

Utility Solid Waste Activities Group v. EPA, 236 F3d 749 (D.C. Cir. 2001).

B. What is the Agency's Authority for Taking this Action?

The authority for issuing 40 CFR 761.30(p) was section 6(e)(2) of the Toxic Substances Control Act (TSCA), 15 U.S.C. 2605(e)(2). This amendment is issued pursuant to a decision of the Court.

Section 6(e) of TSCA, 15 U.S.C. 2605(e), specifically regulates PCBs. It bans the manufacture, processing, distribution in commerce, or use of PCBs in other than a "totally enclosed manner," unless the activity is specifically authorized by EPA through rulemaking. In order to authorize any of these activities, EPA must make an affirmative finding that the activity does not pose an unreasonable risk of injury to health or the environment. Comprehensive regulations addressing the manufacture, processing, distribution in commerce, use, and disposal of PCBs were promulgated by EPA in 1979 and codified at 40 CFR part 761.

C. What is the History of this Action?

On December 6, 1994, EPA proposed extensive revisions to the PCB regulations. Some of the commenters on this proposal asked EPA to consider including an authorization for the use of porous surfaces that had been contaminated by old PCB spills. EPA considered the information submitted by the commenters and decided to include such a use authorization in the final amendments to the PCB regulations published in the **Federal Register** issue of June 29, 1998 (63 FR 35384) (FRL-5726-1) EPA determined that the continued use of porous surfaces cleaned, sealed, and marked in accordance with the requirements of 40 CFR 761.30(p) does not pose an unreasonable risk of harm to human health and the environment.

EPA had intended to apply the cleaning, sealing, and marking requirements in this new provision of the regulations to use of all porous surfaces that had been contaminated by spills of liquids containing PCBs at levels greater than or equal to 50 parts per million (ppm), regardless of the residual contamination level on the surface of the material. This is the standard EPA historically has used to trigger the regulation of PCB disposal. Unfortunately, due to an editing error, the 1998 version of 40 CFR 761.30(p) referred to a unit of measurement inapplicable to the concentration of PCBs in liquids. Instead of the 50 ppm standard for this use authorization, the

1998 final rule referred to ">10 µg/100 cm²." Shortly after the 1998 final rule was published, EPA discovered this and several other errors. EPA posted a list of the errors and appropriate corrections on its Internet site and, on June 24, 1999, in the **Federal Register** (64 FR 33755) (FRL-6072-4), promulgated these corrections in a final rule without prior notice and comment.

The Utility Solid Waste Activities Group and others challenged the 1999 amendment to 40 CFR 761.30(p), arguing that EPA had failed to follow requisite procedures by issuing the amendment without notice and comment.

D. What is the Basis for this Action?

On January 30, 2001, the Court vacated the correction to 40 CFR 761.30(p). *Utility Solid Waste Activities Group v. EPA*, 236 F3d 749 (D.C. Cir., 2001) The Court determined that EPA was required to promulgate the correction through full notice and comment rulemaking procedures consistent with section 553 of the Administrative Procedures Act (APA) (5 U.S.C. 553).

Accordingly, EPA is issuing this document to revise the language of 40 CFR 761.30(p) to conform to the Court's decision. The regulation at 40 CFR 761.30(p) will now read as published in 1998. However, EPA continues to believe that the 1999 amendment of 40 CFR 761.30(p) is the appropriate approach for the continued use of porous surfaces contaminated by spills of liquid PCBs. The Agency intends to issue a proposal in the near future to amend 40 CFR 761.30(p).

III. Statutory and Executive Order Reviews

This action amends 40 CFR part 761 to conform to a decision by the Court. Under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4). This action does not involve special consideration of environmental justice-related issues as required by Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994). Because this action is not subject

to notice and comment requirements under the APA or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This action also is not subject to Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997), because EPA interprets Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Executive order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish any environmental standards intended to mitigate health or safety risks. This action does not involve technical standards and therefore is not subject to section 12(d) of the National Technology Transfer and Advancement Act of 1995, 15 U.S.C. 272 note. This final rule does not have federalism implications and, therefore, Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999), does not apply. This action does not involve or impose any requirements that affect Indian Tribes, so the requirements of Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 62749, November 6, 2000), are not applicable. This final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866. Finally, this action is not subject to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, because it does not impose any monitoring, reporting, or recordkeeping requirements. EPA's compliance with the statutes and Executive orders for the underlying Disposal Amendments rule is discussed in the June 29, 1998, **Federal Register** (63 FR 35384).

IV. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the Agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United