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The Changing Landscape of PCB Regulation: TSCA Reform, EPA's Rulemaking, and Related Equipment Management Issues for Utilities

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Welcome

- Allison D. Foley (adfoley@venable.com)
- Counsel to Utility Solid Waste Activities Group (USWAG)
- Advise USWAG and its members on regulatory compliance issues, including PCB management and disposal
- On behalf of USWAG, engage with EPA regarding interpretation of existing PCB regulations and new rulemakings





Agenda

- Background: The PCB Use Authorizations
- Regulatory Developments
 - PCB ANPRM (2010)
 - Anticipated PCB Proposal (late 2012)
- Prospects for Legislative Reform
 - Pending Legislation
 - International Developments
- NYC PCB Controversy
- Next Steps for Utilities





Terminology

PCB-Contaminated	≥ 50 ppm and < 500 ppm
PCB-Containing	≥ 50 ppm
PCB Equipment, PCB Transformer, PCB Large Capacitor	≥ 500 ppm





Background: TSCA and the PCB Use Authorizations

- Toxic Substances Control Act (TSCA) passed in 1976
- TSCA Section 6(e) prohibits the manufacture, processing, distribution in commerce, and use of PCBs unless the PCBs are "totally enclosed," <u>but</u>
- Section 6(e)(2)(B) allows EPA to authorize the manufacture, processing, distribution in commerce and use of PCBs in a non-totally enclosed manner
- Authorizations for use of PCBs in electrical equipment and natural gas pipelines are set forth at 40 C.F.R.
 Part 761





Background: EPA's "No Unreasonable Risk" Finding

- In order to authorize such use, EPA must first find that it "will not present an unreasonable risk of injury to health or the environment."
- In making this determination prior to promulgating the use authorizations for PCBs, EPA considered:
 - impacts on economy;
 - impacts on electric energy availability; and
 - all other health, environmental, or social impacts that could be expected.





Regulatory Developments: Reassessment of the PCB Use Authorizations





Advance Notice of Proposed Rulemaking (ANPRM):

Reassessment of the PCB Use Authorizations

- 75 Fed. Reg. 17645 (April 7, 2010)
- Comments submitted August 20, 2010
- EPA solicited information to help the Agency:
 - Reassess the efficacy and protectiveness of the thirty-year-old use authorizations
 - Consider costs related to management and disposal of PCBs under current use authorizations
 - Weigh benefits and costs of phase-out





ANPRM (cont'd)

- Requested information on wide range of issues associated with phase-out
- Suggested phase-out dates for PCB-containing equipment
- Broad scope of contemplated interim measures:
 - Testing requirements and associated reclassification/disposal requirements
 - Elimination of servicing options, storage for reuse
 - Marking of all PCB-containing equipment
 - Increased inspection frequency
 - "PCB Article" → approx. 1.7 fl. oz. ≥50 ppm PCBs
 - Registration of PCB Large Capacitors
 - Reporting requirement when PCBs found in pipeline





Phase-Out Dates Contemplated in ANPRM

- EPA identified possible timeframes for eventual phase-out of all PCB-containing equipment:
 - By 2015: Elimination of all use of askarel equipment (≥ 10,000 ppm PCBs), beginning with highest potential exposure areas, and with allowances for case-by-case exceptions
 - By 2020: Elimination of all use of oil-filled PCB equipment (≥ 500 ppm) and elimination of use of PCBs at concentrations ≥ 50 ppm in pipeline systems
 - By 2025: Elimination of all use of any PCBcontaminated equipment still authorized for use





Industry Response to ANPRM

- Main themes of USWAG comments:
 - Existing regulations have proven effective in ensuring adequate protection of human health and the environment
 - Reversal of the original "no unreasonable risk" finding is not justified by <u>risk</u> or <u>cost</u>
 - Risk:
 - Current data demonstrate that PCBs are less toxic than was thought in 1979
 - Far less exposure today than in 1979 as there are far fewer PCBs in use
 - <u>Cost</u>: Cost of phase-out, including necessary identification, far greater today (> \$20 billion for utility industry)
 - Identification required for phase-out would present serious safety risks and necessitate widespread outages/service disruptions





Industry Response to ANPRM (cont'd)

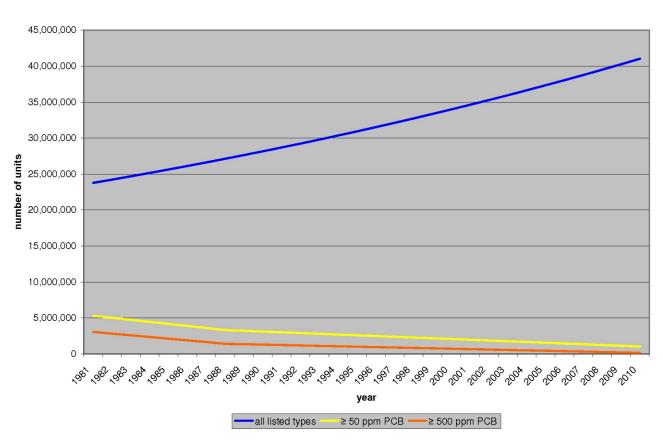
- Conducted survey of USWAG member companies to compile data on current inventories, equipment management practices, and costs associated with accelerated disposal/ultimate phase-out of PCBcontaining equipment
- Worked with consultant at ENVIRON, Inc. to establish industry-wide inventory estimates, track phase-down progress, and project phase-out dates for PCBcontaining equipment based on current disposal rates
 - PCB Large Capacitors down from estimated 2.8 million in 1982 to 120,000 today (98% reduction)
 - All PCB-containing transformers projected to be removed from service by 2030





ENVIRON Estimates of Phase-Down Progress Since 1981

FIGURE 1: CHANGES IN EQUIPMENT INVENTORIES SINCE 1981







ENVIRON Estimates of Phase-Down Progress Since 1981

<u>E</u>	quipment Category	<u>1981-82</u>	<u>2009-10</u>
>	PCB-contaminated transformers	2,166,159	892,458
>	PCB Transformers	259,558	97,610
>	All types* of PCB-containing		
	equipment (≥ 50 ppm)	5,303,921	1,141,241
>	All types* of PCB equipment		
	(≥ 500 ppm)	3,062,645	217,834



9.43% 2.3%

Percentage of total universe of equipment with ≥ 500 ppm PCBs:

12.9%

0.54%





Response to ANPRM – Other groups

- General Electric: focus on science, toxicity
- AGA, INGAA: natural gas transmission/distribution
- NRECA: focus on small business impacts
- NACUBO: urge use authorization for caulk
- DOE: Phase-out costly, timeline unrealistic
- Others:
 - Testimony from concerned parents regarding PCBs in schools
 - Comments from AFT urged EPA to withdraw use authorization for intact small caps





Proposed Rule Reassessing PCB Use Authorizations: Schedule, Status, and Scope





Schedule for Proposal

- Political considerations → Accelerated schedule
 - Regulatory agenda: April 2013
 - Current target: Publication by end of 2012
 - To OMB by summer of 2012
 - Goal: Publish before new administration
 - OPPT has reviewed comments
 - Now turning to drafting





Scope of Proposal

- Scope significantly narrower than ANPRM
 - Influence of public comments
 - EPA resources, budget
 - Data needs associated with risk finding
- Now focusing on phase-out of:
 - Known PCB Transformers, Large Caps
 - Askarel equipment
- Less sweeping interim measures
 - Marking: likely only for equipment removed from service/de-energized
 - Large Cap registration database





Scope of Proposal (cont'd)

- Likely restriction/removal of some existing provisions:
 - Storage for reuse (even in 761.65(b) facility)
 - Continued use of porous surfaces (761.30(p))
- EPA has moved away from certain troublesome concepts in ANPRM
 - Not changing definition of "article" or associated definitions (Large capacitor, Small capacitor)
 - Not changing 50 ppm regulatory threshold





Scope of Proposal (cont'd)

- Options EPA is considering for natural gas pipelines include:
 - Sampling Procedures Modifications
 - Recordkeeping and Reporting Requirements
 - Release Response Requirements
 - General Reduction and Remediation Measures
- Data collection: 50 targeted companies





Legislative Developments: "The Safe Chemicals Act of 2011"





Prospects for TSCA Reform

- Reform has support of key industry and environmental groups
- Advocates for TSCA reform include American Chemistry Council (ACC), Dow Chemical, and many environmental groups
- Current regulations promulgated under authority of TSCA (§ 6(e))
- Bottom line: EPA's PCB rulemaking effort could be meaningless if TSCA legislation succeeds





The Safe Chemicals Act of 2011

- Introduced by Senator Frank Lautenberg (D-NJ),
- Similar to versions released in previous years
- Key provisions:
 - Promote the use of safer alternatives;
 - Shift the burden of demonstrating chemical safety to manufacturers, processors, and importers of chemical substances;
 - Replace TSCA § 6(e) entirely; new standard for PCB use authorizations
 - Upon ratification of international treaties, implement goals and timelines for phase-out of PCB-containing electrical equipment





The Safe Chemicals Act of 2011 (cont'd)

- Wholesale replacement of § 6(e)
 - "Unreasonable risk" → "Substantial endangerment"
 - Likely intended to be more stringent
 - Would require re-promulgation of use authorizations/reassessment under new standard
- Practical impact upon enactment
 - Current use authorizations no longer valid
 - Immediate state of non-compliance
- Unlikely that this is the intent of drafters





The Safe Chemicals Act of 2011 (cont'd)

- Upon ratification, EPA must implement provisions of treaties including Stockholm Convention,
 LRTAP POPs Protocol
 - Stockholm & LRTAP call for elimination of PCBs
 - Stockholm: Targets PCB Equipment by 2025
 - Could supersede EPA's use authorizations
 - U.S. a signatory to both; has ratified neither
- Preemption
 - SCA would eliminate TSCA's preemption provision
 - States could adopt more stringent rules





Pressure to Implement Stockholm Convention Measures in Federal Law

- It appears unlikely that any comprehensive
 TSCA reform bill will be passed this year,
 though bill continues to work through Congress
- TSCA reform will be on the table in 2012
- In the meantime, public pressure is mounting on Congress and regulators
 - Media attention stemming from events in NYC





Discovery of PCBs in New York City Schools





Original Discovery of PCBs in School Caulk

- 2004: Parent of NYC student had crumbled caulk sampled for PCBs
 - Found levels hundreds of times above regulatory limit of 50 ppm
 - NYC schools agreed to spend \$100,000 on clean-up, including contaminated soil
 - Story highlighted in New York Times
- 2008: New York Daily News article alleging PCB contamination in window sills, door frames in more than 250 NYC public schools





Public Outrage Over Discovery of PCBs in School Buildings







Lawsuit Over PCBs in NYC Schools

- 2009: Bronx mother files notice of intent to sue NYC Dept. of Education and NY School Construction Authority (NYSCA)
 - demands sampling of caulk and soil at all NYC schools and appropriate remediation
- 2010: NYC DOE and NYSCA reach agreement with EPA Region 2
 - Originally focused on identification of contaminated caulk and associated remediation
 - Focus quickly shifted to school light fixtures





Investigation of School Light Fixtures

- As of early 2011, every school inspected found to have leaking light ballasts containing PCBs
 - Even where old fixtures replaced, the new ballasts were often installed in the original contaminated fixtures
- EPA Region 2 reports that 78% of all samples taken in NY schools in January and February 2011 contain PCBs at concentrations ≥ 50 ppm







City and Public Response to Discovery of PCBs in School Light Fixtures

- Investigation and its findings received significant media attention
- EPA and NYC officials repeatedly assured the public that the PCBs did not pose an immediate health risk
 - Did not quiet parents' calls for a shut-down of all affected schools pending clean-up
 - Bloomberg administration claimed that removal of all pre-1980 light fixtures would cost \$1 billion
 - Framed as a jobs issue; cost equated to salary of 15,000 teachers





Current Status of Identification and Clean-up

- February 23, 2011:
 - NYC announces plan to replace old light fixtures in two-thirds of City schools (772 schools)
 - Project planned to take 10 years
 - Estimated cost: \$708 million
- In response, EPA has suspended its own inspections of NYC schools
- Second lawsuit filed in July
 - Federal court (E.D.N.Y.)
 - Alleging violations of TSCA based on presence of PCBs





What does this mean for utilities?





PCB-Contaminated Building Materials May Be Found in Many Buildings

- Given prevalence of PCB use in a range of building materials throughout the twentieth century, likely that PCBs will continue to be detected in pre-1980 schools and other public and commercial buildings
- NYC results suggest that there will be wide variation in PCB concentration from one source to the next
- Debate over toxicity of PCB continues, but public pressure mounting





Implications of NYC PCB Controversy

- Public pressure mounting on EPA
 - Renewed attention to 50 ppm level
 - Could generate new toxicity data
 - Reason EPA is putting off non-liquid rule
- Concerns regarding public perception and policy could influence upcoming rulemaking
- Proving relevant to existing regulatory issues
 - Site clean-ups and regional approvals





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