.209(d).

(3) Whenever an off-site shipment of PCB waste is initiated from a storage or disposal facility, the owner or operator of the storage or disposal facility shall comply with the manifest requirements that apply to generators of PCB waste.

**§ 761.209 Retention of manifest records.**

(a) A generator shall keep a copy of each manifest signed in accordance with § 761.208(a)(1) until the generator receives a signed copy from the designated storage or disposal facility which received the waste. The copy signed by the commercial storer or disposer shall be retained for at least 3 years from the date the waste was accepted by the initial transporter. A generator subject to § 761.180 annual document requirements shall retain copies of each manifest for the same records retention period required under § 761.180 for the annual document records.

(b)(1) A transporter of PCB waste shall keep a copy of the manifest signed by the generator, transporter, and the next designated transporter, if applicable, or the owner or operator of the designated storage or disposal facility. This copy shall be retained for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(2) For shipments of PCB waste delivered to the designated storage or disposal facility by water (bulk shipment), each water (bulk shipment) transporter shall retain a copy of the shipping paper described in § 761.208(b)(5)(ii) for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(3) For shipments of PCB waste by rail within the United States:

(i) The initial rail transporter shall keep a copy of the manifest and the shipping paper required to accompany

the PCB waste for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(ii) The final rail transporter shall keep a copy of the signed manifest, or the required shipping paper if signed by the designated facility in lieu of the manifest, for a period of at least 3 years from the date the PCB waste was accepted by the initial transporter.

(c) The owner or operator of a PCB storage or disposal facility that receives off-site shipments of PCB waste shall retain at the facility a copy of each manifest or shipping paper that the owner or operator signs in accordance with § 761.208(c)(1) or § 761.208(c)(2) for the same retention period required under § 761.180(b) for the annual document records.

(d) The periods of retention referred to in this section shall be extended automatically during the course of any unresolved enforcement action regarding the regulated activity or as requested by the Agency.

**§ 761.210 Manifest discrepancies.**

(a) Manifest discrepancies are differences between the quantity or type of PCB waste designated on the manifest or shipping paper, and the quantity of type of PCB waste a designated facility actually receives.

(1) Significant discrepancies in quantity are:

(i) For bulk waste, variations greater than 10 percent in weight.

(ii) For batch waste, any variation in piece count, such as a discrepancy of one drum or other PCB Container in a truckload.

(2) Significant discrepancies in type of PCB waste are obvious differences which may be discovered by inspection or waste analysis, such as the substitution of solids for liquids, or the substitution of high concentration PCBs (above 500 ppm) with lower concentration materials.

(b) Upon discovering a significant discrepancy, the owner or operator of the designated storage or disposal facility shall attempt to reconcile the discrepancy with the waste generator or transporter. If the discrepancy is not resolved within 15 days after receiving the waste, the owner or operator shall immediately submit to the Regional Administrator for the Region in which the designated facility is located a letter describing the discrepancy and attempts to reconcile it, and a copy of the manifest or shipping paper at issue.

**§ 761.211 Unmanifested waste report.**

(a) If a PCB storage or disposal facility receives any shipment of PCB waste from an off-site source without an accompanying manifest or shipping paper (where required in lieu of a manifest), and any part of the shipment consists of PCBs at concentrations of 50 ppm or greater, then the owner or operator of the storage or disposal facility shall prepare and submit a single copy of a report to the Regional Administrator for the Region in which the disposal facility is located within 15 calendar days after receiving the waste. The report may be submitted on EPA Form 8700–13B, or by a written letter designated "Unmanifested Waste Report." The report shall include the following information:

(1) The EPA identification number, name, and address of the storage or disposal facility.

(2) The date the storage or disposal facility received the unmanifested PCB waste.

(3) The EPA identification number, name, and address of the generator and transporter, if available.

(4) A description of the type and quantity of the unmanifested PCB waste received at the facility.

(5) The disposition made of the unmanifested waste by the storage or disposal facility.

(6) A brief explanation of why the waste was unmanifested, if known.

(b) [Reserved]

**§ 761.215 Exception reporting by generators of PCB waste.**

(a) A generator of PCB waste who does not receive a copy of the manifest with the handwritten signature of the owner or operator of the designated PCB storage or disposal facility within 35 days of the date the waste was accepted by the initial transporter shall contact the transporter and/or the owner or operator of the designated facility to determine the status of the PCB waste.

(b) A generator of PCB waste shall submit an Exception Report to the Regional Administrator for the Region in which the generator is located if the generator has not received a copy of the manifest with the handwritten signature to the owner or operator of the designated facility within 45 days of the date the waste was accepted by the initial transporter. The Exception Report shall include:

(1) A legible copy of the mainfest for which the generator does not have confirmation of delivery.

(2) A cover letter signed by the generator or an authorized representative explaining the efforts taken to locate the PCB waste and the results of those efforts.

(c)(1) A disposer of PCB waste shall submit a One-year Exception Report to the Regional Administrator for the Region in which the disposal facility is located whenever the following occurs:

(i) The disposal facility receives PCBs or PCB Items on a date more than 9 months from the date the PCBs or PCB Items were removed from services, as indicated on the manifest or continuation sheet; and

(ii) Because of contractual commitments or other factors affecting the facility's disposal capacity, the disposer of PCB waste cannot dispose of the affected PCBs or PCB Items within 1 year of the date of removal from service.

(2) A generator or commercial storer of PCB waste who manifests PCBs or PCB Items to a disposer of PCB waste shall submit a One-year Exception Report to the Regional Administrator for the Region in which the generator or commercial storer is located whenever the following occurs:

(i) The generator or commercial storer transferred the PCBs or PCB Items to the disposer of PCB waste on a date less than 9 months from the date of removal from service of the affected PCBs or PCB Items, as indicated on the manifest or continuation sheet; and

(ii) The generator or commercial storer either has not received within 13 months from the date of removal from service a Certificate of Disposal confirming the disposal of the affected PCBs or PCB Items, or, the generator receives a Certificate of Disposal confirming disposal of the affected PCBs or PCB Items on a date more than 1 year after the date of removal from service.

(3) The One-year Exception Report shall include:

(i) A legible copy of any manifest, Certificate of Disposal, or other written communication relevant to the transfer and disposal of the affected PCBs or PCB Items.

(ii) A cover letter signed by the submitter or an authorized representative explaining:

(A) The date(s) when the PCBs or PCB Items were removed from service.

(B) The date(s) when the PCBs or PCB Items were received by the submitter of the report, if applicable.

(C) The date(s) when the affected PCBs or PCB Items were transferred to a designated disposal facility.

(D) The identify of the transporters, commercial storers, or disposers known to be involved with the transaction.

(E) The reason, if known, for the delay in bringing about the disposal of the affected PCBs or PCB Items within 1 year from the date of removal from service.

**§ 761.218 Certificate of Disposal.**

(a) For each shipment of PCB waste that is delivered to a PCB disposal facility accompanied by a manifest, the owner or operator of the disposal facility shall prepare a Certificate of Disposal, which shall include:

(1) The identity of the PCB wastes affected by the Certificate, either by specific types and quantities, or by reference to the manifest document number for the shipment.

(2) The identity of the disposal facility, by name, address, and EPA identification number.

(3) A statement certifying the fact of disposal of the identified wastes, including the date(s) of disposal, and identifying the disposal process used.

(4) A certification as defined in § 761.3.

(b) The Certificate of Disposal shall be sent to the generator identified on the manifest which accompanied the shipment of the PCB wastes within 30 days of the date that disposal of the PCB wastes identified on the manifest was completed.

(c) The disposal facility shall keep a copy of each Certificate of Disposal among the records that it retains under § 761.180(b), for the same retention period that applies to its annual document records.

(d)(1) Generators of PCB wastes shall keep a copy of each Certificate of Disposal that they receive from disposers of PCB wastes among the records that they retain under § 761.180(a), for the same retention period that applies to their annual document records.

(2) Commercial storers of PCB wastes shall keep a copy of each Certificate of Disposal that they receive from disposers of PCB wastes among the records that they retain under § 761.180(b), for the same retention period that applies to their annual document records.

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Part VI

# Department of Labor

**Pension and Welfare Benefits Administration**

**29 CFR Parts 2560 and 2570**

**Final Regulations Relating to Civil Penalties and Establishing Procedures for the Assessment of Civil Sanctions Under ERISA Section 502(i)**

**DEPARTMENT OF LABOR**

**Pension and Welfare Benefits Administration**

**29 CFR Part 2560**

## Final Regulation Relating to Civil Penalties Under ERISA Section 502(i)

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Final regulation.

**SUMMARY:** This document contains a final regulation that defines the terms "amount involved" and "correction" under section 502(i) of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act). Section 502(i) of ERISA authorizes the Secretary of Labor to assess civil penalties against parties in interest who engage in prohibited transactions with certain employee benefit plans. This section generally applies to prohibited transactions involving welfare plans and nonqualified pension plans and provides for the imposition of an initial penalty of up to five percent of the "amount involved" in the underlying prohibited transaction. Section 502(i) specifies that if the prohibited transaction is not "corrected" within 90 days, the penalty may be up to 100 percent of the "amount involved." The Department of Labor (the Department) has determined that the interests of participants and beneficiaries of employee benefit plans would be advanced by the exercise of the Department's authority to assess such sanctions under ERISA section 502(i). The final regulation clarifies the manner in which the Department will assess sanctions under ERISA section 502(i) and will enable the Department to carry out its authority under that section. A separate document which contains final regulations establishing procedures for the assessment of civil penalties under ERISA section 502(i) is also being published today.

**EFFECTIVE DATE:** October 26, 1988.

**FOR FURTHER INFORMATION CONTACT:** Susan E. Rees, Plan Benefits Security Division, Office of the Solicitor, (202) 523–9141, U.S. Department of Labor, Washington, DC 20210, or Debra L. Silver, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523–8671.

**SUPPLEMENTARY INFORMATION:** Section 406 of ERISA prohibits certain transactions between an employee benefit plan and a "party in interest" (as defined in section 3(14) of ERISA) with respect to the plan. In section 502(i), Congress granted the Secretary of Labor the authority to assess civil penalties against parties in interest who engage in prohibited transactions with plans that are not subject to the excise tax imposed by section 4975 of the Internal Revenue Code (the Code). These plans include welfare plans and pension plans which are not "qualified" plans under the Code. Section 502(i) provides that the amount of the civil penalty may not exceed 5 percent of the "amount involved" in the transaction except that if the transaction is not "corrected" within 90 days after notice from the Secretary, such penalty may be in an amount not more than 100 percent of the "amount involved." Under section 502(i), the term "amount involved" has the same meaning given it in the prohibited transaction excise tax provisions of the Code. Moreover, section 502(i) directs the Secretary of Labor to issue regulations relating to the term "corrected" which are consistent with the definition of that term in the prohibited transaction excise tax provisions of the Code. On August 27, 1986, the Department published a notice in the **Federal Register** (51 FR 30501) containing proposed regulations that would provide: (1) A definition of the "amount involved" in a prohibited transaction to which the civil penalty in ERISA section 502(i) may be applied, (2) a description of the form and scope of the "correction" of a prohibited transaction which is required to avoid liability for the 100 percent penalty, (3) a description of the "correction period" for purposes of section 502(i), and (4) an illustration of the computation of the civil penalty under section 502(i).

The proposed regulation provided that the initial civil penalty under section 502(i) shall be 5 percent of the "amount involved" (and that the "second-tier" penalty discussed above shall be 100 percent of the "amount involved"). However, the proposed regulation also made it clear that the decision of an administrative law judge may incorporate a voluntary settlement by the parties for an amount less than 5 percent (or 100 percent).[1]

The Department has never assessed the civil sanctions under section 502(i) of ERISA because until now it has not issued the interpretative regulations contemplated by that section nor implemented procedures for an administrative hearing which would take into account the special features and purposes of those sanctions. In the Department's view, the section 502(i) sanction is a valuable additional enforcement tool which is necessary for the effective implementation of its ERISA enforcement program. In this respect, the Department has, in recent years, devoted more of its enforcement resources to violations involving welfare plans, and the Department anticipates that the availability of the section 502(i) sanction will assist it in resolving these enforcement matters. Thus, the Department publishes this final regulation, and, separately, final procedural regulations relating to proceedings to enforce the ERISA section 502(i) sanction.

The notice of proposed rulemaking gave interested parties an opportunity to comment on the proposal. In response, the Department received four letters of comment on the Department's proposed interpretations and procedures relating to 502(i) sanctions. The discussion below summarizes the proposed regulation and the issues raised by the comments and explains the Department's reasons for adopting the provisions of the final regulation.

### Amount Involved

The Department received only one comment, and that favorable, on the Department's proposal to adopt the definition of the term "amount involved" under the Internal Revenue Code (and regulations) for the purpose of computing the civil penalty under section 502(i) of ERISA. Thus, in light of the Congressional mandate that "amount involved" be defined under section 502(i) or ERISA as it is defined under Code section 4975(f)(4) (and the adoption of temporary regulations applying the standards developed under section 4941 of the Code for purposes of making determinations of the "amount involved" under section 4975), the Department adopts the definition of the term "amount involved" under 26 CFR 53.4941(e)–1(b) for the purpose of computing the civil penalty under section 502(i) of ERISA.

### Correction

The Department also received no critical comments on its proposal to adopt the Internal Revenue Code definition of this term. As with the term "amount involved," section 502(i) of ERISA states that the regulations for determining "correction" under that section shall be consistent with the standards of "correction" under Code section 4975(f)(5). Therefore, the Department adopts the standards of "correction" set out in 26 CFR 53.4941(e)–1(c), which construe that term for purposes of section 4975 of the Code,

[1] As provided in § 2570.6(d) of this chapter, the administrative law judge is required to incorporate the terms and conditions of any settlement agreed to by the settling parties into his decision.

for use in ERISA section 502(i) proceedings.

**The Operation of the Correction Period**

Section 502(i) of ERISA allows a party in interest to "correct" a prohibited transaction within 90 days after notice from the Secretary of Labor and thereby avoid the 100 percent second-tier penalty. The Department received no opposition to its proposal that, as a general matter, the "correction period" will begin on the date of the prohibited transaction and end 90 days after final agency action has been taken in a particular case, or a final order has been entered in a judicial review of the final agency action. The final regulation is therefore published as it was proposed. It contains cross references to limitations periods provided by the 502(i) procedural regulations and gives examples of application of this subsection. An additional example has been added to § 2560.502(i)–1(d)(3) to clarify the application of the limitation periods with regard to a final order issued by the Secretary of Labor. Section 2560.502(i)–1(d)(2) has also been clarified to indicate explicitly that the extension of the correction period is provided only in those cases where the period has not already expired—*i.e.*, when a party seeks judicial review within 90 days of any final agency order.

**The Computation of the Sanction**

The proposed regulation also illustrated the method of computing the civil penalty under section 502(i) of ERISA. Many prohibited transactions between a plan and a party in interest, such as a sale or exchange of property, involve a single prohibited act. In such cases, the computation of the amount of the civil penalty is simply five percent of the "amount involved" in the transaction. However, other prohibited transactions, such as loans or leases, are continuing in nature. In these cases, the Department proposed a regulation which provides that the sanction under section 502(i) of ERISA is separately imposed for each year during which the transaction is not corrected. Thus, as proposed, a continuing prohibited transaction would be treated as giving rise to a separate event subject to the sanction for each year (as measured from the anniversary date of the transaction) in which the transaction occurs. In the preamble to the proposed regulation, the Department indicated that this "pyramiding" approach was based on the legislative history of ERISA, which suggests that the sanction under section 502(i) of ERISA should operate in a manner similar to the prohibited transaction excise tax under section 4975 of the Code.

Two commentators objected to the Department's proposed method of computation, both arguing that multi-year leases and loans should be treated as a one time transaction for purposes of assessing a 502(i) penalty. One commentator found no basis in either section 4975 of the Code or in the applicable IRS regulations for treating continuing transaction as separate events on an annual basis, and stated that the proposed method of computation was "especially onerous" where a long-term lease or loan is not renegotiated annually. The second commentator argued that the Department's proposal to impose a separate penalty for each year in which a continuing transaction occurs is inconsistent with the plain language of ERISA section 502(i), and the Congress' failure to refer to an annual sanction in section 502(i) as it did under the analogous sections of the Code suggests that Congress did not intend for section 502(i) of ERISA to operate in the same manner as the Code provisions. Further, the commentator stated that there was no indication in the legislative history of section 502(i) of Congressional support of the Department's approach.

After careful consideration, the Department has decided to retain the method of computation on an annual basis as proposed. The Department believes that this approach is necessary to implement the intent of Congress to have the ERISA section 502(i) sanction operate in a manner similar to the parallel excise tax provisions of the Code.

Although prior to 1987 section 502(i) of ERISA did not expressly refer to an annual sanction for prohibited transactions which are continuing in nature, Congress had expressed the intent that the sanction under section 502(i) of ERISA would operate in a manner similar to the excise tax under section 4975 of the Code. Further, Congress derived the prohibited transaction provisions of ERISA from the private foundation excise tax language under section 4941 of the Code,[2] and the method of computing the tax under the private foundation excise tax regulations was well-established at the time that Congress passed ERISA.[3] In addition, in 1986 Congress expressly authorized the Department to assess civil penalties on an annual basis with respect to prohibited transactions by parties in interest to the federal Thrift Savings Fund [4] and indicated that the Secretary of Labor's responsibility to enforce fiduciary responsibilities is similar under FERSA and ERISA.[5] Moreover, on December 22, 1987, Congress amended section 502(i) of ERISA to clarify that civil penalties under that provision (as under § 4975 of the Code) were to be assessed on an annual basis for prohibited transactions that were continuing in nature. See Subtitle D of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100–203, 101 Stat. 1330–373, Part II (The Pension Protection Act of 1987), Subpart D, Section 9344.

Based on the foregoing, the Department believes that there is no indication that Congress intended to single out plans covered by 502(i) of ERISA for a different and lesser penalty. Rather, Congress has expressed its intent that each of these prohibited transaction penalty provisions serve the same function—to deter prohibited transactions. In the Department's view, the pyramiding approach adopted by the IRS in 1973 best effectuates that goal.[6]

Thus, the Department has concluded that it is consistent with Congressional intent to compute the two civil penalties under section 502(i) of ERISA in accordance with the method of computation use in the Internal Revenue Code and regulations. Therefore, on this point, the final ERISA section 502(i) regulation is published as proposed.

The proposed regulation contained two examples of how to compute the civil penalty. One example described a sale of property (involving a single prohibited act) and the other described a prohibited transaction which is continuing in nature, thereby illustrating the pyramiding approach. This latter computation was taken from the private foundation excise tax regulations at 26 CFR 53.4941(e)–(1)(e)(1)(ii), Example 2, and involves a multi-year lease. The Department received one letter of comment suggesting that an additional example should be provided involving the computation of sanctions for the prohibited lending of money. After consideration, the Department decided that the examples given in the proposed

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[2] H.R. Rep. 1280, 93rd Cong., 2d Sess. 321 (1974).

[3] Regulations under section 4941 of the Code were adopted on April 17, 1973 (38 FR 9493).

[4] Section 8477(e)(1)(B) of the Federal Employees' Retirement System Act of 1986, 5 U.S.C. 8477(e)(1)(B).

[5] Conf. Rep. 99–606, 99th Cong., 2nd Sess. 138 (1986).

[6] See note 3, *supra*. In this regard, the Department notes that section 505 of ERISA contains a broad grant of rulemaking authority. By cross-referencing the parallel Code provisions when enacting ERISA section 502(i), Congress indicated that the Department, in implementing an effective civil penalty program under that broad grant of authority, should look to the Code for guidance.

regulation are sufficient to illustrate the general principles involved in computing the sanction, and the Department is therefore publishing the final regulation as proposed in this regard. As a general matter, the Department notes its intention to follow the published opinions of the IRS with respect to prohibited transaction excise taxes in computing civil sanctions under 502(i) of ERISA.

**Regulatory Flexibility Act**

The Department has determined that this regulatory action will not have any significant impact on a substantial number of small entities, and contains no reporting and disclosure requirements. The primary purpose of the regulation is to deter individuals who manage welfare plan assets from engaging in prohibited transactions, e.g., from using such assets for their own benefit. To that extent, the regulation will enable the Department to assess civil penalties on those individuals who are found to be violating the ERISA prohibited transaction provisions. Based on enforcement experience and information filed by welfare plans on annual financial reports (Form 5500's), the Department estimates that it will identify approximately 100 cases each year which will result in penalties. Some, and perhaps many, of the penalties will involve parties in interest with respect to small plans; however, given the selective nature of the burden imposed by this regulation, the Department believes that the regulation will not have a significant impact on small employee benefit plans. In addition, the regulation will not substantially affect small entities which provide services to such plans or small entities in which such plans invest.

**Executive Order 12291**

The Department has determined that this final regulation does not constitute a "major rule" as that term is used in Executive Order 12291 because the action does not result in: An annual effect on the economy of $100 million; a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

**Paperwork Reduction Act**

The final regulation defining terms which relate to the assessment of civil sanctions under ERISA section 502(i) does not contain any new information collection requirements and does not modify any existing requirements. Thus, it is not subject to section 3504(h) of the Paperwork Reduction Act, 44 U.S.C. 3504(h).

**Statutory Authority**

The regulation is adopted pursuant to the authority contained in sections 502 and 505 of ERISA (Pub. L. 93–406, 88 Stat. 892, 894; 29 U.S.C. 1132, 1135) and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987).

**List of Subjects in 29 CFR Part 2560**

Claims, Employee benefit plans, Employee Retirement Income Security Act, Law enforcement, Pensions.

For the reasons set out in the preamble, Subchapter G of Chapter XXV of Title 29 of the Code of Federal Regulations is amended as follows:

## PART 2560—RULES AND REGULATIONS FOR ADMINISTRATION AND ENFORCEMENT

1. The authority citation for Part 2560 is revised to read as set forth below:

**Authority:** Section 502, 505 of ERISA, 29 U.S.C. 1132, 1135, and Secretary's Order 1–87, 52 FR 13139 (April 21, 1987). § 2560.502–1 also issued under Section 502(b)(2), 29 U.S.C. 1132(b)(2); § 2560.502i–1 also issued under Section 502(i), 29 U.S.C. 1132(i); § 2560.503–1 also issued under Section 503, 29 U.S.C. 1133.

2. By adding a new § 2560.502i–1 in the appropriate place to read as follows:

**§ 2560.502i–1 Civil Penalties Under Section 502(i).**

(a) *In general.* Section 502(i) of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) permits the Secretary of Labor to assess a civil penalty against a party in interest who engages in a prohibited transaction with respect to an employee benefit plan other than a plan described in section 4975(e)(1) of the Internal Revenue Code (the Code). The initial penalty under section 502(i) is five percent of the total "amount involved" in the prohibited transaction (unless a lesser amount is otherwise agreed to by the parties). However, if the prohibited transaction is not corrected during the "correction period," the civil penalty shall be 100 percent of the "amount involved" (unless a lesser amount is otherwise agreed to by the parties). Paragraph (b) of this section defines the term "amount involved," paragraph (c) defines the term "correction," and paragraph (d) defines the term "correction period." Paragraph (e) illustrates the computation of the civil penalty under section 502(i). Paragraph (f) is a cross reference to the Department's procedural rules for section 502(i) proceedings.

(b) *Amount involved.* Section 502(i) of ERISA states that the term "amount involved" in that section shall be defined as it is defined under section 4975(f)(4) of the Code. As provided in 26 CFR 141.4975.13, 26 CFR 53.4941(e)–1(b) is controlling with respect to the interpretation of the term "amount involved" under section 4975 of the Code. Accordingly, the Department of Labor will apply the principles set out at 26 CFR 53.4941(e)–1(b) in determining the "amount involved' in a transaction subject to the civil penalty provided by section 502(i) of the Act and this section.

(c) *Correction.* Section 502(i) of ERISA states that the term "correction" shall be defined in a manner that is consistent with the definition of that term under section 4975(f)(5) of the Code. As provided in 26 CFR 141.4975–13, 26 CFR 53.4941(e)–1(c) is controlling with respect to the interpretation of the term "correction" for purposes of section 4975 of the Code. Accordingly, the Department of Labor will apply the principles set out in 26 CFR 53.4941(e)–(1)(c) in interpreting the term "correction" under section 502(i) of the Act and this section.

(d) *Correction Period.* (1) In general, the "correction period" begins on the date the prohibited transaction occurs and ends 90 days after a final agency order with respect to such transaction.

(2) When a party in interest seeks judicial review within 90 days of a final agency order in an ERISA section 502(i) proceeding, the correction period will end 90 days after the entry of a final order in the judicial action.

(3) The following examples illustrate the operation of this paragraph:

(i) A party in interest receives notice of the Department's intent to impose the section 502(i) penalty and does not invoke the ERISA section 502(i) prohibited transaction penalty proceedings described in § 2570.1 of this chapter within 30 days of such notice. As provided in § 2570.5 of this chapter, the notice of the intent to impose a penalty becomes a final order after 30 days. Thus, the "correction period" ends 90 days after the expiration of the 30 day period.

(ii) A party in interest contests a proposed section 502(i) penalty, but does not appeal an adverse decision of the administrative law judge in the proceeding. As provided in § 2570.10(a) of this chapter, the decision of the administrative law judge becomes a final order of the Department unless the decision is appealed within 20 days after the date of such order. Thus, the correction period ends

90 days after the expiration of such 20 day period.

(iii) The Secretary of Labor issues to a party in interest a decision upholding an administrative law judge's adverse decision. As provided in § 2570.12(b) of this chapter, the decision of the Secretary becomes a final order of the Department immediately. Thus, the correction period will end 90 days after the issuance of the Secretary's order unless the party in interest judicially contests the order within that 90 day period. If the party in interest so contests the order, the correction period will end 90 days after the entry of a final order in the judicial action.

(e) *Computation of the Section 502(i) penalty.* (1) In general, the civil penalty under section 502(i) is determined by applying the applicable percentage (five percent or one hundred percent) to the aggregate amount involved in the transaction. However, a continuing prohibited transaction, such as a lease or a loan, is treated as giving rise to a separate event subject to the sanction for each year (as measured from the anniversary date of the transaction) in which the transaction occurs.

(2) The following examples illustrate the computation of the section 502(i) penalty:

(i) An employee benefit plan purchases property from a party in interest at a price of $10,000. The fair market value of the property is $5,000. The "amount involved" in that transaction, as determined under 26 CFR 53.4941(e)–1(b), is $10,000 (the greater of the amount paid by the plan or the fair market value of the property). The initial five percent penalty under section 502(i) is $500 (five percent of $10,000).

(ii) An employee benefit plan executes a four year lease with a party in interest at an annual rental of $10,000 (which is the fair rental value of the property). The amount involved in each year of that transaction, as determined under 26 CFR 53.4941(e)–1(b), is $10,000. The amount of the initial sanction under ERISA section 502(i) would be a total of $5,000: $2,000 ($10,000 x 5% x 4 with respect to the rentals paid in the first year of the lease); $1,500 ($10,000 x 5% x 3 with respect to the second year); $1,000 ($10,000 x 5% x 2 with respect to the third year); $500 ($10,000 x 5% x 1 with respect to the fourth year).

(f) *Cross Reference.* See §§ 2570.1–2570.12 of this chapter for procedural rules relating to section 502(i) penalty proceedings.

Signed at Washington, DC this 20th day of September, 1988.

**David M. Walker,**

*Assistant Secretary of Labor, Pension and Welfare Benefits Administration.*

[FR Doc. 88–21790 Filed 9–23–88; 8:45 am]

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## 29 CFR Part 2570

## Final Regulation Establishing Procedures for the Assessment of Civil Sanctions Under ERISA Section 502(i)

**AGENCY:** Pension and Welfare Benefits Administration, Labor.

**ACTION:** Final regulation.

**SUMMARY:** This document contains a final regulation that sets forth the procedures for the assessment of civil sanctions under section 502(i) of the Employee Retirement Income Security Act of 1974 (ERISA, or the Act). Section 502(i) of ERISA authorizes the Secretary of Labor to assess civil penalties against parties in interest who engage in prohibited transactions with certain employee benefit plans. This section generally applies to prohibited transactions involving welfare plans and nonqualified pension plans, and provides for the assessment of penalties equal to specificed percentages of the amount involved in the underlying prohibited transaction. This regulation establishes the procedural framework for such civil penalties. A separate document containing regulations which define the terms "amount involved" and "correction" under ERISA section 502(i) is also being published today.

**EFFECTIVE DATE:** October 26, 1988.

**FOR FURTHER INFORMATION CONTACT:** Susan E. Rees, Plan Benefits Security Division, Office of the Solicitor, (202) 523–9141, U.S. Department of Labor, Washington, DC 20210, or Debra L. Silver, Pension and Welfare Benefits Administration, U.S. Department of Labor, Washington, DC 20210, (202) 523–8671.

**SUPPLEMENTARY INFORMATION:** Section 406 of ERISA prohibits certain transactions between an employee benefit plan and a "party in interest" (as defined in section 3(14) of ERISA). In section 502(i) of ERISA, Congress granted the Secretary of Labor the authority to assess civil penalties against parties in interest with respect to prohibited transactions with welfare plans and pension plans which are not "qualified" plans under the Internal Revenue Code.[1] That section of the Act provides that the amount of such penalty may not exceed 5 percent of the amount involved in the transaction except that if the transaction is not corrected within 90 days after notice from the Secretary, such penalty may be in an amount not more than 100 percent of the amount involved. These final procedural rules provide for an administrative proceeding with respect to the assessment of the ERISA section 502(i) sanction. A separate final regulation dealing with the definition of the terms "amount involved" and "correction" is also being published today. As discussed in the supplementary information accompanying that publication, the Department of Labor (the Department) believes that adoption of these regulations is necessary for the effective implementation of its ERISA enforcement program.

On August 27, 1986, the Department published a notice in the **Federal Register** containing proposed regulations to establish procedures for: (1) Notification to a party in interest that the Department intends to assess the penalty provided by section 502(i), (2) requesting a hearing with respect to the matter before an administrative law judge, and (3) an appeal of an administrative law judge's decision to the Secretary or his delegate.

The Department has published rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges at 29 CFR Part 18, 48 FR 32538 (1983). The proposed regulation presented for comment several modifications to the rules set forth in 29 CFR Part 18. The proposed modifications were designed to maintain the maximum degree of uniformity with the rules set forth in 29 CFR Part 18, consistent with the special characteristics of proceedings under ERISA section 502(i). The final rules published herein relate specifically to proceedings under ERISA section 502(i) and are controlling to the extent they are inconsistent with any portion of 29 CFR Part 18.

The following discussion summarizes the specific proposed modifications to the rules in 29 CFR Part 18 and the major issues raised by the commentators, and explains the Department's reasons for adopting the final regulations published with this notice.

### General

The Applicability of these rules under ERISA section 502(i) is set forth at the outset of the procedural regulations (§ 2570.1). The definitional section (§ 2570.2) incorporates the basic

[1] The excise tax provisions of sections 4941 and 4975 of the Internal Revenue Code impose similar penalties against disqualified persons who engage in prohibited transactions with, respectively, private foundations and tax qualified benefit plans. A parallel provision of the Federal Employee Retirement System Act of 1986 assesses a similar penalty with respect to prohibited transactions involving the Federal Thrift Savings Fund. *See* 5 U.S.C. 8477(e)(1)(B).