HOW TO HANDLE AN AWFUL & HORRIBLE USED OIL/PCB INCIDENT

in twenty-seven easy steps
quite simple really
But time is not on your side
IMMEDIATE FIRST STEPS

Stop the spread of the PCB virus. Lock down the tanks and tank trucks and railcars.

Don’t let tank trucks, pumps, valves, gauges or other equipment result in further PCB contamination of clean used oil.
• Track down the culprit generator and get samples from his used oil tank.

• Get samples from all other potential generators to eliminate them as potential sources.

• Get plenty of samples and test for aroclors. Use a certified laboratory.
Lock down the samples and develop a chain of custody record for all samples.

Why? Because the defense attorneys will try to demolish all your evidence.
Retrieve any contaminated used oil that went to customers and arrange to have their tanks cleaned.

Be sure to comply with the NCP (OSHA, TSCA, RCRA, HAZMAT etc.)

Get samples from their tanks.

Notify EPA (the EPA Region where the contaminated used oil is located) in writing. (e-mail is OK).
Notify your insurance company (i.e., file a formal claim). If there is a plausible basis for coverage under your policy but the insurance company denies your claim, you may have to sue.

Call your environmental litigation lawyer.
Make sure you have the original of culprit generator’s certification that the used oil for this pick-up contained no PCBs.

Make sure you have the culprit generator’s complete file (including the material profile).

Take lots of photos.
CERTIFICATION     No PCBs

As a material part of this transaction and for good and valuable consideration, I, __________________, on behalf of [name of company] __________________________, hereby certify and confirm to Acme A-1 Oil Recyclers, Inc. that (1) the material, described above, contains no quantifiable concentration of polychlorinated biphenyls (PCBs) nor any hazardous waste as defined by RCRA; and (2) accurate laboratory testing for this material has been provided to Acme A-1 Oil Recyclers, Inc. to verify that this material contains no quantifiable concentration of PCBs nor any hazardous waste as defined by RCRA.

In the event that this certification is inaccurate, [name of company] ______________ will indemnify Acme A-1 Oil Recyclers, Inc. and promptly pay for all costs directly or indirectly resulting from this inaccurate certification including, but not limited to, contaminated product or inventory, proper storage, shipment and disposal, sampling, testing, decontamination, attorneys fees, expert witness fees, penalties, fines and courts costs.

_________________________________       ____________________________
Signature                                  Printed Name
Notify EPA of your PCB handling activity.

United States Environmental Protection Agency
Washington, DC 20460

Form Approved OMB No. 2070-0112

Notification of PCB Activity

Return To:
Document Control Officer (5305P) Office of Solid Waste U.S. Environmental Protection Agency 1200 Pennsylvania Ave., N.W.
Washington, DC 20460-0001

For Official Use Only

1. Name of Facility

Name of Owner Facility

2. EPA Identification Number (if already assigned under RCRA)

3. Facility Mailing Address (Street or PO Box, City, State, & Zip Code)

4. Location of Facility (No. Street, City, State, & Zip Code)

5. Installation Contact (Name and Title)

Telephone Number (Area Code and Number)

7. Certification

Under civil and criminal penalties of law for the making or submission of false or fraudulent statements or representations (18 U.S.C. 1001 and 15 U.S.C. 2615), I certify that the information contained in or accompanying this document is true, accurate, and complete. As to the identified section(s) of this document for which I cannot personally verify truth and accuracy, I certify as a company official having supervisory responsibility for the persons who, acting under my direct instructions, made the verification that this information is true, accurate, and complete.

Signature

Name and Official Title (Type of Print)

Date Signed
Preparing your case

• Get congener analysis of the relevant samples.

• Aroclors are like blood types (e.g. O Positive). Congener analysis is like fingerprint analysis.
You will need to clean your tank trucks, tanks or equipment. Be sure to follow EPA’s TSCA rules and use a professional decontamination specialist (one who complies with all the relevant rules such as HAZMAT, TSCA, OSHA, etc.) These are important in establishing compliance with the National Contingency Plan (“NCP”) and avoiding EPA penalties.

Why? Cost Recovery Lawsuit Under §107(a) of CERCLA requires compliance with the NCP.
more fun things to do

• Prepare a flow chart summarizing the spread of the contaminated used oil. This information would include the locations of where the used oil is stored, the quantities and concentrations, and the date and time of any transfers.

• Why? To explain to EPA, the culprit generator and others how 250 gallons of PCB-contaminated used oil somehow transformed into 50,000 gallons.
key to successful CERCLA cost recovery

• Document “releases” including drips and spills of the PCB-contaminated used oil (including on shoes, clothing and skin).

• Why? A “release to the environment” of a hazardous substance is an essential element of a CERCLA cost recovery lawsuit.
AND THEN

- Contact the culprit generator and provide the relevant evidence. Ask if they have insurance.
- Expect that the culprit generator will immediately resort to “full denial” mode which is followed by “blame the transporter/processor” mode.
- Make sure that the information you provide to the culprit generator is the final version.
In preparation for your CERCLA lawsuit

Prepare a CERCLA Removal Action Plan.

Publish notice in local newspaper of availability of the Plan.
Request comments from the public.
Damages

• Keep track of all investigation and clean-up costs.

• Determine cost of diversion of resources and employees to address the PCB contamination incident.

• Determine the value of your used oil inventory – prior to decontamination. (Available under state law cause of action – not CERCLA.)
Causes of Action Under State Law

- Breach of Contract
- Negligent Misrepresentation
- Negligent Training and Supervision
- Nuisance
- Trespass
- Property Damage
- Ultra Hazardous (Abnormally Dangerous) Activity
BEFORE THE PCB HIT

Check your insurance policy to determine if there is coverage for PCB contamination caused by a third party (your customer).
Insurance Company’s Denial of Coverage

“There is no coverage under Coverage B or Coverage F as there was no Clean-Up Costs or Emergency Response Costs resulting from a Pollution Condition. Pollution Condition means “1. The discharge, dispersal, release or escape; or 2. The illicit abandonment on or after the Inception Date by a third party without the Insured's consent, of any solid, liquid, gaseous or thermal irritant or contaminant, including, but not limited to, smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, hazardous substances…”
Before the PCB Hit

• Deploy an effective guard tank system.
• Test for PCBs.
• Retain samples from generators
• (Follow NORA’s Best Management Practices.)
Best Management Practices for Prevention of PCB Contamination of Used Oil

- Best Management Practices to prevent PCB contamination of used oil requires that its used oil does not contain PCBs above 50 parts per million ("ppm") supported by testing, analyses or other reliable documentation and that no dilution of PCBs at concentrations of 50 ppm or greater has occurred. Processors or re-refiners who receive used oil directly from a used oil generator shall obtain the certification from the generator.

- Generator Identification System: The transporter, processor or re-refiner shall implement a generator identification, certification and record-keeping system. Each sample from a used oil generator shall be retained and properly stored for a minimum of forty-five (45) days. Samples shall be accurately labeled with either (1) the identity and address of the generator’s facility, the date the sample was taken, and the identity (including accurate contact information) of the person collecting the sample; or (2) a reference number or code that allows access to the identity and address of the generator’s facility, the date the sample was taken, and the identity (including contact information) of the person collecting the sample. The minimum quantity of each sample shall be adequate to allow accurate testing.

- Quality Control System: At the facility receiving used oil, a quality control system shall be implemented to test used oil for PCBs prior to the introduction into the facility’s processing system. Used oil received at the facility shall be tested for the presence and concentration of PCBs: (1) prior to the unloading of vehicles and containers; (2) after unloading used oil into a guard tank; or (3) at the generator’s facility. Records will be maintained that document the testing and analysis of used oil samples to determine the presence and concentration of PCBs prior to any processing of the used oil. Applicable EPA testing procedures and protocols for testing of PCBs must be followed. Each guard tank at any single used oil receiving facility shall not exceed 35,000 gallons of storage capacity.
Before the PCB Hit

Have a plan for responding to the PCB incident.

Designate key employees to manage the incident.

Select qualified clean up contractors.

Select qualified counsel.
more fun than you deserve

THE END