

## **PCB ENFORCEMENT IN A NUTSHELL<sup>1</sup>**

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### **Overview of PCBs and Statutory Bans**

Polychlorinated biphenyls, or “PCBs” are a class of approximately 130 different organic compounds. First marketed in 1929 as coolants and insulating fluids for transformers and capacitors, PCBs saw application over the ensuing decades as plasticizers in paints and cements, as stabilizing additives in flexible PVC coatings of electrical wiring and electronic components, as flame retardants, lubricating oils, hydraulic fluids, sealants, adhesives, and in a large variety of other applications. PCBs were manufactured under various trade names in nearly a dozen countries – in the U.S., the chief producer was Monsanto Company under the trade name “Aroclor”, from approximately 1930 - 1977. Because PCBs are a suspected carcinogen and because they do not decompose readily, in the 1970s Congress banned domestic production of PCBs through the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §2601 *et seq.*, and placed limits on the continued use of PCBs. TSCA is not an outright ban of PCBs, and some uses of PCBs were (and still are) permitted under that Act, but the overall scheme of TSCA is to continually restrict the use of PCBs and to ultimately cause the disposal of all PCBs in the United States. Abroad, PCBs were not internationally banned until 2001 by the Stockholm Convention on Persistent Organic Pollutants, 40 ILM 532 (2001), though some foreign countries by such time had already enacted their own domestic legislation banning production and/or limiting or eliminating the use of PCBs.

Prior to the passage of TSCA, the use of PCBs in the maritime industry – domestic and foreign – was widespread, and PCBs in liquid and solid form are often found throughout ships built prior to such time in paint, gaskets, wiring, electronics, electrical and lighting components, insulating materials, and in other shipboard applications. PCBs were also widely used in ships built for the Army, Navy, and Coast Guard, and it is suspected by some that some public vessels

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built even after the ban took effect still incorporated actionable levels of PCBs in order to comply with pre-ban contractual specifications, using PCB-laden materials that may have been on hand in shipyards.

### **Statutes, Regulations and Cases**

TSCA can be found at 15 U.S.C. §2601 *et seq.* The toxic substances regulated under TSCA include PCBs as well as other substances, such as asbestos. However, the import and export provisions of TSCA relate specifically to the management and handling of PCBs. An overview of the entire Act is beyond the scope of this paper. Instead, we focus on the following few key sections relevant to PCBs on ships.

#### 1. EPA Inspections of Vessels.

TSCA specifically sets forth that the EPA may inspect “... any establishment, facility, or other premises ...” in which PCBs are “... manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport [PCBs] in connection with distribution in commerce.” 15 U.S.C. §2610(a). An inspection must be made in connection with a written notice to the owner, operator, or agent in charge of the premises or conveyance, and must be conducted at “... reasonable times, within reasonable limits, and in a reasonable manner.” *Id.*

In terms of scope, the inspection authority specifically indicates that it extends to “... all things within the premises or conveyance inspected (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of [TSCA] applicable to [PCBs] within such premises or conveyance have been complied with.” 15 U.S.C. §2610(b)(1). Inspections do not extend to (a) financial data, (b) sales data (other than shipment data), (c) pricing data, (d) personnel data, or (e) research data, “unless the nature and extent of such data are described with reasonable specificity in the written notice ....” 15 U.S.C. §2610(b)(2).

Additionally, the EPA has subpoena power to “... require the attendance and testimony of witnesses and the production of reports, papers, documents, answers to questions, and other information that the [EPA] deems necessary.” 15 U.S.C. §2610(c).

Nowhere in TSCA is warrant authority granted to the EPA. The general rule of statutory construction is that if Congress has enumerated certain powers to be given to an agency, the Courts should not infer others. “Congress says in a statute what it means and means in a statute what it says there”. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). *See also Harris v. Garner*, 216 F.3d 970, 976 (11<sup>th</sup> Cir. 2000) (*en banc*), *cert. denied*, 532 U.S. 1065 (2001) (“[w]e will not do to the statutory language what Congress did not do with it, because the role of the judicial branch is to apply statutory language, not to rewrite it”). In contrast, the EPA is specifically granted warrant authority in other statutes such as the Federal Insecticide, Fungicide, and Rodenticide Act in the Federal Environmental Pesticide Control Act (7 U.S.C. §136g(b)).

The authority of the EPA to issue a warrant for inspection of a vessel was at issue in the *Sanctuary* case. *United States v. M/V SANCTUARY*, 540 F.3d 295 (4<sup>th</sup> Cir. 2008). The *Sanctuary* was built in 1944 and originally served as a United States Navy hospital ship. *Id.* at 298. The government sold the vessel in 1989 for ten dollars (\$10) with the stipulation that the vessel would be used for humanitarian purposes. *Id.* The owner docked the vessel at a Maryland Port Authority Pier in Baltimore but never actually used the vessel for charitable or humanitarian purposes. *Id.* After the failure of the owner to pay dockage and related charges, the vessel was arrested and sold to Potomac Navigation, Incorporated (“Potomac”), a United States citizen. The court order confirming the sale required Potomac to tow the vessel from Baltimore within sixty (60) days. *Id.* Potomac advised the court that the vessel would be transported overseas for refurbishment, “most likely as a storage unit, a hotel platform, or other similar use.” *Id.*

Following an investigation, the EPA determined that the *SANCTUARY* likely contained PCBs. *Id.* at 299. The EPA later confirmed the presence of PCBs on the vessel through information obtained from a domestic ship recycling firm that tested the paint as part of considering a bid for the vessel. *Id.* The EPA sought permission from Potomac to inspect the vessel which was denied. *Id.* The EPA then successfully petitioned the district court for (1) an administrative warrant authorizing the inspection of the vessel, and (2) a preliminary injunction prohibiting Potomac from moving the vessel until the inspection was completed (and, if PCBs were found in actionable quantities, until the same was remediated). *Id.*

Potomac appealed the ruling on several bases including the lack of warrant authority of the EPA under TSCA. *Id.* The court disagreed, instead finding that “... courts have consistently held that a federal regulatory agency is authorized to apply for a warrant to exercise a statutory grant of inspection authority.” *Id.* at 300, quoting *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 325 (1978). The court further stated “[w]hen Congress invests an agency with enforcement and investigatory authority, it is not necessary [for Congress] to identify explicitly each and every technique that may be used in executing the statutory mission...[i]nstead, [r]egulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.” *Id.* at 299. (4<sup>th</sup> Cir. 2008), quoting *Dow Chemical Co. v. United States*, 476 U.S. 227, 233 (1986).

In inferring such warrant authority in TSCA, the District of Maryland and the Fourth Circuit are not alone, however – the District of Rhode Island also inferred warrant authority under TSCA in *Boliden Metech, Inc. v. United States*, 695 F.Supp. 77, 80-82 (D.R.I. 1988).

Potomac further argued that a vessel is not a place where an inspection is authorized by TSCA. 540 F.3d at 301-302. Specifically, Potomac argued that the vessel was “... neither a premises where PCBs are held “before or after their distribution in commerce” nor a conveyance being used to transport PCBs “in connection with distribution in commerce.” 540 F.3d at 299, quoting 15 U.S.C. §2610(a). The court found that Potomac could not “credibly argue that any PCBs in the coatings, (paint, for example), components, or materials in [the vessel] were not distributed in commerce before the ship was built.” *Id.* Accordingly, the court found the vessel qualified for an inspection under TSCA. *Id.*

Such a reading of TSCA arguably means that so long as any PCB substance was sold at any time, then it has been “distributed in commerce” and any premises (including vessels) holding said substance is subject to inspection by EPA under TSCA, who may obtain a warrant if the owner or manager of the facility will not voluntarily allow EPA to inspect. This holding is consistent with the EPA’s general position that any deployment and use of PCBs is construed as a distribution in commerce.

However, the *SANCTUARY* decision does not address whether the right to inspection includes the right of the EPA under TSCA to inspect a United States vessel in a foreign jurisdiction or require a United States flag vessel in a foreign jurisdiction return to the United States for purposes of such inspection.

## 2. Vessel Recycling as a Banned Export of PCBs.

It is illegal to export PCBs from the United States for distribution into commerce under TSCA, except by exemption. 15 U.S.C. §2611(a)(2); 40 C.F.R. §761.20(c). TSCA also bans the export of PCBs for disposal without an exemption. 40 C.F.R. §761.97(a).

It is likewise illegal to import PCBs into the United States for disposal without an exemption. 40 C.F.R. §761.93.

The terms “export” and “import” are not defined in TSCA. It is not believed that any exemption has ever been granted by the EPA for either the export or import of PCBs.<sup>2</sup> However, certain transboundary shipments are not considered either imports or exports under TSCA. 40 C.F.R. §761.99. These excluded transboundary shipments include “... PCB waste generated in the United States, transported outside the Customs Territory of the United States ... through another country or its territorial waters, or through international waters, and returned to the United States for disposal.” 40 C.F.R. §761.99(a).

The issue of whether an export of a vessel for recycling constitutes a prohibited export under TSCA was addressed in *USS CABOT / DEDALO Museum Foundation v. United States Customs Service*, 1995 U.S. Dist. LEXIS 4068 (E.D.LA. Mar. 30, 1995). In this case, the *CABOT* was an aircraft carrier commissioned in 1943 and sold to the Spanish Government in 1972 (prior to enactment of TSCA) following its decommission. *Id.* at 1. In 1989, the vessel was sold by the Spanish Government to the plaintiff Foundation, a Louisiana not for profit corporation, for conversion to a permanent museum. *Id.* After funding attempts failed, the Foundation attempted to sell the vessel for recycling in India. *Id.* When the EPA learned of the proposed export of the vessel, it notified Customs which agreed to withhold clearance of the vessel to leave port until the absence of regulated PCBs onboard could be verified. *Id.* at 2. After testing of the vessel for PCB, the parties were unable to agree on how to proceed and each

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<sup>2</sup> The owners of the *SANCTUARY* learned that EPA will not grant exemptions except by way of a public notice and hearing procedure, a process that takes at least a year, perhaps as much as two years or more, and that even after such procedure, there is no guarantee that an exemption will be granted, as the same remains an issue of discretion by the agency.

filed motions for injunctive relief regarding the departure of the vessel from the United States. *Id.*

The Foundation argued that even if regulated PCBs were present in the electrical cable, the export of the vessel was permitted under TSCA because “PCBs at concentrations of 50ppm or greater, or PCB Items with PCBs at concentrations of 50ppm or greater, sold before July 1, 1979 for purposes other than resale may be distributed in commerce only in a totally enclosed manner.” *Id.* at 3 quoting 40 C.F.R. 761.20(c)(1). The Foundation claimed that because the electrical cabling was installed in the vessel prior to July 1, 1979, and any PCBs are totally enclosed within the cable, the vessel could be sold to a foreign owner without violating TSCA. *Id.*

The Court rejected the argument of the Foundation because the evidence showed that the vessel was being sold to the foreign owner for recycling and not continued use. *Id.* The court granted the United States a permanent injunction prohibiting the vessel to leave the United States until the PCBs were removed. *Id.* at 4. While the holding was based on the standard for ruling for injunctive relief, the court interestingly did not cite specific sections of TSCA in support of its ruling but rather stated “... the intended export of the [v]essel in its present condition would thwart the legislative purpose of TSCA ....” *Id.*

Despite the argument raised in the *CABOT* case, the EPA has taken the position that TSCA is applicable to the foreign and domestic sales of United States flag vessels for continued use. The basis for this position appears to be as stated in the *SANCTUARY* case – an owner – foreign or domestic – can choose to recycle the vessel rather than continue its use. To be fair, in *SANCTUARY*, the vessel owner moved to dismiss and EPA opposed on the basis that it had reason to believe that the vessel would be scrapped despite the owner’s absolute and unqualified denial. Based on the legal standards for a motion to dismiss, the Maryland District Court was compelled – for purposes of the motion – to agree with the EPA because it was plausible that the owner’s true intent was to scrap the vessel. Whether TSCA is truly applicable where the seller can demonstrate at trial (or at the summary judgment stage) that the vessel will be in continued use has not been decided by the courts.

Perhaps the most notable enforcement action involved the *OCEANIC (ex-SS INDEPENDENCE)* which was a cruise ship constructed in 1951 in the United States. The vessel was operated until 2001 when it became the property of MarAd following the bankruptcy of its owner. The vessel sailed from Hawaii to San Francisco in 2001 where she was placed in layup. MarAd sold the vessel to Norwegian Cruise Lines at auction in 2003. In 2007, Norwegian Cruise Lines announced that it had sold the vessel. The purchaser was Global Shipping LLC, an American company. The vessel was towed from San Francisco Bay in February 2008 with a reported initial destination of Bangladesh. The owner filed an application with MarAd for approval of the sale of the vessel to a foreign owner for recycling. In March 2008, the EPA filed a complaint against the owner alleging an illegal distribution in commerce and export of PCBs.

The case eventually settled in January 2009 resulting in a penalty payment to the EPA in excess of \$500,000. A contributing factor to the settlement was the owner’s desire to continue

the vessel's towage for recycling. However, the notoriety accompanying the case made acceptance of the vessel for recycling problematic. In October 2009, Indian authorities initially denied the vessel access to the recycling facilities at Alang. The Ministry of Forests and Environment intervened and granted permission for the vessel to be recycled in India. Controversy ensued with calls for the vessel to be returned to the United States for recycling. The vessel ran aground off the coast of India in February 2010. After her hull cracked, the vessel was recycled where she lay.

In the *SANCTUARY* case discussed above, Potomac argued that the planned foreign refurbishment of the vessel did not constitute a banned export of PCBs under TSCA. 540 F.3d at 301. The court found that a decision on whether such activity would be an export was immaterial to the case because the warrant for inspection was issued based on probable cause that PCBs were present on the vessel (and not on the basis of a banned export). *Id.*

### 3. Civil Penalties.

Civil penalties for violation of TSCA are not to exceed \$20,000 per violation per day. 15 U.S.C. §2615(a)(1). “Knowing” or “willful” violations of TSCA can result in criminal penalties of a fine of not more than \$25,000 per day of violation or imprisonment for not more than one year, or both. 15 U.S.C. §2615(b). In the case of the *OCEANIC* discussed above, the settled fine amounted to 20 days’ violation.

### 4. Citizens’ Civil Actions.

TSCA authorizes citizen’s suits to prevent violations of TSCA. 15 U.S.C. §2619(a). Before a citizen may file suit, the citizen must provide sixty (60) days advance notice of an alleged violation of TSCA to both the EPA and the intended defendant. 15 U.S.C. §2619(b)(1)(A). If the EPA has commenced prosecution, then a citizen suit cannot proceed. 15 U.S.C. §2619(b)(1)(B). Environmental watchdog groups, including the Basel Action Network (“BAN”), have utilized this statute in an attempt to try to prevent the disposal of ex-military vessels under MarAd’s care which were slated for disposal in England. The litigation was ultimately unsuccessful and the vessels were sent to England for disposal (where English environmental groups unsuccessfully opposed the dumping of American hazardous waste in England). BAN also brought an action relating to the disposal of the *USS ORISKANY* offshore Florida as an artificial reef on the basis that the PCBs had not been removed, and that the turning of the vessel into a reef would result in PCBs entering the US food supply via the fish that would live in and feed off the vessel. That suit was also unsuccessful and the *ORISKANY* was reefed. However, subsequent reefings of vessels have involved more stringent scrutiny by the EPA of potential PCB content onboard.<sup>3</sup>

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<sup>3</sup> The entire fleet of *Spruance*-class destroyers, though, which were reputedly built with actionable levels of PCBs even past the 1973 TSCA ban on PCBs, has been sunk/reefed without any TSCA enforcement activity by EPA.

## 5. Citizens' Petitions.

Citizens may petition the EPA to commence proceedings against a defendant for violation of TSCA. 15 U.S.C. §2620(a). The EPA must grant or deny the petition within ninety (90) days. 15 U.S.C. §2620(b)(3). If the petition is granted, the EPA must promptly begin appropriate proceedings. *Id.* If the petition is denied, the EPA must publish the reasons for such denial in the Federal Register. *Id.*

Environmental watchdog groups have successfully petitioned the EPA to commence proceedings for perceived violations of TSCA. In both the *SANCTUARY* and *OCEANIC* matters, the EPA's involvement directly stemmed from petitions received from the BAN.

### **Genesis of Enforcement Actions**

The EPA, in its capacity as steward of the environment, is authorized by TSCA to conduct such investigations as it deems necessary to determine if actionable quantities of PCBs (50 ppm or more) are present. As discussed above, this authority includes investigations on vessels.

Until relatively recently, the EPA itself was not regularly initiating shipboard investigations for PCBs. Regulations under TSCA and guidance documents published by the EPA concerning PCB enforcement were entirely related to land-based activities (i.e., investigation of factories, soil, vehicles, etc.), likely because TSCA does not appear to be drafted to address the regulation of PCBs on vessels. Accordingly, TSCA investigations by the EPA on vessels were infrequent or nonexistent.

BAN keeps track of older vessels in the United States registry and began to petition the EPA to commence proceedings against shipowners in an effort to prevent vessels from being recycled abroad. As an example, in the case of the *SANCTUARY* discussed above, BAN petitioned the EPA to prevent the vessel's owners from towing the vessel from Baltimore (the owners planned to tow the vessel to Greece, where the owners wished to refurbish the vessel in order to utilize it as a hotel platform for offshore construction work), alleging – incorrectly – that the owners' intent was to tow the vessel to Bangladesh for scrapping.

The domestic ship recycling industry also stands to benefit from the prevention of vessels being sold foreign for recycling. Recycling vessels in the United States is more costly to shipowners than operations abroad due to more stringent safety and environmental regulations and wage requirements in the United States.

BAN and its supporters have sued the United States and the EPA in particular in order to enforce TSCA, and the practical result has been an increased awareness of shipboard PCB issues within the EPA and the USDOJ's ENRD. Indeed, ENRD Trial Attorney Marcello Mollo was formerly employed by EarthJustice, a BAN-related watchdog group and is on record as stating

that it is the “moral obligation” of the United States to ensure that no PCBs are disposed of abroad.<sup>4</sup>

The EPA learned through its experiences with investigations and enforcement actions with various vessels that MarAd effectively had sole authority to permit the departure of ships from the United States flag, and that in the past MarAd regularly authorized such departures without first consulting EPA regarding potential TSCA issues. EPA is also apparently concerned that it may lack authority under TSCA to investigate PCBs on vessels after their transfer to a foreign flag. As a result, the EPA and MarAd reportedly entered into a Memorandum of Understanding (the “MOU”) that requires MarAd to first consult with EPA to determine if EPA believes an investigation under TSCA (or other environmental statute) is required prior to authorizing a transfer of a vessel from the United States registry.

However, the process of authorizing the foreign transfer of vessels has reportedly experienced significant problems in terms of operation under the MOU. Initially, MarAd would refer applications to EPA and await a response from EPA before ruling on an application for foreign transfer of a vessel. A decision from EPA on whether or not it wished to conduct any TSCA-related investigation for PCBs was often substantially delayed. As a result, many applications to leave the U.S. flag, and the related agreements of sale for the vessels, were left to flounder. The result was ongoing complaints to MarAd and lost revenue for the shipowners.

As published in the Federal Register on June 27, 2011, MarAd issued a clarification of its approval process for transfer of vessels to foreign owners. 76 Fed. Reg. 37280. The process requires the shipowner to self-certify in the required form, that “after reasonable due diligence” there no regulated PCBs on the vessel. *Id.* The self-certification applies to any application for approval for foreign transfer filed after February 14, 2011 but any vessel built after 1985 is exempted from the self-certification. The clarified process also provides that MarAd will provide EPA with up to thirty (30) days’ notice prior to approving any transfer order. *Id.* Presumably this notice period permits the EPA to decide whether it would like to conduct a

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<sup>4</sup> Marcello Mollo criticized U.S. Government policy concerning old and obsolete vessels and wrote extensively on the perceived harms of allowing such vessels to be scrapped abroad. Numerous press releases issued by environmental activist groups refer to Mr. Mollo and can easily be found on the internet. Among them, Environment News Service quotes him as saying there is a need to “prevent our country from passing its toxic burden to laborers and environments in other countries...[n]ow we need to ensure that EPA shows similar responsibility with government owned ships.” The same article indicates that Mr. Mollo (then with EarthJustice) was critical of a “double standard” being employed by the EPA in connection with ship scrapping. See “Discovery of PCBs Keeps Ex-Naval Ship from Chinese Scrapyard”, [www.ens-newswire.com/ens/may2004/2004-05-05-095.asp](http://www.ens-newswire.com/ens/may2004/2004-05-05-095.asp). Another article quotes Mr. Mollo as saying “[t]he U.S. shouldn’t be exporting its toxic waste to other countries...[t]he U.S. is morally responsible for handling its own waste.” “EPA Halts Export of WWII Ship to China, Citing Toxic Chemicals”, [www.ban.org/ban\\_news/2004/040504\\_epa\\_halts.html](http://www.ban.org/ban_news/2004/040504_epa_halts.html). See also other articles and publications by Mr. Mollo or referencing him concerning PCBs on ships, including “Bush Administration Violates PCB Export Ban”, [www.earthjustice.org/news/press/003/bush\\_administration\\_violates\\_pcb\\_export\\_ban.html](http://www.earthjustice.org/news/press/003/bush_administration_violates_pcb_export_ban.html); “Toxic Ship Export Deal Declared Illegal by UK – US Environmental Groups Call on Bush Administration to Safely Return and Recycle “Ghost Fleet” in USA”, [www.commondreams.org/scriptfiles/news2003/1105-05.htm](http://www.commondreams.org/scriptfiles/news2003/1105-05.htm). Mr. Mollo also appears to be the lead author of EarthJustice’s 2005 “Environmental Rights Report” which contains a lengthy section criticizing foreign ship scrapping practices, and one of the authors of a letter (along with Basel Action Network) to EPA in response to comments sought by the EPA prior to sending several National Defense Reserve Fleet vessels to England for scrapping there.

TSCA-related investigation for PCBs. Absent a timely response from EPA that it will conduct a TSCA investigation, MarAd has then begun processing the application for transfer following receipt of the required self-certification of the shipowner (if the vessel was built prior to 1985). Assuming all other requirements for approval of the transfer order are met, MarAd usually issues its authorization to sell the vessel to a foreign owner within thirty (30) days following the expiration of the period for EPA review. In situations where the EPA has not performed a TSCA-related investigation under the current MOU procedure, it is unclear whether compliance with MarAd's self-certification will ultimately protect a (former) vessel owner from future enforcement action by EPA under TSCA. The time limits for EPA to commence such enforcement action against former vessel owners for alleged sales of PCBs for disposal abroad are not entirely clear, and if EPA pursues any such actions in the future, whether self-auditing for PCBs will avoid penalties remains to be seen.

### **Maritime Personal Injury and Death Claims**

Despite the alleged linkages between PCBs and human health issues (PCBs are a suspected carcinogen), successful prosecutions of personal injury or death claims against manufacturers or others due to exposure to PCBs have largely not succeeded. There are some scientific studies which suggest that PCBs cause cancer, but in several cases these studies have not survived *Daubert* challenges. Research concerning the potential harms caused by PCB exposure continues, and if a definitive link can be established, it is possible that personal injury and death claims will be brought. If so, such claims would seem to need, at a minimum, to (a) show that the injury/illness/death was directly related to PCB exposure, and (b) identify the PCB product to which the claimant was exposed.

Of interest (and not helpful to potential personal injury plaintiffs), the EPA is currently in the process of modifying the PCB standard to allow greater exposure to PCBs, raising the action level above 50 PPM. EPA ANPRM, 75 Fed.Reg. 17645-67 (Apr. 7, 2010). Over the last year, EPA has held public hearings with respect to its proposal in this regard. The proposal seems to stem from a cost-benefit analysis relating to PCBs in New York public schools: a great number of schools were built throughout the state of New York prior to the TSCA PCB ban coming into being, and all of the windows were caulked with PCB caulking that is heavily laden with PCBs. Additionally, fluorescent light ballasts – also widely used in public buildings like schools – contain liquid PCBs which over time may leak. The cost of remediation of PCBs on such a scale is estimated in the trillions of dollars. An increase in the action level for PCB exposure could potentially result in a savings in the cost of remediation, but of course there is the underlying question of whether such a change is in the best interests of human health (and whether the long-term cost of increased health care needs from PCB exposure will outweigh the short-term cost of remediation). It is ironic that under TSCA, no person may export PCBs in excess of 50 PPM on the basis that such export (regardless of how carefully under the foreign country's laws PCBs may be disposed) will potentially contaminate foreign persons or foreign property with a suspected carcinogen, but that exposure of American school children to increased quantities of PCBs (and permitting "scheduled remediation") is being pushed by the very same agency as rational and scientifically acceptable.

## Advising Clients

Clients with U.S. flag vessels must be concerned about the possibility of PCBs in their vessels. PCBs may be found in paint, gaskets, caulk, electronic components, transformers, insulation, and electric wiring. Liquid PCBs may have been carried as part of the ship's stores, or may have been carried as cargo. Spills of solid or liquid PCBs that may have occurred at some time in the ship's history will leave a persistent trace of the chemical that can be detected.

Environmental watchdog groups, including BAN, are on the lookout for older US flag vessels which may be scheduled to leave US waters, and they quickly notify EPA to try to prevent such vessels from leaving the US. In the past, the EPA has acted on such watchdog notifications, enlisting the aid of Coast Guard, Customs, and the Courts to prevent sailings. When sailings occur anyway, the EPA has taken enforcement action against the vessel owners, collecting large fines (as was the case in *OCEANIC*).

In the event of an inspection and investigation, the EPA can be expected to conduct destructive testing, and will not hesitate to seek a warrant if access to the vessel is not freely granted. Based on the Fourth Circuit's decision in *SANCTUARY*, it seems likely that efforts to challenge the issuance of a warrant will face an uphill battle.

Although the regulations authorize the use of PCBs throughout the life expectancy of a PCB component, EPA's interpretation of these regulations is that such allowance is permitted only with respect to liquid PCBs (which, ironically, are more harmful than inert solid-state PCBs). Accordingly, if PCBs are found in the insulation of electric wiring, which would more likely than not be solid-state PCBs, then the EPA might seek to require remediation, which could include the removal of all affected wiring on the vessel.

Remediation of PCBs on ships can be very expensive, and it is fair to question whether it can even be done to EPA's satisfaction in a way which will allow for the continued use of the ship. In one of the cases in which one of the authors of this paper has been involved, the cost of expert preparation and implementation of a PCB sampling plan (which satisfied EPA) exceeded \$225,000 and took months to complete. The cost of remediation of the PCBs on that vessel (found in paint, gaskets, and wiring) was estimated at about \$2 million, and there was no guarantee that such remediation, if performed, would satisfy EPA that the PCB issue had been remedied. The client therefore elected to dispose of the vessel in the United States instead of incurring the cost of remediation. EPA has also prevented sales of US flag vessels (including single-skin barges now becoming obsolete under OPA) to foreign interests on the basis of PCB concerns. On the US East and Gulf Coasts, scrap yards tend to offer about 15% of the vessel's scrap value in order to purchase PCB-contaminated vessels for disposal. The yards, of course, incur a heavy cost in terms of proper disposal of PCBs and other toxic materials, which can eat up 25% or more of the vessel's scrap value. Additionally, labor and insurance costs for such dangerous work are high, which also eats into the yards' profitability. From the vessel owner's economic standpoint, neither remediation nor scrapping in the United States is desirable, though in some cases (as in the *SANCTUARY*), it may ultimately prove unavoidable.

Even without an investigation by EPA, vessel owners are now faced with the self-certification process with MarAd. This certification requires that the vessel owner conduct “reasonable due diligence” into the presence of regulated PCBs. There is no case law under this certification but it is likely that the EPA version of a “reasonable due diligence” is more stringent than most shipowners would ever undertake – *to wit* the \$225,000 PCB sampling protocol developed as discussed above.

The facts surrounding each vessel will be paramount in any investigation by the EPA. The EPA takes the position that the sailing of a vessel with PCBs to a foreign port with the intent of recycling is a banned export of PCBs. This analysis was used in the *Oceanic* case and was based on the *Dedalo* case. The EPA also took the position in *Sanctuary* that even if an American owner swore under oath that the sailing of the vessel abroad was for the purpose of extending the life of the vessel and to continue using the vessel for commercial purposes, it was still entitled to treat the sailing as a banned export of PCBs. The EPA’s position precludes the remediation of the vessel at the foreign port even if the materials are to be returned to the United States for remediation. The EPA has also taken the position in at least one case that any attempt to return suspect materials removed from a vessel in deep layup in a foreign jurisdiction via container is a banned import under TSCA. However, the EPA stated that the materials could be returned to the United States onboard the ship from which they were removed. Obviously, the return of the vessel to the United States with the suspect material onboard would subject the vessel to possible further inspection by destructive testing by EPA.

While the EPA may no longer have jurisdiction over a vessel after it is deleted from the United States registry, it will have jurisdiction over the former shipowner (to the extent that entity has a continued existence). Therefore, shipowners must exercise caution in developing the “reasonable investigation” required under the MarAd self-certification regarding the absence of PCBs. The reasonableness of any investigation will be determined on the facts surrounding each particular case. Failure to exercise caution may result in the shipowner being in a weakened position if faced with a subsequent investigation by the EPA, which could lead to stiff civil and criminal penalties.