Evolving EPA Guidance on Non-Liquid PCBs and the Upcoming Proposal to Reassess the PCB Use Authorizations

Allison D. Foley  
Venable LLP  
ADFoley@Venable.com  
202.344.4416

MD-DC Utilities Association  
2015 Environmental Conference  
Wednesday, October 21, 2015
PCBs in Building Materials

EPA’s Evolving Policy;
Related Compliance and
Enforcement Considerations
PCBs in Building Materials – Background

• Non-liquid PCBs used in manufacture of certain building materials – *e.g.*:
  – Plastics/plastic insulation (wire, cable)
  – Paints, waxes, varnishes, other sealants
  – Caulk
  – Adhesives
  – Potting material of fluorescent light ballasts

• Can deteriorate/crumble/become detached
• Can penetrate substrate/underlying building material
Terminology

- **PCB-Contaminated**: ≥ 50 ppm and < 500 ppm PCB
  - “PCB Containing”: not defined term; generally referring to PCBs at any regulated levels (i.e., ≥50 ppm)

- **Excluded PCB Products**
  - Broad exclusion for materials containing < 50 ppm PCB, if legally manufactured, processed and distributed in commerce prior to October 1, 1984

- **PCB Bulk Product Waste**
  - Waste derived from manufactured products containing PCBs in non-liquid state, where PCBs ≥ 50 ppm at time of disposal
PCB Bulk Product Waste vs. PCB Remediation Waste

• **PCB Bulk Product Waste (§ 761.62)** – waste derived from a manufactured product containing PCBs in a **non-liquid** state where the concentration at disposal is ≥ **50 ppm**
  - PCB-containing **liquid** products are **not** PCB bulk product wastes; dispose of per 40 C.F.R. §761.60(a)

• **PCB Remediation Waste (§ 761.61)** – waste containing PCBs as result of a spill, release, or other unauthorized disposal, from ≥50 ppm source or unauthorized use
  - Historically: Substrate impacted by the PCB bulk product waste would be PCB Remediation Waste
PCB Bulk Product Waste – EPA’s October 2012 Reinterpretation

- EPA’s reinterpretation of definition of “PCB bulk product waste”
- Includes within definition **building materials** (i.e., substrate) “coated or serviced” with PCB bulk product waste (e.g., caulk, paint, sealants)
  \(\rightarrow\) **Provided** the PCB bulk product waste is **attached** to the substrate **at the time of designation for disposal**

- Prior to reinterpretation, would have had to dispose of PCB-contaminated building material as PCB remediation waste
PCBs in Building and Lighting Materials: Regulatory Status

• No use authorization for PCBs in non-liquid uses, including building materials (e.g., caulk, paint) or lighting materials

• PCB Mega-Rule:
  - EPA floated idea of use authorization in 1994
  - In Mega-Rule, declined to proceed
    - ... but stated that “owners and operators will not be required to remove fluorescent light ballasts prior to the end of their useful life”

• EPA has issued guidance over the years addressing PCBs in non-liquid uses and in lighting materials
PCBs in Fluorescent Light Ballasts (FLBs)

• If PCBs in FLB only in an **intact and non-leaking** PCB Small Capacitor ➔ may be disposed of in MSWLF
  - Storage, manifesting and notification requirements **do not apply**
PCBs in Fluorescent Light Ballasts (cont’d)

• If PCBs in **potting material** $\geq$ 50 ppm PCB $\rightarrow$ **PCB bulk product waste** ($\S 761.62$)
  - ... or decontaminated per $\S 761.79$

• No regulatory requirement to test potting material prior to disposal
  - But, as always ... have to be right
PCBs in Fluorescent Light Ballasts – Labeling

- FLBs manufactured between July 1, 1978 and July 1, 1998 must be labeled “No PCBs” if they do not contain PCBs
  - Of similar durability & readability as other electrical information marking
  - FLBs manufactured after 1998 not required to be labeled

- EPA: If not labeled and date of manufacture not known to be after 1979, assume to contain PCBs
FLB Labeling

A typical pre-1979 PCB-containing fluorescent light ballast (FLB)

A typical Non-PCB containing fluorescent light ballast. The ballast has a "No PCBs" marking on the top of the ballast and the text "electronic ballast". Only magnetic fluorescent light ballasts contained PCBs.

Image taken from EPA’s online guidance compendium:
http://www.epa.gov/wastes/hazard/tsd/pCBS/pu/ballasts.htm
Storage of FLBs

• FLBs with $\geq 50$ ppm PCB in potting material (BPW) subject to storage for disposal requirements of §761.65
  - *i.e.*, storage up to one year in storage unit meeting §761.65 requirements (or up to 30 days in temporary storage facility)

• **But note:** FLBs may be stored **at the point of generation** for up to **180 days** in units not meeting §761.65 standards
  → Comply with conditions at §761.65(c)(9)

• **Commercial storage:** Facilities storing FLBs with regulated levels of PCBs from **non-related entities** subject to “commercial storer” regulation
EPA Guidance – Coal Tar Wrap

EPA letter to KeySpan (now National Grid) re: regulatory status of coal tar wrap (June 22, 2006):

• "The use of PCBs in coal tar wrap to prevent corrosion on the exterior of the piping has never been authorized by [EPA] ..."

• "Because its use is unauthorized and there is a potential for exposure, PCB-containing coal tar wrap must be removed and replaced upon discovery."

• "Disposal of this material is covered by the current PCB regulations as PCB bulk product waste ..."
EPA Compendium of Guidance: PCBs in Caulk and Building Materials

EPA Guidance on Caulk and Other Building Materials

→ [www.epa.gov/pcbsincaulk](http://www.epa.gov/pcbsincaulk)

- Much of this information developed in response to discovery of PCBs in caulk, FLBs in school buildings
- Geared towards school administrators and contractors
  → ... But most information/guidance is of broad applicability
EPA’s “PCB in Building Materials Diagram”

**Actions for Reducing Exposures to PCBs in Indoor Building Environments**

**1950 to 1979**

EPA believes that there was potentially widespread use of PCB-containing building materials in schools and other buildings built or renovated between about 1950 and 1979.

**Recommended Actions**

- Remove all PCB-containing Fluorescent Light Ballasts and any PCB-stained fixtures
- Implement best management practices: proper ventilation, cleaning, and hygiene.

**Renovation and Repair**

Remove other PCB sources (e.g., PCB-containing caulk) during planned renovation and repairs.
EPA Q&A re: PCBs in Building Materials (July 2015)

• Agency acknowledges compliance predicament presented by PCBs in building materials
• Emphasis on reducing PCB exposures

→ “Although the presence of PCBs in schools and other buildings may be a concern, the presence of PCBs alone is not necessarily a cause for immediate alarm”

→ “If PCBs are present or suspected of being present, EPA recommends the actions outlined in this document be taken by ... building owners and building managers to reduce PCB exposures”
EPA Q&A re: PCBs in Building Materials (cont’d)

• Agency acknowledges that TSCA prohibits the use of ≥50 ppm PCBs in caulk/other building materials ...

• EPA “does have enforcement tools” to be used “where the PCB concentration in the caulk or other materials is above the regulatory limit,” but ...

→ “EPA is most interested in ensuring that school districts and other building owners undertake the recommended actions to limit exposures to PCBs...

→ “EPA believes that enforcement may not be the most effective tool to reduce health risks when schools and other building owners follow these recommendations.”
Limitations of EPA Guidance

• Guidance only; does not change regulations; **not a use authorization**

• EPA re July 2015 guidance: intended as “informal reference” and “not a summary of applicable PCB requirements”

  ➔ Q&A “does not replace nor supplant the requirements of the [TSCA] PCB regulations”

  ➔ EPA “will not hesitate to act in situations where ... significant risks to public health” not being addressed

  ➔ Refers users to 40 C.F.R. Part 761
EPA’s Rulemaking to Reassess the PCB Use Authorizations

Recent Developments
Regulatory Developments: Timeline

- **April 2010**: Advance Notice of Proposed Rulemaking (ANPRM)
- **April – Aug. 2010**:  
  - Public comment period  
  - Multiple public hearings on ANPRM
- **July 2013**: Announcement of SBAR Panel
- **Dec. 2013**: SBAR Pre-Panel Kick-Off Meeting
- **Feb. 2014**: Convention of SBAR Panel
- **April 2014**: SBAR Panel Report Submitted to EPA
- **~March 2016 – July 2016**: Current target date for proposal  
  - Public comment period  
  - EPA will consider and respond to comments prior to issuing final rule
EPA’s PCB Rulemaking

- EPA now looking to **reassess** the existing use authorizations
- In forthcoming proposal, EPA likely to attempt to show that:
  - The **risk** from PCBs in electrical equipment is greater today than in 1979 because either
    - ... the **toxicity** of PCBs is greater than previously believed, and/or
    - ... there is greater **exposure** to PCBs
  - The **costs** associated with mandatory phase-out are less today than they would have been in 1979.
PCB Rulemaking –
Advanced Notice of Proposed Rulemaking

• ANPRM – broad in scope
  - *Not a proposal.* EPA solicited feedback on various issues.
  - Posed hundreds of questions regarding use, inventory, storage disposal of PCB-containing equipment
  - Framed in terms of *mandated phase-out dates* for PCB-containing equipment
  - Suggested various *interim use conditions* prior to phase-out deadlines

• Generally, did not distinguish between “known” vs. “unknown” PCB-contaminated/PCB equipment
2010 ANPRM (cont’d)

• EPA solicited information to help the Agency:
  - Reassess the efficacy and protectiveness of the 30-year-old use authorizations
  - Consider costs related to management and disposal of PCBs under current use authorizations
  - Weigh benefits and costs of phase-out

→ **Bottom line:** ANPRM signaled EPA’s attempt to develop administrative record to support reversal of its original “no unreasonable risk” determination for PCBs
PCB ANPRM (cont’d)

• Specific issues raised in ANPRM included:
  - Reclassification/servicing procedures
  - Marking all ≥50 ppm PCB equipment
  - Increased inspection frequency
  - 761.30(p)
  - Potential broadening of PCB Article to include all equipment with >0.05 liters (~1.7 oz) of ≥ 50 ppm PCB dielectric fluid
  - Potential registration requirement for Large PCB Capacitors

→ Implicit requirement of measures contemplated in ANPRM: system-wide sampling of equipment
Industry Response to ANPRM

• USWAG compiled member company information on current inventories, equipment management practices, and costs associated with accelerated disposal/ultimate phase-out of PCB-containing equipment
  
  - Estimated cost of sampling associated with phase-out: $21 billion
  - PCB Large Capacitors down from estimated 2.8 million (1982) to 120,000 (2010)
    → Represents a 98% reduction
  - All PCB-containing transformers projected to be removed from service by 2030
ENVIRON, Inc. Estimate: PCB Phase-Down Progress Since 1981

FIGURE 1: CHANGES IN EQUIPMENT INVENTORIES SINCE 1981

© 2015 Venable LLP
Small Business Advocacy Review (SBAR) Panel

- Convened pursuant to the Small Business Regulatory Flexibility Act (SBREFA)
  - **Goal:** Consider impact of proposed regulatory measures on “small entities,” including electric cooperatives

- Panel comprised of representatives from:
  - EPA (Small Business Office, OPPT)
  - Office of Management & Budget (OMB)
  - Small Business Administration (SBA)

- “Small Entity Representatives” (SERs) invited to listen, provide feedback and written comments to Panel
PCB Rulemaking:  
(Expected) Scope, Post-SBAR Panel

• Scope of rulemaking appears to be **significantly narrower** than in 2010

• Four key areas:
  1. PCBs in electrical equipment
  2. PCBs in fluorescent light ballasts
  3. Continued use of PCB-contaminated porous surfaces
  4. PCBs in natural gas pipelines

• *Note – While this is subject to change, EPA appears to have moved away from at least some of the troubling suggestions in the ANPRM*
Anticipated Rulemaking – PCB-Containing Electrical Equipment

• Possible phase-out of PCB Transformers and PCB-Contaminated transformers
  - Initially, would have applied to all transformers falling within either category
  - Wouldn’t have been limited to “known”
  - So, like measures in ANPRM, would require massive sampling effort to ensure compliance
  - EPA responded to comments received following SBAR kick-off meeting ...

⇒... In Feb. 2014 presentation, contemplated measures limited to known PCB Transformers/PCB-Contaminated transformers
Anticipated Rulemaking – PCB-Containing Electrical Equipment

• PCB Transformers – Possible date for termination of use authorization:
  – 2020, 2025, 2030 (i.e., 5, 10, 15 years after rule)
  → EPA also sought input regarding length of “grace period” to dispose of (previously unknown) PCB Transformers following discovery

• Options for amending Storage for Reuse authorization for PCB Transformers:
  – Revoke after 1 year (i.e., 2016)
  – Revoke after 2 years (i.e., 2017)
  – Revoke after 5 years (i.e., 2020)
  – Revoke after 10 years (i.e., 2025)
Anticipated Rulemaking – PCB-Containing Electrical Equipment

• PCB-Contaminated transformers – Possible date for termination of use authorization:
  - 2020, 2025, 2030 (i.e., 5, 10, 15 years after rule)
  → EPA’s cost projections based on assumptions: dispose of 95% of PCB-contaminated transformers, reclassify 5% to <50 ppm

• Only option presented for servicing of PCB-contaminated transformers:
  - Prohibition of all servicing except to reclassify to <50 ppm

• Options for amending Storage for Reuse authorization for PCB Transformers – mirrored those presented for PCB Transformers
Anticipated Rulemaking – PCB-Containing Electrical Equipment

• Possible phase-out of other types of PCB-containing equipment
  - Unfortunately, other measures considered by EPA not limited to “known”
  - ... In other words, sampling would still be (implicit) requirement of phase-out requirements for voltage regulators, capacitors, cable, etc.

• EPA still appears to believe that “little if any of this equipment exists or contains PCBs”

• Only option presented:
  - Revoke use authorization within 1 year (i.e., 2016) of final rule
Anticipated Rulemaking – Fluorescent Light Ballasts

- Fluorescent Light Ballasts:
  - Potentially regulated universe:
    • Daycare centers and primary/secondary schools;
    • Daycare centers, primary/secondary schools, hospitals and public housing; or
    • All public and commercial buildings
  - Regulatory options under consideration:
    • Revoke use authorization for PCBs in small capacitors in FLBs in 1, 3, or 5 years; or
    • Revise use authorization for PCB small capacitors to require identification of leaking PCB FLBs

\[\text{Driven by developments in New York City schools}\]
Anticipated Rulemaking – Continued Use of Porous Surfaces

- Options presented for §761.30(p):
  - **Option 1**: No modification
  - **Option 2**: Require notification
    - 2a) retroactive notification (i.e., including past uses of the authorization)
    - 2b) prospective only
  - **Option 3**: Require deed restriction
  - **Option 4**: Restrict to “low occupancy” areas
    - **Note**: EPA suggested that industry requested this change.
    - Industry has focused on types of locations where this is used, i.e., accessibility to public
Anticipated Rulemaking – Natural Gas Pipelines

• EPA concerned about instances where PCBs reached residential meter “and beyond”

• October 2011 – Data submission request to natural gas pipeline owners
  - Received 21 responses
  - 150 reported instances of discovery of PCBs ≥50 ppm

• Regulatory options under consideration:
  - Require reporting to EPA regions and/or affected customers where PCBs ≥ 50 ppm released to customer meters
  - Require reporting to EPA regions of all discoveries PCBs ≥50 ppm
  - Considering “prove out” option for “dry” systems (until any PCB hit)
A note about the EPRI Predictive PCB Database

• Intended as tool to guide proactive/voluntary ID and removal efforts
  – Provides additional information to better inform decision-making regarding equipment that is difficult to sample (due to, e.g., accessibility, cost, safety considerations)

• Does not change regulatory status of equipment
  → **Does not relieve anyone of any regulatory obligation** (e.g., use conditions/disposal requirements)
  → Existence of database **does not change use assumptions** or render equipment PCB-Contaminated / PCB Transformer
  → **Significance in “known” vs. unknown context?**
PCB Rulemaking – Next Steps

• OPPT completes drafting
• Proposal goes to OMB
• Publication in Federal Register
  – EPA’s Online Rulemaking Portal: March 2016
  – More likely: June-July 2016
• Following proposal:
  - Public comment period; may be extended
  - May be additional public hearings
  - EPA will review, respond to comments before issuing final rule