

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

and

THE GOVERNMENT OF CANADA

Respondent / Party

**MEMORANDUM ON U. S. LAW
ON BEHALF OF
THE GOVERNMENT OF CANADA**

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**MEMORANDUM ON U.S. LAW ON BEHALF
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1. This memorandum on U.S. law is submitted pursuant to the order of the Tribunal, dated December 31, 1999. As requested, the first part of this memorandum reviews the background of the adoption of the Toxic Substances Control Act, Pub. L. No. 94-469, 15 U.S.C. § 2601, *et seq.* ("TSCA" or the "Act"), and the provisions governing the import and disposal of polychlorinated biphenyls ("PCBs") under Section 6(e) of the Act. It reviews regulations developed by the U.S. Environmental Protection Agency ("EPA") to govern the imports of PCBs, the efforts by S.D. Myers, Inc. ("SDMI" or "Myers") to obtain exemptions from TSCA to permit the import of PCBs from Canada and EPA's proposed ruling on the exemption requests, the efforts by Myers to obtain a grant of enforcement discretion from EPA and EPA's ruling on that request, EPA's subsequent adoption of regulations that permitted the import for disposal of PCBs from Canada, and the decision by the Ninth Circuit Court of Appeals striking down the EPA regulations.
2. The second part of this memorandum reviews U.S. law on the exercise of enforcement discretion by U.S. agencies. It concludes by considering how the law would apply to EPA's grant of enforcement discretion to SDMI.
3. The third part of this memorandum briefly comments on the statements of the disputing parties in their memorials on the development and implementation of the EPA regulatory regime under TSCA and the grant of enforcement discretion by EPA to SDMI.

4. Based upon this analysis, this memorandum concludes that there was ample reason in 1995 to question whether EPA had legal authority under TSCA to adopt a generic rule permitting PCB imports from Canada -- a view ultimately vindicated by the Ninth Circuit decision. It further concludes that there was ample reason in 1995 to question whether EPA had lawfully exercised its enforcement discretion to allow SDMI to import PCBs into the United States and that, had a lawsuit been brought challenging EPA's action, a U.S. court might have struck down such action.

I. THE TOXIC SUBSTANCES CONTROL ACT AND ITS IMPLEMENTATION.

A. The Requirements of the Act.

5. The Toxic Substances Control Act (TSCA) was signed into law on October 11, 1976, and became effective on January 1, 1977. TSCA authorizes EPA to regulate the effects of chemicals on human health and the environment. TSCA applies to the manufacture, processing and use of chemical products. TSCA, Section 3(7), 15 U.S.C. § 2602(7). Section 6 of TSCA, 15 U.S.C. § 2605, generally authorizes EPA to prohibit or limit the "manufacture" or use of any chemical upon a finding that it presents an "unreasonable risk of injury to health or the environment." The concept of "unreasonable risk" is at the heart of TSCA and "involves a balancing of the magnitude of a chemical's adverse effects against the social and economic costs of restricting the chemical's availability." Hayes and Sussman, *EPA Activities under the Toxic Substances Control Act*, C667 ALI-ABA 299, 302 (October 31, 1991).
6. For purposes of the Act, the term "manufacture" is defined to include importation into the United States. Thus, TSCA's prohibitions on "manufacture" apply equally to importation.
7. TSCA deals expressly with PCBs in Section 6(e), 15 U.S.C. § 2605(e). This Section has remained in force unchanged since its original enactment in 1976, including throughout the relevant period. Three elements of Section 6(e) are relevant to EPA's authority to permit or ban the importation of PCBs into the United States. First, Section 6(e)(1)(A) of the Act authorizes EPA to promulgate rules to "prescribe methods for the disposal of polychlorinated biphenyls." Second, Section 6(e)(3)(A) establishes a ban on the manufacture, *viz.*, import, of PCBs, effective January 1, 1979. Third, Section 6(e)(3)(B) creates a mechanism for obtaining an "exemption" from this ban. It provides that "any person" may petition EPA for an exemption, and EPA may grant such exemption if it finds that:
 - (i) an unreasonable risk of injury to health or environment would not result, and
 - (ii) good faith efforts have been made to develop a chemical substance which does not present an unreasonable risk of injury to

health or the environment and which may be substituted for such polychlorinated biphenyl.

8. Section 6(e)(3)(B) goes on to specify that any such exemption may not be in effect for a period of more than one year. Section 6(e)(4) of TSCA further specifies that exemptions granted must be in the form of a “rule” issued in accordance with detailed, statutory rulemaking procedures set out in Section 6(c) of TSCA.
9. Several things can be said about Section 6(e) of TSCA. First, there can be no doubt that this provision generally bans the importation of PCBs into the United States. Second, as we will see from a review of EPA’s later regulatory steps, there has been a question whether EPA could utilize its general rulemaking authority under Section 6(e)(1) to allow the importation of PCBs into the United States on a generic basis or whether any exemption(s) from the import ban could only be granted under Section 6(e)(3)(B). This was the issue addressed by the Ninth Circuit in *Sierra Club v. EPA*, 118 F.3d 1324 (9th Cir. 1997). Third, it is obvious that the Section 6(e)(3)(B) exemption process is cumbersome and of limited usefulness, particularly because of the one-year limitation on the duration of exemptions and the requirement for rulemaking prior to the grant of any exemption. The impediments to securing an exemption are examined in greater detail in our discussion of the exemption process in Section I.(D), below. Fourth, it is unclear how the so-called “chemical substitute” test in Section 6(e)(3)(B)(ii), which appears to be directed at situations involving the use rather than the disposal of PCBs, can or should apply in the context of a petition to allow the importation of PCBs for disposal. Fifth, and finally, neither Section 6(e) of TSCA nor any other provision of this statute expressly provides for the exercise of enforcement discretion by EPA.
10. It is clear, in sum, that TSCA establishes a regulatory regime which disfavors PCB imports in the extreme. Whether, and, if so, to what extent, EPA has had any realistic flexibility to allow PCB imports have been the subjects of continuing controversy and debate in the years since TSCA’s enactment.

B. Legislative History of the Act.

11. The legislative history of a statute can sometimes illuminate Congressional intent, especially insofar as the discretion or flexibility of the chosen administrative agency to implement the law is concerned. Unfortunately, the legislative history of TSCA is sparse and does little to explain what Congress wished to accomplish in Section 6(e).¹
12. Section 6(e) was not included in the bills approved by committee in either the House or the Senate. See H.R. Rep. No.1341, 94th Cong., 2d Sess. (1976); S. Rep. No. 698, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code, Cong. and Adm. News

¹ In any event, it should be pointed out that the Ninth Circuit Court of Appeals, in setting aside EPA’s generic PCB import rule, felt that TSCA was so clear on its face that no examination of TSCA’s legislative history was necessary for the Court to reach its decision. See discussion in Section I.(G), *infra*.

4491. Rather, this provision was added to the legislation by Floor amendment in both chambers.

13. In the Senate, Senator Nelson (D.-Wis.), a leading environmental advocate, offered the amendment to the Senate bill (S. 3149) on March 26, 1976. *See* 122 *Cong. Rec.* 8291 (Mar. 26, 1976). In his introductory statement, Senator Nelson emphasized that his objective was to eliminate the “manufacture” and “use” of PCBs in the United States, “unless the EPA administrator finds that there is not a serious health hazard.” *Id.* at 8292. While Senator Nelson made it clear that “all imported PCB’s would be subject to the same restrictions,” *id.*, neither Senator Nelson nor any other Member of the Senate addressed the issue of import *for disposal*.
14. In the House, the PCB amendment (H. Res. 1458) was offered by Representative Dingell (D.-Mich.) on August 23, 1976. *See* 122 *Cong. Rec.* 27184 (Aug. 23, 1976). Congressman Dingell emphasized the environmental risks associated with PCBs. However, more so than in the Senate, Congressman Dingell and his colleagues stressed that the bill contained “flexibility” to allow continued PCB use in situations where such use “outweigh[s] safety considerations.” *Id.* at 27187 (statement of Cong. Leggett, D.-Cal.). Once again, while Members noted that under the terms of the Dingell amendment “imported PCB’s [would be subject] to these same restrictions,” *id.* at 27188 (statement of Cong. Downey, D.-N.Y.), they were focused on manufacturing, processing and distribution rather than on importation for disposal. No Member in fact addressed the import for disposal issue.
15. The conference report on the bill indicates that the legislation adopted by Congress basically follows the provisions of the Senate bill, including the PCB prohibitions. *See* H.R. Conf. Rep. 1679, 94th Cong., 2d Sess. 77 (1976), *reprinted in* 1976 U.S. Code, Cong. and Adm. News 4562. The conference report underscores that Congress broadly intended to ban the manufacture, processing, distribution and use of PCBs in the United States and that TSCA’s prohibitions were only to be lifted if EPA, by rule, determined that the requisite statutory tests were met. Thus, the conference report refers to a “complete ban” on PCBs, subject only to EPA “grant[ing]” an “exemption” where the agency “finds that there is no unreasonable risk to health or the environment, and that good faith efforts have been made to develop a substitute.” *Id.* However, there is no specific discussion in the conference report of the ban as it relates to “imports” or of the permissible nature and extent of any deviations from that ban.²
16. Despite the paucity of Congressional discussion of the import ban, a review of TSCA’s legislative history certainly indicates that Congress was contemplating a far-reaching prohibition. It might be argued that Congress simply never focused on

² Except for the managers’ summary of the legislation, which essentially reiterated the terms of the statute, there was no debate relevant to the scope and effect of Section 6(e) when the conference report was considered on final passage in the House and Senate. *See* 122 *Cong. Rec.* 32582, 32583-84 (Sept. 28, 1976) (Senate passage); 122 *Cong. Rec.* 33037, 33038 (Sept. 28, 1976) (House passage).

import *for disposal* and that the inclusion of the “chemical substitute” test in Section 6(e)(3)(B), which on its face has no relevance to importation for disposal, indicates that Congress was only concerned with importation for subsequent processing, distribution and use in commerce. Nonetheless, it can also be argued that the Congressional objective of eliminating PCBs in the U.S. environment, coupled with the law’s tightly drawn exemption provisions, support the view that EPA has lacked the ability to lift the ban on a generic basis and/or to permit, through the exercise of “enforcement discretion,” broad classes of importers to bring PCBs into the United States without fear of being subject to civil and criminal penalties under Section 16 of TSCA, 15 U.S.C. § 2615, or to specific enforcement and seizure under Section 17 of TSCA, 15 U.S.C. § 2616.

C. EPA Implementation of TSCA – The Early Years.

17. Despite the plausible reading of TSCA that it vested EPA with no authority to permit PCB imports on a generic basis, EPA’s early implementation of the Act was based upon its assertion of power to proceed generically under Section 6(e)(1). This was reflected in the so-called 1979 “open border policy.”
18. On May 31, 1979, EPA adopted an “open border policy,” permitting, for a period of one year, the importation of PCB wastes for disposal. *See* 44 *Fed. Reg.* 31514, 31526-27 (May 31, 1979). In taking this regulatory action, EPA relied on Section 6(e)(1). EPA stated:

EPA has reviewed whether regulation of imported and exported PCB wastes for disposal should be accomplished under section 6(e)(1) of TSCA or under section 6(e)(3). While section 6(e)(3)(A)(i) could be read to allow regulation of the import of PCB wastes for disposal, section 6(e) treats PCB disposal as a separate matter under section 6(e)(1). Both the import and export of PCB wastes for disposal may be regulated under section 6(e)(1), which allows comprehensive regulation of the disposal of PCBs. Accordingly, EPA has elected to regulate the import and export of PCB wastes for disposal under section 6(e)(1). Since the requirements governing disposal of PCB wastes must be complied with for all imported PCB wastes, no unreasonable risks should result. Moreover, proper disposal in this country provides protection against possible hazards from improper disposal elsewhere.

19. *Id.* at 31526. EPA indicated that it would “monitor the results” of its policy, with the view to possible alterations at the conclusion of one year. *Id.* at 31527.
20. On May 1, 1980, EPA revoked its open border policy and instead barred all PCB imports for the indefinite future. *See* 45 *Fed. Reg.* 29115 (May 1, 1980). EPA stated that the primary basis for taking this action was that “most other nations do not have proper disposal facilities.” *Id.* In other words, export-related considerations drove the change in policy in 1980. Notably, EPA’s 1980 notice lays out no rationale for

barring imports and, indeed, scarcely mentions the import-related implications of its policy change. At the same time, moreover, EPA's 1980 notice in no way suggested that Section 6(e)(1) had been inappropriately relied upon in 1979 or would not be an appropriate way for dealing with imports at some future point through a new rule. That having been said, from May 1980 forward the only regulatory basis for importing PCBs would be in the context of an exemption petition under Section 6(e)(3)(B) of TSCA.³ While EPA stated that it would shortly issue a proposed rule governing imports, 45 *Fed. Reg.* at 29115, it took the agency fourteen years actually to do so.

D. Statutory Exemption vs. Enforcement Discretion.

21. The statutory exemption process under Section 6(e)(3)(B) of TSCA, though it is not subject to any statutory or regulatory time constraints or schedule, is highly structured. In this regard, it contrasts markedly with the exercise by EPA of "enforcement discretion" -- often referred to by EPA as providing "no action assurance." Although enforcement discretion is governed by substantive criteria set forth in an agency policy statement and must be exercised personally by EPA's Assistant Administrator for Enforcement, it is nonetheless otherwise subject to few, if any, procedural requirements.

1. The Statutory Exemption Process.

22. Existing rules for the exemption process under Section 6(e)(3)(B) of TSCA are found at 40 C.F.R. Part 750, Subpart B. These rules have been largely unchanged for the past 20 years. Nothing in the Ninth Circuit decision in the *Sierra Club* case invalidating the generic PCB import rule required their modification, and no new regulations would be needed for any entity to pursue an exemption today.
23. As a practical matter, EPA's regulations are complex and create a number of procedural and substantive impediments to securing an exemption under current law:
 - First, any petition "must be submitted on an individual basis for each manufacturer or individual affected by the 1979 manufacturing ban." 40 C.F.R. § 750.11(a). This means that a nationwide exemption is effectively precluded.
 - Second, individualized determinations on both the "unreasonable risk" and "chemical substitute" criteria must be made. *See* 40 C.F.R. § 750.20(c). EPA, in the context of the 1996 import rule, generally determined that the "unreasonable risk" test is met today for PCB imports. *See* 61 *Fed. Reg.* 11096 (Mar. 18, 1996). However, EPA has interpreted the "chemical substitute" criterion to require a demonstration that there are not available alternatives for PCB destruction within Canada, and in fact it proposed

³ As discussed in Section I.(G), *infra*, in a handful of instances after 1980 EPA also exercised its enforcement discretion, based on the circumstances of particular cases, to permit discrete imports of limited quantities of PCBs.

to deny petitions for exemption in light of the existence of Canadian disposal facilities. *See 59 Fed. Reg. 62875, 62879 (Dec. 6, 1994).*

- Third, as noted above, once EPA receives a petition, it is under no specific deadline to act, positively or negatively. Although Appendix A to Subpart A of 40 C.F.R. Part 750 notes that EPA hopes to proceed from notice of proposed rulemaking to close of the comment period within approximately four months, it nonetheless underscores that this is an estimate only and a longer period may be required.

- Fourth, a complex notice and comment rulemaking must be conducted, including hearings with the possibility of cross-examination on disputed issues of material fact. *See 40 C.F.R. Part 750, Subpart A.* It is quite conceivable that environmental groups, such as the Sierra Club, or companies engaged in the PCB disposal business in Canada, could strongly oppose the grant of any exemption, tie up the rulemaking process and even challenge the eventual EPA decision in court.

- Fifth, as noted above, even if an exemption is obtained, it only lasts for one year. *See 40 C.F.R. § 750.11(d)(4).* Renewal requests must be filed within six months of the exemption's expiration, followed by another round of rulemaking. Any exemption thus entails essentially endless involvement in rulemaking.

24. What this means is that the exemption process does not work very well in practice. For example, as discussed in greater detail in Section I.(E) below, SDMI filed the first of its four exemption requests in May, 1991. It did not get to the hearing stage until some four years later, in late 1994.⁴ At that point, EPA in fact proposed to deny the exemption requests on the grounds that Myers had failed to prove that either statutory criterion was met. *See 59 Fed. Reg. at 62879.* At a minimum, processing of any exemption petition, even assuming no significant opposition, takes at least eighteen months. When EPA adopted its new, generic import rule in 1996, the agency noted that "exemptions were rarely granted" under the existing procedures. *See 61 Fed. Reg. at 11096.*⁵ Stated simply, because of what EPA views as the statutory requirement for individualized, case-by-case consideration, the need for findings on each of the two statutory exemption criteria, the burdensome notice, comment and hearing procedures and the one year limitation on exemptions, running an effective

⁴ EPA proposed to deny Myers' petitions on December 6, 1994. Myers thereafter requested a hearing, which was held in March 1995. *See 60 Fed. Reg. 7742 (Feb. 9, 1995).* No final EPA decision was ever made on the Myers' petitions, since they were overtaken by events, *viz.*, the exercise of enforcement discretion in October 1995 and the issuance of the import for disposal rule in March 1996.

⁵ It has been suggested that certain changes might improve the process, *e.g.*, requiring decisions within a certain timeframe. *See 61 Fed. Reg. at 11099.* However, it is questionable whether they would really address the basic procedural and substantive barriers imposed by Congress in TSCA itself.

exemption program would require the kind of concerted effort which the agency has not been prepared to undertake.

2. The Exercise of "Enforcement Discretion".

25. As discussed in Section II below, EPA, as a federal regulatory agency, has authority to determine how vigorously to enforce the statutes under its jurisdiction, and the authority to decide how to commit its resources in its enforcement efforts. *See* 2 Kenneth Culp Davis, *Administrative Law Treatise* §9:1 at 216 (2nd ed. 1979). EPA has little in the way of formal or informal procedures for requesting or granting "enforcement discretion." However, in 1984 EPA reaffirmed its general policy against giving assurances that EPA will not proceed to take enforcement action against a specific individual violation of an environmental protection statute or regulation. The reaffirmation of this policy was communicated in a memorandum from EPA's Assistant Administrator for Enforcement and Compliance Monitoring to other EPA assistant administrators and to EPA regional administrators. U.S. EPA Memorandum, "Policy against 'No Action' Assurances," November 16, 1984.
26. The EPA policy states that a decision not to enforce a legal requirement against a particular party could severely hamper later enforcement efforts against that party or against others that may be "similarly situated." *See id.* at 1. The policy notes that giving an assurance of no enforcement action can "erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community." *Id.* at 1. The memorandum states unequivocally that the policy applies in all contexts, including an enforcement discretion that is sought "on the basis that revision to the underlying legal requirement are being considered." *Id.* at 2.
27. Exceptions to the general rule against granting enforcement discretion are available under the 1984 policy in two relatively narrow categories: (1) where a process for granting a no action assurance is expressly provided in an applicable statute or regulation, and/or (2) "in extremely unusual cases in which a no action assurance is clearly necessary to serve the public interest." *Id.* at 2. Since, as noted above, TSCA makes no express provision for enforcement discretion, only the second category is applicable in the context of PCB imports. As an example of the second category, the memorandum notes that enforcement discretion might be warranted to avoid extreme risks to public health or safety. *Id.* at 2. It is our understanding that enforcement discretion decisions must be personally made by the Assistant Administrator for Enforcement and cannot be made by lower level agency officials.
28. EPA reaffirmed its 1984 policy on the use of enforcement discretion in March 1995. In a memorandum to assistant administrators and regional offices, Steven A. Herman, the Assistant Administrator for Enforcement and Compliance Assurance, stated that the agency has "long adhered to a policy against giving definitive assurances" that the government will not proceed with an enforcement response for a violation of a statute or regulation unless it is within the context of a formal enforcement proceeding. U.S.

EPA Memorandum, "Processing Requests for Use of Enforcement Discretion," March 3, 1995, at 1. The memorandum points out that the limitation on the use of enforcement discretion is "necessary and critically important," and has been "a consistent feature of the enforcement program" since it was formalized in 1984. *Id.* The March 1995 memorandum also reiterates that no action assurances will be considered only if expressly authorized by statute or if extremely unusual circumstances are present. *Id.* at 2. We understand that the issuance of no action assurances by EPA has in fact been quite rare.

29. Notwithstanding his reaffirmation of long-standing EPA policy on enforcement discretion and its infrequent use within the agency, less than seven months later Assistant Administrator Herman granted enforcement discretion to SDMI to permit the import of PCB wastes from Canada for disposal in the U.S. Letter from Steven A. Herman to Dana S. Myers, October 26, 1995. EPA cited two factors that led to its decision to grant enforcement discretion. First, EPA found that there would be "no unreasonable risk of injury" from the imports of PCB wastes from Canada. *Id.* at 1. Second, in direct conflict with its enforcement policy, EPA relied upon the fact that the general rule on PCB imports was expected to become final by the end of January 1996, and that the rule when final would permit the type of transport for disposal requested by SDMI. *Id.* at 1. Neither of these factors was of course unique to SDMI. Thus, EPA also stated that it would allow other similarly qualified companies to apply for the same enforcement discretion that it was granting to SDMI. Indeed, as a practical matter, given EPA's determination, EPA would have had no basis for treating any other company differently than Myers.
30. The EPA action is notable in several respects. First, the agency's finding of "no unreasonable risk of injury" is the very opposite of the determination it conveyed to SDMI in December 1994, when it proposed to deny SDMI's request for an exemption under Section 6(e)(3)(B) of TSCA. *See* Section I.(E), *infra*. EPA reversed its position on no unreasonable risk of injury without any indication of the reasons for its switch in position, or any analysis of the potential risks that might be posed by the import of Canadian PCBs for disposal. Second, this letter does not cite or refer to the criteria of EPA's newly-reaffirmed general enforcement policy, and Assistant Administrator Herman made no effort to justify the exercise of enforcement discretion in light of the established exceptions referred to above or to explain why EPA was deviating from the basic principles of its general enforcement policy. Third, EPA chose to act while the generic import for disposal rule was undergoing final review, thereby in effect short-circuiting the ordinary notice and comment rulemaking process under the Administrative Procedure Act, 5 U.S.C. § 553 (the "APA"), that governed the proposed import for disposal rule.

E. EPA's Proposed Decision on Myers' Exemption Petitions.

31. Between May 1991 and October 1993, SDMI filed four petitions for exemptions, pursuant to Section 6(e)(3)(B) of TSCA and 40 C.F.R. § 750.31, to permit it to import PCB wastes from Canada into the United States for disposal. SDMI proposed to

dispose of these wastes at its TSCA-approved facility in Tallmadge, Ohio. Despite the one-year limitation of the Act, Myers requested that EPA grant it import approval for a period of five years.

32. On December 6, 1994, in a notice published in the *Federal Register* (59 *Fed. Reg.* 62875), EPA proposed to deny all four Myers petitions. EPA explained that it considered the Myers petitions in accordance with the requirements of Section 6(e)(3)(B) of TSCA. With respect to both the “unreasonable risk” and the “chemical substitute” criteria, EPA underscored that the petitioner “bear[s] the burden of demonstrating eligibility.” 59 *Fed. Reg.* at 62876. In other words, EPA interpreted TSCA “to require a petitioner to demonstrate that the proposed activity would not pose an unreasonable risk,” *id.*, and to demonstrate “that it has made the requisite good efforts [to develop a chemical substitute].” *Id.* at 62877. With respect to this latter test, EPA stated that a petitioner seeking import authorization was required to “show why such activity must occur in the United States and what steps will be taken to eliminate the need to import PCBs in the future.” *Id.*
33. EPA proposed to find that Myers failed to carry its burden with respect to both statutory criteria. 59 *Fed. Reg.* at 62877-62879. First, EPA stated that Myers had “failed to establish that there is no unreasonable risk.” *Id.* at 62878. EPA explained that in 1979 it had made a generic determination that importation of PCBs “present[s] an unreasonable risk of injury to human health and the environment.” *Id.* Noting that Myers’ proposal involved the “transportation and disposal of very large quantities of PCB waste,” *id.* EPA emphasized that the exposure risk would be increased, even if the wastes were destroyed at SDMI’s facility in Tallmadge, Ohio, and that transportation of significant amounts of PCBs throughout the United States “pose[s] a potential risk of spills or other exposure.” *Id.* EPA further found that Myers had not shown that continued storage of PCB wastes in Canada posed any risk of cross-border contamination. *Id.* at 62879.
34. Second, EPA found further grounds to deny the petitions under the “chemical substitute” test. EPA stated that it interpreted the “chemical substitute” test in the context of a petition for an import exemption to require the agency to “consider the issue of the availability of alternatives, and the overall necessity for granting an exemption.” 59 *Fed. Reg.* at 62879. In this regard, EPA noted that Myers had “fail[ed] to demonstrate that establishing a facility in Canada is not feasible,” nor had Myers explained why it had not made “substantial good faith efforts” to do so. *Id.* Finally, EPA stressed that Canada had its own PCB destruction capability and was in the process of developing additional capability, so that it could not be said that there was any “necessity” to ship wastes to the United States. *Id.*
35. The message of EPA’s proposed denial of the Myers petitions could readily be understood to be that, as even a general proposition, the statutory justification for allowing importation of PCB wastes was lacking. Indeed, EPA’s stated adherence to its determination that imports of PCBs would pose an “unreasonable risk” to human health and the environment might easily be taken to rule out future action to permit

such imports either through the mechanism of “enforcement discretion” or generic rule.

36. Still, EPA itself was careful not to constrain its future action in quite so tight a manner. EPA thus stressed that its determinations were based on *Myers' failure* to submit “adequate information,” 59 *Fed. Reg.* at 62879, and it concluded its discussion of Myers’ petitions by explaining that it was “preferable” to consider import issues, because of their “far-reaching consequences,” in the context of changes EPA was proposing to make in its disposal rules generally rather than “in isolation in the context of individual company’s petitions for exemption.” *Id.* EPA expressly stated it wished comment “on the circumstances under which the United States border should be opened to the transboundary [sic] shipments of PCBs for disposal.” *Id.*

F. EPA’s 1996 PCB Import Rule.

37. During the pendency of the SDMI petitions, EPA was actively considering the possibility of revival of the “open border policy,” at least in modified form, in the context of its rewrite of its PCB disposal rules.
38. In an Advance Notice of Proposed Rulemaking, published on June 10, 1991 (56 *Fed. Reg.* 26738), EPA announced that it was considering amending its PCB disposal regulations. While EPA did not expressly state that it would reconsider the import ban, it noted that it would take comments regarding virtually any aspect of these regulations. 56 *Fed. Reg.* at 26740.
39. On December 6, 1994, contemporaneously with its denial of the SDMI petitions, EPA published its proposed rule on PCB disposal (59 *Fed. Reg.* 62788). EPA expressly proposed a new import rule under which the agency would make case-by-case determinations to permit imports “where EPA determines that it is in the interests of the United States and will not result in unreasonable risks to health or the environment.” 59 *Fed. Reg.* at 62817. In explaining its proposal, EPA noted that there might be instances where import was desirable, for example, “where PCBs were located outside the United States, but in close proximity to the United States, and adequate disposal facilities were not available in the country in which they were located.” *Id.* In such circumstances, EPA proposed to use what it claimed was its authority under Section 6(e)(1) of TSCA “to allow these case-by-case exceptions to the ban on import for disposal of PCBs at concentrations of 50 ppm or greater at EPA’s initiative or in response to a petition.” *Id.* Under the proposal, while petitions would still have to be submitted on an individual basis, the one-year limitation would no longer have applied, and there would have been no “chemical substitute” test to be met. Furthermore, EPA would have reserved the right to create what it termed a “categorical exception” where appropriate. *Id.* Still, EPA was not proposing just to open U.S. borders to imports, without qualification. Indeed, it stressed that it “would not be inclined to find that import for disposal was in the interests of the United States solely because disposal of the PCBs in this country was less expensive.” *Id.* EPA gave no indication that, as a general matter, imports no longer posed an

“unreasonable risk” to human health or the environment within the meaning of Section 6(e) of TSCA.

40. In connection with its proposed rule, EPA solicited written comments and held a public hearing on June 7-8, 1995. Opposition to EPA’s proposal was expressed, in particular, by the U.S. law firm of Hogan & Hartson on behalf of Chem-Security (Alberta) Ltd. and two other Canadian and U. S. disposal firms. Among other things, Hogan & Hartson argued that EPA lacked statutory authority under Section 6(e)(1) of TSCA to open the U.S. border and that, instead, all PCB imports were required to be regulated under Section 6(e)(3)(B). Hogan & Hartson pointedly noted that, should EPA proceed as planned, it “risk[ed] a substantial likelihood of court challenge and reversal.” *See* 61 *Fed. Reg.* at 11099-11100; letter, dated May 5, 1995, from Kenneth W. Farber, Esq. to EPA Office of Pollution Prevention and Toxics. Thus, EPA -- and other interested parties -- were on notice as early as the spring of 1995 that there might be serious legal infirmities with EPA’s approach to regulating PCB imports and that a court challenge was possible.
41. On March 18, 1996, EPA issued its final rule concerning importation of PCBs for disposal (61 *Fed. Reg.* 11096). This final rule, premised on EPA’s asserted rulemaking authority under Section 6(e)(1) of TSCA, went far beyond the December 1994 proposal and essentially opened the border to imports of PCBs at concentrations greater than 50 ppm, subject to EPA’s storage and disposal rules in the United States.
42. In announcing its final action, EPA harked back to its 1979 “open border policy” and claimed that it had sufficient authority “to regulate import of PCB waste for disposal” under Section 6(e)(1) of TSCA, notwithstanding the import ban in Section 6(e)(3)(A). In EPA’s view, as long as it could determine that there was no “unreasonable risk” to human health and the environment, then it could properly invoke its Section 6(e)(1) authority to permit imports. EPA rejected in a single, conclusory sentence the arguments of Canadian disposal firms that the agency lacked such authority under the law. *See* 61 *Fed. Reg.* at 11100. The effect of proceeding under Section 6(e)(1) was, of course, to eliminate any further need for individual companies to resort to the exemption process under Section 6(e)(3)(B) and 40 C.F.R. Part 750.
43. Despite its adherence less than eighteen months previously to the view that “unreasonable risk” had not been demonstrated, at least by SDMI, EPA then determined that the risk associated with import for disposal would be “insignificant.” 61 *Fed. Reg.* at 11097. Emphasizing the substantial information submitted to it during the public comment period on the proposed rule, EPA found that, because PCBs in transit would be subject to Department of Transportation regulations for transporting hazardous materials, transportation “presents little risk of injury.” *Id.* at 11098. At the same time, EPA said, its own requirements for storage and disposal in TSCA-approved facilities likewise “presents little risk of injury.” *Id.* EPA further noted that allowing importation would not cause any shortages in U.S. disposal capacity. Finally, EPA explained that it now considered “impractical and inequitable” its original proposal to make judgments about risks to the U.S.

environment from wastes stored abroad. *Id.* at 11099. Thus, EPA could readily conclude that “import will not present an unreasonable risk of injury to health or the environment in the United States.” *Id.* at 11097.

44. Under the generic import rule as adopted by EPA, importation of PCB wastes became a relatively simple matter. Any importer would submit a “PCB waste import notice” to EPA at least 45 days prior to the first import. Each notice covered all shipments during the ensuing twelve months. Because EPA believed that the information required in the notice would “generally not warrant treatment as confidential business information,” 61 *Fed. Reg.* at 11101, the content of the notices would ordinarily be public. EPA would “review” import notices for adequacy and might refuse entry where notices were “incomplete, inaccurate, or the designated storage or disposal facility is not approved for the type, concentration or quantity of waste proposed.” *Id.* However, the importation itself would not be subject to EPA prior authorization or approval. EPA made clear that imported PCBs would be “regulated under 40 C.F.R. Part 761 in the same manner as domestic PCBs, except that imported PCB wastes must be stored and disposed of in a facility with an appropriate commercial storage or disposal approval that has been issued under section 6(e) of TSCA.” *Id.* Finally, certain record-keeping and manifesting requirements applied. *Id.* at 11102.
45. In sum, as of March 18, 1996, EPA instituted a policy that reflected a fundamental turnabout from the previous sixteen years. Instead of an absolute ban, subject to an individualized company-by-company exemption process which was rarely invoked and which largely didn’t work, EPA reverted back to a policy of allowing importation of PCB wastes without the need for any EPA approval, on the premise that such importation did not pose an “unreasonable risk” to human health or the environment. As long as notice and record-keeping requirements were met, and as long as disposal were accomplished in accordance with the Part 761 regulations, barriers to importation had been eliminated.

G. The Ninth Circuit’s Decision in Sierra Club v. EPA.

46. EPA’s generic PCB import rule survived only a little more than fourteen months. When presented with a facial, statutory challenge to the rule, the Ninth Circuit Court of Appeals, in *Sierra Club v. EPA*, 118 F.3d 1324 (9th Cir. 1997), gave short shrift to EPA’s assertion of authority under Section 6(e)(1) of TSCA and held the rule unlawful and invalid.
47. In a unanimous opinion handed down on July 7, 1997, the Ninth Circuit disposed of the import rule with less than one page of analysis. The Court relied on the rule of construction announced by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), that, where Congress has “directly spoken to the precise question at issue,” the language of the statute is controlling. Here, the Ninth Circuit found that Section 6(e) of TSCA imposed an “absolute ban” on the import of PCBs, with the result that “EPA may not promulgate a rule governing the disposal of PCBs that would violate this categorical ban.” 118

F.3d at 1326. The Court noted that the “lone exception” to the ban was found in Section 6(e)(3)(B), but that such exception “may not last for more than one-year,” and, therefore, EPA’s rule, which allowed importation for the indefinite future, could not be sustained. *Id.* at 1327. Last of all, the Court explained that, because the rule “attempts to obviate” TSCA’s “unreasonable risk” and “chemical substitute” tests, the rule was “contrary to the clear intent of Congress embodied in unambiguous statutory text.” *Id.*

48. The consequences of the Ninth Circuit’s decision have been straightforward. Effective July 20, 1997, EPA closed the U.S. borders to PCB imports. Today, EPA cannot establish a generic rule allowing importation of PCB wastes into the United States. Rather, EPA can only grant case-by-case exemptions to the ban, so long as both the “unreasonable risk” and “chemical substitute” tests are met and so long as the exemptions do not last for more than a year. As EPA stated when at long last it issued its revisions to the Part 761 PCB disposal rules on June 29, 1998, “EPA can now only allow imports of PCBs by issuing exemptions to importers via the petition process under section 6(e)(3)(B) of TSCA.” 63 *Fed. Reg.* 35384, 35420 (June 29, 1998).
49. Other than through invocation of the Section 6(e)(3)(B) process, there is no way, short of legislation amending TSCA, to open U.S. borders at this time to PCB imports.⁶ In particular, “enforcement discretion,” which EPA invoked in October 1995 to permit imports in the absence of a generic rule, is not available, at least to allow broad-scale importation of PCBs.⁷ Enforcement discretion was invoked in 1995 because EPA had already made the decision, on the basis of its purported authority under Section 6(e)(1) of TSCA, to open the border by generic rule, and it was only a matter of a few short months before such rule would be issued. In the current circumstances, in light of the Ninth Circuit decision and with no prospect for a generic rule, there is no basis for exercising any similar enforcement discretion to permit PCB imports. Indeed, in retrospect, given the clarity of the Ninth Circuit’s reading of TSCA, it may be questioned whether EPA could or should properly have invoked enforcement discretion to permit PCB imports between November 1995 and March 1996. The Ninth Circuit decision plainly vindicates those who all along had questioned EPA’s authority to act under Section 6(e)(1).

⁶ It should be noted that there has not been a major legislative effort to overturn the TSCA ban. To the contrary, when the issue was fresh in 1997, there was a substantial initiative by Congressman Bensten (D.-Texas) and others to codify the Ninth Circuit’s decision and explicitly bar EPA from using its regulatory authority to allow PCB waste imports. *See* 143 *Cong. Rec.* H 8666 (daily ed., October 8, 1997); *see also* 143 *Cong. Rec.* H5343-45 (daily ed., July 16, 1997).

⁷ Between 1980 and 1995, EPA on a few occasions did exercise enforcement discretion to permit limited quantities of PCB imports in individual cases. In the absence of Section 6(e)(1) authority, it is perhaps questionable whether even this degree of enforcement discretion still exists today. In any event, EPA’s action in these cases, which apparently involved the return to the United States of shipments made to Canada in mistake, is in no way comparable to the across-the-board no action assurances allowing Myers and other companies to import PCBs in 1995 and 1996.

II. THE LEGAL FRAMEWORK GOVERNING ENFORCEMENT DISCRETION.

A. General Principles.

50. U.S. courts have been reluctant to review agency decisions not to enforce statutes, particularly when such decisions are made on a case-by-case basis. Under Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 701, a presumption of unreviewability has thus been established. However, that presumption is not absolute and may be rebutted, especially when agency action or inaction is embodied in general policy statements that go beyond the facts of any one particular case. If deemed reviewable, a court may set aside the agency action where it is inconsistent with the underlying statute or where it is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.
51. All regulatory agencies have enforcement discretion, *i.e.*, the power not to enforce, or to enforce statutes or regulations aggressively or apathetically, strongly or weakly. 2 Kenneth Culp Davis, *Administrative Law Treatise* § 9:1 at 216 (2nd ed. 1979). That is true even if a statute provides with clarity that an agency “shall” or “must” enforce or that it has a “duty” to enforce. *Id.* at 217. Nearly all statutes that provide in “absolute” terms for enforcement are nullified in some measure by what sometimes referred to as an “inherent,”⁸ discretionary power not to enforce. *Id.* at 217-18.
52. U.S. courts have been reluctant to review agency decisions not to enforce, and specifically not to prosecute, for many reasons. 3 Kenneth Culp Davis, *Administrative Law Treatise* § 17.5 at 122 (3rd ed. 1994). Courts have recognized that no agency has access to all of the investigative and prosecutorial resources required to prosecute all violations of law within its jurisdiction. *Id.* Moreover, in order to review each decision to determine whether an agency is abusing its discretion, courts would need to identify criteria suitable for use by judges in evaluating decisions not to prosecute. *Id.* Identifying such criteria is difficult since the factors that influence the resource allocation decisions of prosecutors are complicated, hard to assess and dynamic. *Id.* The long history of giving deference to agencies using their assumed enforcement discretion, and the rationale for doing so, are predicated on the perceived need for agencies and their prosecutors to have such discretion when determining whether to prosecute on a case-by-case basis. *Id.* at 121-22.
53. Despite the general reluctance of the courts to review “enforcement discretion,” courts have recognized that this reluctance should not extend to allowing agencies to abdicate their responsibility in enforcing a statute by choosing not to enforce a statute at all. Thus, the exercise of enforcement discretion is not absolute. *Id.* The exercise of enforcement discretion can be circumscribed by the U.S. Constitution, statute and

⁸ *E.g.*, *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 675 (D.C. Cir. 1994).

the agency's own policies and may be set aside by the courts in appropriate circumstances.

B. The APA and Judicial Review of Enforcement Discretion.

54. The APA contains comprehensive provisions for judicial review of agency action (and inaction) and thereby provides for a judicial check on agency discretion, including enforcement discretion. *See* 5 U.S.C. §§ 701-706.⁹ However, judicial review of agency action is unavailable to the extent “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. §701(a). The application of these two exceptions, especially the second, determines the reviewability of enforcement discretion.

55. On the one hand, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the Supreme Court established a general presumption in favor of the reviewability of agency action. The Supreme Court stated that:

[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review [S]o long as no statute precludes such relief or the action is not one committed by law to agency discretion, . . . [t]he Administrative Procedure Act provides specifically not only for review of “agency action made reviewable by statute” but also for review of “final agency action for which there is no other adequate remedy in a court” [O]nly upon a showing of “clear and convincing evidence” of a contrary legislative intent should courts restrict access to judicial review.

56. 387 U.S. at 140-41. *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Supreme Court interpreted the second APA exception -- “except to the extent that . . . agency action is committed to discretion by law” -- and emphasized that it is only applicable “in those rare instances where ‘statutes are drawn in such broad terms that in a given case there is *no law to apply*.’” 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945) (emphasis added)).

57. On the other hand, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court declined to extend the principle of a presumption of reviewability to situations where the agency determines in its discretion not to enforce a law or regulation. Rather, the Court determined that for such inaction cases there is a presumption of unreviewability under the APA. *Id.* The Court paraphrased the “no law to apply” test, stating that “review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.” *Id.* at 830. The Court reasoned that agency decisions to refuse enforcement are generally unsuitable for judicial review because of the difficulty of

⁹ 5 U.S.C. § 551(13) defines “agency action” as including “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*” (emphasis added). Thus, agency *inaction*, as well as agency action, is reviewable.

finding and applying a meaningful standard to judge the agency's decision not to act. *Id.* at 830-831. The Court in *Chaney* nonetheless "emphasize[d]" that an agency's decision not to enforce is "only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 832-33. In the case at hand, contrary to the lower court, which relied upon the agency's policy statement to find "law to apply," the Court found the policy statement "singularly unhelpful" in large part because it was vague and did not purport to limit the agency's discretion. *Id.* at 836.¹⁰

58. *Chaney* left open the question of what kind of agency policy statement would be sufficient to rebut the presumption against reviewability of agency decisions not to enforce. Since *Chaney*, some courts and commentators have concluded that policy statements cannot rebut the presumption because they are by definition not binding upon the agency. *PIRG v. NRC*, 852 F.2d 9, 15 (1st Cir. 1988); 3 Kenneth Culp Davis, *Administrative Law Treatise* § 17.7 at 141 (3rd ed. 1994). However, other courts have concluded that, consistent with *Chaney*, "[j]udicially manageable standards may be found in formal and informal policy statements and regulations as well as statutes," and, thus, policy statements can be sufficient to rebut the presumption of unreviewability. *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987); see *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994).
59. A forceful argument can be made that the Court did not intend in *Chaney* to announce a blanket rule that policy statements can never be used to rebut the presumption against reviewability. In *Chaney*, "the policy statement [at issue] was attached to a rule that was never adopted," and, as noted above, the Court would have had difficulty with it "even if it were a properly adopted agency rule." *Chaney*, 470 U.S. at 836. While these statements might be taken to mean that the Court would require a binding rule to rebut the presumption, the Court seemed more concerned with the fact that the policy statement was vague and did not purport to limit the agency's enforcement discretion. *Id.* It would thus seem logical that, if an agency policy statement instead was not vague and did clearly limit the agency's enforcement discretion, then such a policy statement would provide courts a sufficiently manageable standard against which to judge an agency action and thus, "law to apply." This conclusion is reinforced by the Court's statement that one such circumstance which might indicate that an agency decision was not committed to its discretion may exist when an agency "consciously and expressly adopt[s] a *general policy* that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n.4. (emphasis added). See *Adams v.*

¹⁰ The policy statement under review in *Chaney* only provided that the agency was "obligated to investigate . . . thoroughly and to take whatever action is warranted." *Chaney v. Heckler*, 718 F.2d 1174, 1186 (D.C. Cir. 1983). Obviously this left the agency entirely free to determine what, if any, action was warranted in any particular situation and so did not meaningfully constrain agency discretion.

Richardson, 480 F.2d 1159, 1163 (D.C. Cir. 1973) (holding that a “consistent failure” to enforce the law is a “dereliction of duty reviewable in the courts”).

60. In sum, if an agency adopts a policy that involves not just declining to enforce in individual cases, but rather declining to enforce a statute across-the-board, there is a strong argument that this is sufficient to rebut the presumption of unreviewability and provide “law to apply.” See, e.g., *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (“[A]n agency’s adoption of a general enforcement policy is subject to review. Indeed, . . . this court [has] distinguished between ‘an agency’s statement of a general enforcement policy’ and a ‘single-shot nonenforcement decision,’ the former being reviewable even though the latter may not be.”); *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (“It is conceivable that a document announcing a particular non-enforcement decision would actually lay out a general policy delineating the boundary between enforcement and nonenforcement and purport to speak to a broad class of parties; such a communication might qualify as the sort of general statement of policy [that is] reviewable . . .”).

C. The Standard of Review.

61. Once it is determined that an agency’s action or inaction does not meet either of the exceptions to judicial review under the APA, § 701(a)(1)-(2), the reviewing court must determine which standards to apply upon review. This process is straightforward.
62. First, the Court must decide whether the agency action is consistent with the underlying statute. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this involves application of a two-part test. One, the reviewing court must ask “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. In making this determination, “the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron*, 467 U.S. at 842-43. Two, if the reviewing court finds that “the statute is silent or ambiguous with respect to the specific issue,” the court must uphold the agency’s interpretation as long as it represents “a permissible construction of the statute.” *Id.* at 843.
63. Second, if Congress has left a gap to fill through the exercise of agency discretion, courts will review the agency action under APA § 706(2)(A), which provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” In this review, the court’s basic inquiry is to determine whether the agency has “[e]xamined the relevant data and articulated a satisfactory explanation for its action including a ‘rational connection between the facts found and

the choices made.” *Motor Vehicle Mfrs. Ass’n. of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 44 (1983) (internal citations omitted). While courts have sometimes indicated that alleged violations of policy statements, such as EPA’s statement of the general agency standards governing the grant of enforcement discretion, are not reviewable, there are nonetheless instances in which “[c]ourts have found agencies to have violated the APA by deviating from an announced policy without sufficient reason.” *Southwest Center for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 n. 4 (9th Cir. 1998); *People of State of Cal. v. FCC*, 905 F.2d 1217, 1234-38 (9th Cir. 1990).

D. Grounds for Challenging EPA’s Grant of Enforcement Discretion to SDMI.

64. This review demonstrates that, while U.S. courts are reluctant to review agency grants of enforcement discretion, they may do so whenever the agency action deviates from underlying policy without good reason that has been articulated by the agency, or whenever the grant of discretion to a particular entity is not based on the specific facts presented by that entity, but instead indicates an agency determination on an across-the-board basis not to enforce a congressional mandate.
65. The grant of enforcement discretion to SDMI on October 26, 1995 can reasonably be considered such a case, and thus might have been subject to challenge and review in the U.S. courts. As an initial matter, as noted in Section I.(A), nothing in TSCA expressly authorizes EPA to exercise enforcement discretion. Moreover, the grant of discretion to SDMI was not an isolated instance predicated on the specific facts presented by SDMI, but in fact represented a new policy course for EPA. In addition, the letter to SDMI contravened EPA’s policy on the grant of enforcement discretion announced seven months earlier. Finally, the grant of enforcement discretion effectively served to pre-determine and pre-ordain the direction of EPA policy on PCB imports even though EPA had not fully completed its required notice-and-comment review under the APA.
66. Even though EPA stated that enforcement discretion was being granted on a case-by-case basis, the October 26, 1995 letter in fact appears to be very much like a new statement of general policy, and one that is binding on all those subject to it. EPA’s action was not based on any facts peculiar to SDMI (such as its special ability to handle the wastes, its proximity to the U.S.-Canada border, etc.). Moreover, EPA made its judgment on the basis of no unreasonable risk posed as a general matter and the pending revision of its TSCA regulations. Furthermore, EPA expressly stated that other “similarly qualified” companies would be granted “the same discretion.” All these facts strongly indicate that the action was a general shift in policy, not an action that was designed to deal with the specific fact pattern posed by the SDMI request. A clear indication that this was so comes from the fact that within less than three weeks of the granting of the SDMI request, at least 10 new requests for enforcement discretion were filed with EPA. Most of these requests were filed within one week of the October 26, 1995 grant of enforcement discretion. The requests were filed on

behalf of 31 facilities located in 21 different states. As far as we can determine, even though review was nominally on a “case-by-case” basis, every one of these new requests was granted by EPA. This provides a strong indication that the SDMI approval letter in fact constituted a new direction in EPA’s policy under Section 6(e) of TSCA. As such, it would be reviewable under the *Crowley* and *OSG* line of cases.

67. EPA’s action also was inconsistent with its general policy on enforcement discretion -- a policy that EPA had reaffirmed less than seven months before the SDMI decision was made. Further, EPA’s judgment that the SDMI import request posed “no unreasonable risk” was a turnaround from its earlier announced judgment that the SDMI proposal could well pose an unreasonable risk to human health and safety. *See* 59 *Fed. Reg.* at 62878. EPA, however, never articulated any reasons for its deviation from established enforcement policy or its change in course with regard to the specific risks of Myers’ proposal. Federal agencies, by law, are expected to articulate clear and consistent rationales for the decisions they make, and, as explained in the *Southwest Center* case, 143 F.3d at 523 n. 4, the failure to do so when deviations from established policy are at issue can subject such action to judicial review on the grounds that the action taken is arbitrary and capricious.
68. Finally, EPA’s grant of enforcement discretion to SDMI, while its notice-and-comment APA review process of the proposed new PCB import rule under Section 6(e)(1) of TSCA was underway, may have represented an attempt by the agency to short-circuit the APA process itself, and to grant SDMI the import opportunity that otherwise would have had to await EPA’s final action on the TSCA rule. EPA’s decision to adopt a policy change through the enforcement discretion process rather than engaging in a rule-making contemplated under the APA could be viewed by a court as a circumvention of the APA process, and thus subject to review under 5 U.S.C. §706. *See Alaska Professional Hunters v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”).

III. TREATMENT OF U.S. LAW IN THE PARTIES’ MEMORIALS.

69. At various points in the memorials of Canada and SDMI, the parties address questions related to the application of U.S. law and, more particularly, the regulatory regime established under TSCA and the lawfulness of EPA’s exercise of enforcement discretion under such statute. We have several comments on the discussions by the parties.

A. SDMI Memorial, Pages 5-6, ¶¶ 11-12.

70. Myers describes on pages 5 and 6 of its memorial the regulatory regime under TSCA and the exercise by EPA of enforcement discretion in October 1995. Myers correctly

describes the exemption process under Section 6(e)(3)(B) of TSCA. However, Myers' description of EPA's 1994 proposed import for disposal rule is incomplete, and its characterization of EPA's 1995 action as involving the grant of a "discretionary permit" is inaccurate. First, as explained in Section I.(F) above, EPA's 1994 proposal was not a proposal to open the U.S. border to PCB imports without qualification. Rather, EPA would still have made case-by-case determinations, either on its own initiative or on the basis of petition. Moreover, EPA expressed a general disinclination to allow imports if the rationale for importation was simply economic. Second, as explained in Section I.(D)(2) above, the enforcement discretion is not properly characterized as a "permit." Rather, what Myers received from EPA was a "no action assurance," that is, an assurance from EPA that Myers would not be subject to an enforcement action under TSCA for importing PCBs *in the absence of a valid exemption granted under Section 6(e)(3)(B) and in violation of the import ban.*

B. SDMI Memorial, Page 15, ¶ 45.

71. At page 15 of its memorial, Myers discusses the *Sierra Club* decision and its implications. It is correct that the Ninth Circuit struck down the import for disposal rule. However, for the reasons set forth in Section I.(G) above, we do not believe it is accurate to state that decision "did not affect the ability of EPA to grant individual enforcement discretions to companies such as S.D. Myers, Inc." The particular exercise of enforcement discretion in 1995 was premised on what EPA then believed was its broad, discretionary authority under Section 6(e)(1) of TSCA to permit imports for disposal. The Ninth Circuit made it clear that EPA had no such authority. The Court of Appeals underscored that EPA's only authority to permit PCB imports was under the specific exemption provisions of Section 6(e)(3)(B). In addition, neither the rationales set out in EPA's 1984 and 1995 enforcement policy statements nor the rationales actually provided by EPA in its October 26, 1995 letter to SDMI would be applicable to any request for enforcement discretion that SDMI or other companies might make today. In light of the Ninth Circuit decision and these circumstances, we do not see how EPA could ignore the provisions of the law and proceed outside of the Section 6(e)(3)(B) process to grant enforcement discretion of the sort granted to Myers in 1995 to any company to import PCBs into the United States.

C. SDMI Supplemental Memorial, Pages 7-8, ¶¶ 15-16.

72. At pages 7 and 8 of its supplemental memorial, SDMI again discusses the TSCA exemption process and the exercise of enforcement discretion by EPA. This discussion contains several misstatements. First, it is not correct to refer to the exercise of enforcement discretion under TSCA as "statute-based." As noted in Section I.(A) above, there is no statutory provision of TSCA expressly authorizing EPA not to enforce the law's import prohibitions. Any discretion exercised by EPA must be based upon the agency's claim to have "inherent" or implicit authority to provide no action assurances. Second, the exemption process does not merely require that Myers "in good faith" consider "alternatives to the importation." Rather, EPA

has interpreted the “chemical substitute” test of Section 6(e)(3)(B) of TSCA to call for an objective assessment of the overall availability of alternatives in the exporting country and the “necessity for granting an exemption.” See Section I.(E), *supra*. Third, EPA’s October 26, 1995 letter to Myers does not establish that “Myers successfully demonstrated the safety and efficiency of its proposal.” Indeed, as of December 1994, in the one extant EPA determination on this subject, EPA indicated that Myers had not shouldered its burden in this regard. The October letter, rather than based on specifics regarding Myers’ operations, was instead premised on what EPA then anticipated would be a forthcoming generic determination, eventually embodied in the March 1996 rule, that imports of PCBs into the United States would not pose “an unreasonable risk of injury to health or environment.”

D. Canada Counter Memorial, Pages 12-15, ¶¶ 28-34.

73. In its counter memorial at pages 12-15, Canada discusses SDMI’s efforts to obtain authority to import PCBs into the United States. The description of Myers’ four exemption petitions, filed between 1991 and 1993 (paragraphs 28-29), is accurate. The discussion of SDMI’s U.S. competition and SDMI’s investment in Canada is outside our knowledge. However, we would point out, as discussed in Section II.(D) above, that a number of U.S. competitors of Myers did seek and receive similar grants of enforcement discretion in late 1995 and early 1996 to import PCBs for disposal.

E. Canada Counter Memorial, Pages 39-43, ¶¶ 123-135.

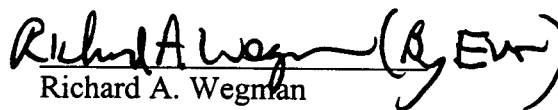
74. At pages 39-43 of its counter memorial, Canada discusses SDMI’s efforts to open the U.S. border to PCB imports. We believe the chronology generally to be correct, although we are not familiar with all SDMI undertakings or the contents of all the documents to which Canada refers. We have several comments. First, as discussed in Section III.(C) above, EPA’s proposed decision to deny Myers’ exemption petitions was not just based on the failure of Myers to demonstrate that it had made good faith efforts to explore alternatives but on an objective assessment of the situation in Canada. Second, while EPA’s December 1994 proposed import for disposal rule did contain “procedures and requirements to ensure safe management of imported PCBs,” it is also the case that existing EPA regulations, plus conditions imposed in EPA’s exercise of enforcement discretion, were intended to achieve the same objectives. See 40 C.F.R. Part 761 (1995); letter from Steven A. Herman to Dana S. Myers, dated October 26, 1995, Encl. #1. In other words, any imported PCBs would have been subject to TSCA’s requirements for safe disposal. Third, we think it is correct to say that the October 1995 enforcement discretion involved non-enforcement of a “ban . . . [that] would remain in place,” and that technically PCB imports would still be “in contravention of U.S. laws.” Fourth, while we are not sure what Canada means by describing enforcement discretion as “extra-legal and irregular,” we would agree that there are no public procedures or public notification attendant upon the exercise of enforcement discretion by EPA. This contrasts with the exemption process procedures under Section 6(e)(3)(B) and 40 C.F.R. Part 750, Subpart B, which are public in nature. It is correct to state that the “hearing and

notification has nothing to do with enforcement discretions as a matter of law or of fact.”

IV. CONCLUSION.

75. In light of the history of EPA’s efforts to regulate PCB imports as set forth in Section I of this memorandum, there was ample reason to question whether EPA possessed legal authority to adopt a generic rule permitting PCB imports from Canada under Section 6(e)(1) of TSCA. The subsequent decision of the Ninth Circuit Court of Appeals in *Sierra Club v. EPA* striking down the EPA rule and finding that TSCA imposed an “absolute ban” on the import of PCBs, subject only to the Section 6(e)(3)(B) exemption process, would appear to vindicate this view.
76. Similarly, in light of U.S. law governing enforcement discretion set forth in Section II of this memorandum, there was ample reason to believe that EPA’s action in granting enforcement discretion to SDMI on October 26, 1995 was contrary both to EPA’s generic enforcement policy and to the statutory ban on PCB imports. Consequently, it was also reasonable to believe that the grant of enforcement discretion might have been subject to challenge in a U.S. court, and, had such a challenge been filed, that a U.S. court might conclude that EPA’s grant of enforcement discretion to SDMI on October 26, 1995 was unlawful.
77. We hope this review of U.S. law governing PCB imports is helpful to the Tribunal. We are prepared to be available to answer any additional questions that members of the Tribunal may have on U.S. law that pertain to this case.

Respectfully submitted,



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Dated: January 14, 2000
Washington, DC

CERTIFICATE OF SERVICE

I, Eldon V.C. Greenberg, hereby certify that on January 14, 2000, I served the foregoing Memorandum on U.S. Law, In the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement, by causing copies thereof to be sent by Federal Express to:

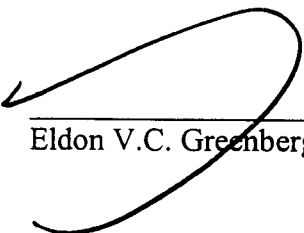
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