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

AUG 13 1999

OFFICE OF
PREVENTION, PESTICIDES AND
TOXIC SUBSTANCES

M. Kelly McTigue
McClintock, Weston, Benshoof,
Rochefort, Rubalcava & MacCuish LLP
444 South Flower Street
Forty Third Floor
Los Angeles, California 90071

Dear Mr. McTigue:

This letter is in response to your inquiry of July 6, 1999. In your letter you request an interpretation of the PCB Disposal Amendments as they apply to a property named PH Property in Waianae, Oahu, Hawaii. My staff has reviewed your inquiry and our response follows.

You describe a property in which PCB contamination of the soil resulted from crushed capacitors containing PCBs. After the contamination of the soil was initially discovered in 1996, the soil was later disturbed during a cleanup effort, resulting in the spread of the PCB contamination. As a result of this disturbance, the PCB concentration in the soil was diluted. You request our approval that the soil can be remediated based on the "as found concentration" that currently exists, not the original concentration initially discovered in 1996. You base your argument on the fact that the PCB Disposal Amendments allow the cleanup of PCB remediation waste based on the "as-found concentration". Additionally, in your letter you state that "[t]he 'anti-dilution rule' does not apply to cleanup and disposal conducted pursuant to Section 761.61 of the above-referenced PCB disposal rule." You also state that "[t]he provision in Section 761.61 directing that persons cleaning up and disposing of PCB Remediation Wastes do so based on the concentrations at which the PCBs are found, applies as of the effective date of the rule, or no earlier than the date the rule was signed."

Your interpretation of the provision in Section 761.61 is correct. The anti-dilution provision is waived for waste classified as PCB remediation waste under Section 761.61. Your client may clean up the property using the PCB concentration "as-found" on the effective date of the rule, August 28, 1998. The anti-dilution provision is only waived once for PCB remediation waste. If the waste on the property is further diluted (i.e., put into piles or barrels, spread around, etc.), it must still be cleaned up and disposed of using the "as-found concentration" on August 28, 1998. Please be advised that even if the property is successfully cleaned up in accordance with Section 761.61, your client or the previous owner of the property may be subject to

enforcement action for disposal practices at the site prior to August 28, 1998. The EPA Regional Office in Region IX can provide more information on these possible violations.

We would like to take this opportunity to clarify a few additional points in your letter. You state that waste containing less than 50 ppm PCBs is not regulated as a TSCA waste. This statement is incorrect. The definition of PCB remediation waste at Section 761.3 includes "materials which are currently at any concentration if the PCBs are spilled or released from a source not authorized for use under this part". Additionally, you are incorrect in stating that the Spill Cleanup Policy can be used to cleanup a site and the waste can then be disposed of in accordance with Section 761.61. If the Spill Cleanup Policy is used to cleanup a site, the policy must be followed in its entirety in order to attain the benefits of using the policy. Additionally, if Section 761.61(a) is used to cleanup a site, if must also be used in its entirety. Your client may not cleanup a site in accordance with the Spill Cleanup Policy and then dispose of the waste in accordance with Section 761.61. Your client must dispose of waste from a cleanup under the Spill Cleanup Policy in accordance with the requirements that apply to the concentration of the original material before it was spilled. For example, if askarel dielectric fluid ≥500 ppm PCBs from ruptured capacitors spilled onto soil, and the contaminated soil was cleaned up under the Spill Cleanup Policy, the soil must be disposed of in an incinerator as if it were PCB liquid ≥500 ppm.

We appreciate your inquiry on this matter. If you have any further questions, please call Max Weintraub at (415) 744-1129 or Yosh Tokiwa at (415) 744-1118.

Sincerely,

for John W. Melone, Director
National Program Chemicals Division

cc: Max Weintraub, Region IX
Yosh Tokiwa, Region IX

McCLINTOCK | WESTON
BENSHOOF | ROCHEFORT
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ATTORNEYS AT LAW

kmctigue@mcclintock.com

July 6, 1999

VIA UPS NEXT DAY

John Melone
Director, National Program Chemicals Division
Office of Pollution Prevention and Toxics
United States Environmental Protection Agency
401 "M" Street
Mail Code 7404
Washington, D.C. 20460

Re: PCB Disposal Rule

Dear Mr. Smith:

This firm represents PH Property Development Company ("PH Property") in certain matters relative to their Maili Kai subdivision project in Waianae, Oahu, Hawaii. By this letter we are requesting your concurrence with our understanding of EPA's recent rule -- "Disposal of Polychlorinated Biphenyls" (PCBs), published in the Federal Register on June 29, 1998, and its application to the PH Property site described below. In particular, we would like confirmation that:

1. The "anti-dilution rule" does not apply to cleanup and disposal conducted pursuant to Section 761.61 of the above-referenced PCB disposal rule.

2. The provision in Section 761.61 directing that persons cleaning up and disposing of PCB Remediation Wastes do so based on the concentrations at which the PCBs are found, applies as of the effective date of the rule, or no earlier than the date the rule was signed.

I. BACKGROUND

Before proceeding with the legal analysis of the PCB disposal rule provided in the next section of this letter, we first provide a brief overview of the background of this matter.

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(Please note that we have already provided substantial information in the form of reports and other submittals to Region IX.)

On or about December 11, 1996, several small capacitors were discovered during clearing and grubbing operations for construction of 4,760 foot long emergency access road at the Maili Kai subdivision located in Waianae, Oahu, Hawaii. PH Property is the owner of the property. Work was halted and an emergency response hazardous waste contractor was mobilized to the site on December 11 and 12, 1996.

The initial response activities consisted of removing the capacitors and a two-foot buffer zone of soil around the wet or stained soil observed in the discovery area, and placing the material on plastic sheeting in a temporary containment area. The capacitors were observed to be rusted and crushed. Two of the capacitors were found to contain fluid that was sampled and tested by the emergency response contractor. The test results showed that PCB-1284 was detected at 790,000 mg/kg and 360,000 mg/kg in the two samples. The capacitors, soil and plastic sheeting were subsequently packaged into DOT-approved drums, manifested and shipped to a licensed disposal facility on the mainland.

A two-phased investigation was completed in 1997 that included collecting 128 soil samples (excluding background samples) from the roadway and adjacent soil stockpiles. The results showed that low levels of PCB were present over approximately 700 linear feet of roadway. Sixty-two percent of the soil samples tested did not detect PCBs or contained less than one milligram per kilogram (mg/kg) PCBs. Thirty-three percent of the road samples had concentrations between 1 and 50 mg/kg. The remaining samples (less than five percent of the total) had PCB concentrations ranging from 52 to 767 mg/kg. Based on these test results, PH Property's environmental consultant estimates that approximately 1,000 to 1,200 cubic yards of soil have been contaminated with PCBs in concentrations of 1 mg/kg or greater. However, even with very conservative volume estimates, less than 10 percent of that soil in the impacted section of roadway has concentrations greater than 50 mg/kg, which is the level at which the waste is regulated as TSCA waste.

Following the PCB characterization, PH Property completed a preliminary evaluation of alternatives for treating or removing the contaminated soil from the site. Onsite treatment technologies were initially evaluated, but then dismissed due to concerns over technical effectiveness, cost and potential long-term trailing liability at the site. The remaining alternatives that were further evaluated included the following:

- ❑ Local disposal of non-hazardous soil (less than 50 mg/kg) and either mainland incineration or mainland Class I landfill disposal of TSCA soil (greater than 50 mg/kg); and

- ❑ Mainland incineration or Class I landfill disposal of all soil (greater than 1 mg/kg).

The estimated costs for the first set of alternatives are slightly less than $500,000. The estimated costs for the second set of options ranges from $1,300,000 to $4,200,000 depending on whether mainland Class I disposal or incineration is implemented. If local disposal in the Hawaii landfill is not permitted, all excavated soil may be shipped to the mainland for disposal since there are no licensed Class I disposal facilities in Hawaii. The primary factors driving costs for the mainland disposal or incineration are disposal fees ($100/ton), incineration ($1,400/ton) and shipping fees ($400/ton).

In the first set of options where the majority of the excavated soil would remain in Hawaii, the soil less than 50 mg/kg would be disposed at a licensed Subtitle D lined landfill that is owned by the City and County of Honolulu ("CCH"). Both the landfill operator (Waste Management of Hawaii) and CCH have tentatively approved receiving the PCB impacted soil pending EPA approval that the soil containing less than 50 mg/kg PCBs is not considered a TSCA waste. Further, the local landfill has already accepted over 6,000 cubic yards of soil impacted with low levels of PCBs from the U.S. Navy (an amount of contaminated soil that greatly exceeds the 1,000 cubic yards of contaminated soil in PH's case).

The State of Hawaii Department of Health ("DOH") requested that PH Property perform a removal action to address the PCB impacted soil on the site. PH Property submitted a package titled *Notification and Certification for Disposal of PCB Contaminated Soil, Maili Kai Emergency Access Road, Waianae, Oahu, Hawaii*, dated February 18, 1999 to EPA Region IX and DOH. This package satisfies all DOH requirements for a removal action and all EPA requirements to perform a self-implementing cleanup and disposal in accordance with 40 C.F.R. 761.61(a).

II. LEGAL ANALYSIS

We read the rule to provide a variance to the anti-dilution rule, to the extent that it applies in this situation, and to dictate that we use the concentrations of PCBs found at the site as of the effective date of the rule, regardless activities at the site prior to the effective date of the rule. Accordingly, we believe that the PCB Disposal rule, and particularly section 761.6, provide the legal authority to dispose of PCB remediation waste with concentrations less than or equal to 50 ppm in an on-island municipal solid waste landfill.

A. The Anti-dilution Rule Does Not Apply to Cleanup and Disposal Undertaken Pursuant to Section 761.61

The preamble to the new rule indicates that while the anti-dilution rule generally remains in effect, specific variances from the anti-dilution rule, including for PCB remediation wastes, have been included in the provisions of subpart D. Specifically, the preamble provides:

> "Any specific variances from the anti-dilution provision, *such as for certain PCB remediation wastes,* have been included in the appropriate provisions of subpart D of part 761."

63 Fed. Reg. at 35388 (emphasis added). The preamble also notes:

> "In finalizing several variances from the anti-dilution rule, EPA is simply recognizing that where PCBs have already been released, the critical disposal issue is to mitigate the damage from the release."

Id. That is exactly what §761.61 in general does -- mitigate the damage while protecting human health and the environment.

The language of §761.61 itself also indicates that the anti-dilution is not applicable to materials subject to that section. The introductory paragraph of that section states:

> "This section provides cleanup and disposal options for PCB remediation waste. *Any persons cleaning up and disposing of PCBs managed under this section shall do so based on the concentration at which the PCBs are found.*"

63 Fed. Reg. at 35488; 40 C.F.R. § 761.61 (emphasis added).

Thus, if a material is a PCB remediation waste and is subject to §761.61, it appears the anti-dilution rule would not apply. In other words, one would look at the concentration of PCBs in the material, not in the original source.

B. <u>The Rule Establishes A Point in Time To Determine Applicable Concentrations For Purposes Of Cleanup And Disposal And Eliminates The Need To Attempt To Reconstruct Historical Events In Order To Determine The Applicable PCB Concentration</u>

As noted above, the preamble states that in finalizing several variances from the anti-dilution rule, such as for PCB Remediation Wastes under Section 761.61, "EPA is simply recognizing that where PCBs have already been released, the critical issue is to mitigate the damage from the release." 63 Fed. Reg. at 35388. In other words, for existing spills, EPA is no longer going to require a party to guess at historical events at the site in order to determine whether the applicable PCB concentration for disposal purposes is the concentration in the soil or the concentration in the original source. Instead, EPA established the effective date of the rule – August 28, 1998 (or perhaps the date the rule became final -- June 18, 1998) as a cut-off date. After August 28, 1998[1], the concentrations of PCBs that are found at a spill site govern for regulatory compliance.

Where soil was disturbed after the effective date of the rule and subsequently was found to have been contaminated with PCBs, we understand that Region IX and perhaps EPA Headquarters may have interpreted the provision that directs a party to cleanup or dispose of PCBs under section 761.61 based on the concentration at which the PCBs are

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[1] For brevity, we refer herein after only to the effective date of the new rule. We recognize, however, that EPA may consider the date that the rule became final as the operative date.

found to mean that a party must use the concentration that would have been found prior to disturbing the soil after the effective date of the rule. We express no opinion as to that interpretation, but merely seek confirmation that the fact that soil may have been moved at a site before the effective date of the rule and before determining that such soil is contaminated by PCBs does not result in the same conclusion. Otherwise, the anti-dilution rule variance component of Section 761.61would be read out of the rule. If a party was required to determine what activities occurred at the site prior to the effective date of the rule that may have diluted the PCB concentrations, the language that a party base its action on the concentration as found would have no effect. In other words, a party would not know if it could rely on the concentrations it finds or if it has to guess whether soil had ever been moved at the site and what the concentrations would have been before the soil was moved.

C. Soils At The Maili Kai Site Are Subject To Regulation Under Section 761.61

Section 761.50 governs the applicability of the various PCB disposal requirements in part 761. Section 761.50(b)(3) provides that "PCB remediation waste . . . is regulated for cleanup and disposal in accordance with §761.61. "PCB Remediation Waste" is defined as:

> "waste containing PCBs as a result of a spill, release or other unauthorized disposal at the following concentration:
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> * * *
>
> materials which are currently at any volume or concentration where the original source was [greater than or equal to] 500 ppm PCB beginning on April 18, 1978, or [greater than or equal to] 50 ppm beginning on July 2, 1979;"

Thus, if the original source was greater than 50 ppm after July 2, 1979 (or 500 ppm if between April 18, 1978 and July 2, 1979) and the release occurred after April 18, 1978, the material would constitute "PCB remediation waste."

Section 761.50(b)(3)(ii) provides that any person who is responsible for a PCB spill or release on or after April 18, 1978 must dispose of the waste either in compliance with the PCB Spill Cleanup Policy and/or in compliance with §761.61. We note that even under the

PCB Spill Cleanup Policy, PCB contaminated soils from a spill cleanup are to be disposed of in accordance with §761.61. [2]

Thus, PCB contaminated soils generated from a spill cleanup that meet the definition of PCB remediation waste are subject to disposal under §761.61. Accordingly, the anti-dilution rule is not applicable to such soils, and it is the PCB concentrations in the soils that are controlling and not the PCB concentration in the original source.

PH Property and its consulting team are prepared to proceed with remedial work at the site. Accordingly, we respectfully request your prompt attention to this matter.

Very truly yours,

M. Kelly McTigue
McCLINTOCK, WESTON, BENSHOOF,
ROCHEFORT, RUBALCAVA & MacCUISH LLP

MKM/nh
cc: John Smith (via UPS next day)

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[2] Under the Spill Policy, cleanup debris and materials are to be disposed of under §761.60. (See §761.125(a)(2).) The new §761.60 no longer covers the disposal of materials constituting PCB remediation wastes. Subsection (d) of the old version was deleted and no new subsection (d) was adopted in its place. §761.50 directs that certain types of PCB wastes are still to be disposed of in accordance with §761.60 (e.g. PCB Items and Liquids). However, it is clear that PCB remediation wastes are governed by §761.61.