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REFERRAL OF TOXIC CHEMICAL REGULATION UNDER THE TOXIC SUBSTANCES CONTROL ACT: EPA'S ADMINISTRATIVE DUMPING GROUND

Cynthia Ruggerio*

I. INTRODUCTION

In 1976 Congress enacted the Toxic Substances Control Act (TSCA or the Act)\(^1\) out of a concern for the effects of toxic chemicals on human health and the environment.\(^2\) The Act provides a statutory basis for comprehensive identification and control of chemicals that pose an unreasonable risk to human health or the environment.\(^3\) Although federal toxic substances regulation existed prior to TSCA, earlier regulation did not comprehensively control the complex problems posed by the use of toxic substances. Rather, prior legislation was designed to allow administrative agencies to regulate particular hazards within their limited jurisdiction by considering a given chemical in isolation from its known collateral effects.\(^4\)

The restrictive scope of pre-TSCA legislation gave rise to significant regulatory gaps concerning toxic substances. The Act was a congressional response to the failure of earlier, narrowly-focused legislation intended to provide for complementary and supplementary assistance to preceding laws and to ensure effective overall control of toxic substances.\(^5\)

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* Associate, Monteverde, Hemphill, Maschmeyer & Obert, Philadelphia, PA; B.S., Fairfield University, 1984; J.D., Rutgers University School of Law—Camden, 1987. The author would like to thank Nicholas A. Ashford, Associate Professor of Technology and Policy, Massachusetts Institute of Technology, Cambridge, MA, for his assistance in the preparation of this Article.


3 Id.


5 See id. at 144.
Despite the efforts of Congress to resolve the serious regulatory problems involved in controlling toxic substances through TSCA, the Act, now thirteen years of age, has proven ineffective. There are two central reasons for the disappointing results of TSCA regulation: first, the Act contains legislative loopholes that significantly impair its effectiveness; and second, the Act is administered by the Environmental Protection Agency (EPA or the Agency), and, like all administrative agencies, the EPA is subject to powerful political pressures in carrying out its responsibilities. The EPA has used the legislative loopholes within the Act as advantageous tools in meeting the political goal of the times, deregulation.

Section 9 of TSCA provides a mechanism for the EPA to refer regulatory responsibility under TSCA to other administrative agencies for regulation under the statutes that they administer, or to a branch of the EPA under a different EPA-administered statute.  

6 See 15 U.S.C. § 2608 (1982). Section 9 reads as follows:
(a) Laws Not Administered by the Administrator
(1) If the Administrator has reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment and determines, in the Administrator's discretion, that such risk may be prevented or reduced to a sufficient extent by action taken under a Federal law not administered by the Administrator, the Administrator shall submit to the agency which administers such law a report which describes such risk and includes in such description a specification of the activity or combination of activities which the Administrator has reason to believe so presents such risk. Such report shall also request such agency —
(A)(i) to determine if the risk in such report may be prevented or reduced to a sufficient extent by action taken under such law, and (ii) if the agency determines that such risk may be so prevented or reduced, to issue an order
declaring whether or not the activity or combination of activities specified in the description of such risk presents such risk; and
(B) to respond to the Administrator with respect to the matters described in subparagraph (A).

Any report of the Administrator shall include a detailed statement of the information on which it is based and shall be published in the Federal Register. The agency receiving a request under such a report shall make the requested determination, issue the requested order, and make the requested response within such time as the Administrator specifies in the request, but such time specified may not be less than 90 days from the date the request was made. The response of an agency shall be accompanied by a detailed statement of the findings and conclusions of the agency and shall be published in the Federal Register.

(2) If the Administrator makes a report under paragraph (1) with respect to a chemical substance or mixture and the agency to which such report was made either—
(A) issues an order declaring that the activity or combination of activities specified in the description of the risk described in the report does not present the risk described in the report, or
(B) initiates, within 90 days of the publication in the Federal Register of the response of the agency under paragraph (1), action under the law (or
Although section 9 was intended to prevent jurisdictional overlap and inefficient use of administrative resources, it has instead become an escape hatch for the EPA to avoid regulatory responsibility that it should legitimately exercise.

laws) administered by such agency to protect against such risk associated with such activity or combination of activities, the Administrator may not take any action under section 2605 or 2606 of this title with respect to such risk.

(3) If the Administrator has initiated action under section 2605 or 2606 of this title with respect to a risk associated with a chemical substance or mixture which was the subject of a report made to an agency under paragraph (1), such agency shall before taking action under the law (or laws) administered by it to protect against such risk consult with the Administrator for the purpose of avoiding duplication of Federal action against such risk.

(b) Laws Administered by the Administrator

The Administrator shall coordinate action taken under this Act with actions taken under other Federal laws administered in whole or in part by the Administrator. If the Administrator determines that a risk to health or the environment associated with a chemical substance or mixture could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in such other Federal laws, the Administrator shall use such authorities to protect against such risk unless the Administrator determines, in the Administrator's discretion, that it is in the public interest to protect against such risk by actions taken under this Act. This subsection shall not be construed to relieve the Administrator of any requirement imposed on the Administrator by such other Federal laws.

(c) Occupational Safety and Health

In exercising any authority under this Act, the Administrator shall not, for purposes of section 653(b)(1) of title 29 [(the Occupational Safety and Health Act of 1970)], be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

(d) Coordination

In administering this Act, the Administrator shall consult and coordinate with the Secretary of Health and Human Services and the heads of any other appropriate Federal executive department or agency, any relevant independent regulatory agency, and any other appropriate instrumentality of the Federal Government for the purpose of achieving the maximum enforcement of this chapter while imposing the least burdens of duplicative requirements on those subject to the chapter and for other purposes. The Administrator shall, in the report required by section 2629 of this title, report annually to the Congress on actions taken to coordinate with such other Federal departments, agencies, or instrumentalities, and on actions taken to coordinate the authority under this Act with the authority granted under other Acts referred to in subsection (b) of this section.

Id.

7 The House Report, prepared by the House Committee on Interstate and Foreign Commerce, states the basis of TSCA legislation as follows:

[Authority is needed to] require testing of chemicals to determine their health and environmental effects, to impose use and distribution restrictions on chemicals where necessary to protect the public health and environment, and to collect information on chemicals and establish a system for classifying and using such information.

Present authorities for protecting against and regulating hazardous chemicals are fragmented and inadequate. Although there are a number of Federal laws which now provide some authority for regulation (e.g., the Clean Air Act, the Federal Water
The unfortunate misuse of section 9 power by the EPA has particularly affected the control of toxic substances in areas regulated by federal statutes other than TSCA, statutes that TSCA was originally intended to supplement. \(^8\) For example, the EPA implemented a policy to refer regulatory responsibility for all toxic substances that are in any way associated with the workplace\(^9\) to the Occupa-

Pollution Control Act, the Occupational Safety and Health Act of 1970, and the Consumer Product Safety Act) conspicuous gaps exist in the protections provided by such laws. Most significant among the deficiencies are the following:

1. In general such laws provide regulatory authority which is not set in motion until after human or environmental exposure to a harmful chemical has occurred.
2. The authorities provided to reduce or eliminate the harmful exposure to a chemical may not be adequate or may be cumbersome or inefficient.
3. No authority exists for collection of data to determine the totality of human and environmental exposure to chemicals.

In summary, the country faces serious risks of harm to the health of its people and to its environment from the substantial use which is made of chemicals, and Federal law is clearly inadequate to deal with such risks. A major element in our efforts to improve the nation’s health and environment must be the enactment of protective legislation such as H.R. 14032. The overriding purpose of the bill is to provide protection of health and the environment through authorities which are designed to prevent harm.


Similarly, the Senate Report, prepared by the Senate Committee on Commerce, describes the need for TSCA legislation as follows:

In order to protect against [the] dangers [of toxic chemical exposure], the proposed Toxic Substances Control Act would close a number of major regulatory gaps, for while certain statutes, including the Clean Air Act, the Federal Water Pollution Control Act, the Occupational Safety and Health Act, and the Consumer Product Safety Act, may be used to protect health and the environment from chemical substances, none of these statutes provide the means for discovering adverse effects on health and environment before manufacture of new chemical substances. Under these other statutes, the Government regulator’s only response to chemical dangers is to impose restrictions after manufacture begins.

The proposed Toxic Substances Control Act provides a far more effective mechanism to protect against dangerous chemical materials contained in consumer and industrial products. While air and water pollution laws authorize limitations on discharges and emission and the Occupational Safety and Health Act authorizes workplace ambient standards, there are no statutes (except the fuel additives provisions of the Clean Air Act) which authorize the direct control of such chemicals for their health or environmental effects.


\(^8\) See D. DONIGER, supra note 4, at 142.

tional Safety and Health Administration (OSHA), which administers the Occupational Safety and Health Act (OSH Act). As a result of this activity, regulation under the OSH Act has increased. Increased use of the OSH Act, rather than more effective exercise of the TSCA enforcement powers, has significantly heightened the impact of dangerous toxic substances in the workplace because the OSH Act is much weaker than TSCA and no OSHA reform is in sight.

This Article addresses the EPA's abuse of its administrative duty under TSCA through section 9 referral of regulatory responsibility to other administrative agencies. The impact of section 9 referrals on toxic substance regulation is most apparent when referral from TSCA to the OSH Act is considered. For this reason, delegation to OSHA serves as the primary example of section 9 referral throughout this Article.

Part II of this Article reviews the purpose of the Toxic Substances Control Act. The shortcomings of the Occupational Safety and Health Act with respect to workplace regulation of toxic substances are addressed in order to give the reader a better understanding of TSCA's intended role as a supplement to prior inadequate legislation. Part II also provides a brief outline of the regulatory mandates within TSCA. Then, Part III describes the mechanics of section 9 referrals. Following this general discussion, specific examples of section 9 referrals are documented and analyzed in Part IV. Finally, the Article sets forth proposals for reform designed to eliminate the section 9 loophole in Part V.

II. AN OVERVIEW OF THE TOXIC SUBSTANCES CONTROL ACT

A. The Purpose of TSCA

The purpose of the Toxic Substances Control Act is to identify and control comprehensively chemicals that pose an unreasonable risk to human health or the environment. Although several other laws existed prior to TSCA that addressed the regulation of toxic


11 OTS, TSCA, supra note 2, at 7; see also supra note 6.
substances, neither of these prior laws provided for multi-media regulation of a toxic chemical through the entire course of its existence as TSCA does. Pre-TSCA statutes restricted the EPA to a narrow, jurisdictionally-limited examination of a particular hazard, thereby precluding consideration of the overall impact of a particular chemical.

As a result of the narrow scope of federal laws predating TSCA, several gaps in toxic substances control policy emerged. The most notable deficiency of pre-TSCA legislation is that such statutes, which include the Occupational Safety and Health Act, the Clean Air Act, and the Federal Water Pollution Control Act, do not

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13 See Miller, Toxic Substances Control Act (TSCA) 3-4, in Gov't Insts., Inc., Environmental Law Handbook 309-10 (10th ed. 1989) [hereinafter GI, HANDBOOK]. Marshall Lee Miller, who served as Deputy Administrator of the U.S. Occupational Safety and Health Administration, Department of Labor, Special Assistant to the first Administrator of the EPA and Chief EPA Judicial Officer, explained the need for TSCA:

Prior to the passage of the Toxic Substances Control Act, significant gaps existed in the federal government’s authority to test and regulate problem chemicals. The Clean Air Act, the Federal Water Pollution Control Act, and other laws dealt with chemical substances only when they entered the environment as wastes (emissions to the air or discharges into the water). In many cases, controls could not be easily fashioned or required without severe economic consequences. Toxic substances legislation, which theoretically would require testing before a chemical reached the production phase, overcame this difficulty.

Other statutes, such as the Occupational Safety and Health Act and the Consumer Product Safety Act, deal only with one phase of the chemical’s existence (worker exposure or direct consumer exposure) and contain no authority to address environmental hazards. While both of these statutes are clearly needed, the life cycle of a chemical, from production to ultimate disposal, provides many opportunities for its escape into the environment and human exposure, and federal authority to deal with the overall cycle is fragmented. The Toxic Substances Control Act was designed to fill these gaps, both in regulatory powers and in authority to require that tests be conducted before the human or environmental exposure occurs.

Id. For a discussion of TSCA’s legislative history, see supra note 7.

14 See Miller, supra note 13, in GI, HANDBOOK, supra note 13, at 308-09, which cites specific instances where jurisdictional limitations hampered effective toxic substance regulation prior to the enactment of TSCA. For example, while highly toxic organic mercury emissions were regulated under the Clean Air Act and the Federal Water Pollution Control Act as of 1972, no federal authority existed to regulate mercury use in industrial, commercial and consumer products or to monitor the introduction of the chemical into the environment. Similar situations existed with respect to polychlorinated biphenyls (PCBs), vinyl chloride (VOCs), and kepone.

Id.


allow for implementation of regulatory action with respect to a particular toxic substance until human exposure to a given chemical is imminent or has occurred.\(^\text{18}\) Accordingly, by the time the regulatory agency takes action, the harmful effects of such exposure may have already taken place. Further, most laws predating TSCA fail to offer direct remedial avenues to those persons who are subject to such toxic chemical exposure. In addition to such inadequacies, it is also important to note that, prior to TSCA, few laws incorporated any means to force industry to share in the financial burdens of toxic substance regulation.\(^\text{19}\)

The above-noted deficiencies of laws predating TSCA highlight only a few of the regulatory pitfalls that characterize such statutes. A brief analysis of the shortcomings of the OSH Act with respect to toxic substance regulation is helpful in ascertaining a more thorough understanding of the inefficiency of pre-TSCA regulation.

### B. The Inefficiency of the OSH Act and the Passage of TSCA

Congress enacted the OSH Act in 1970 to promote the welfare of employees by ensuring “safe and healthful working conditions.”\(^\text{20}\) The Act revolves around the regulatory mechanism of setting ex-

\(^{18}\) See Miller, supra note 13, in GI, HANDBOOK, supra note 13, at 310.


[C]ontrols over effluents suffer from the limited focus of their authority.

The obvious limitation of controls over effluents is that they generally deal with the problem only after it is manifest. They do not provide for obtaining information on potential pollutants before widespread damage has occurred.

COUNCIL ON ENVTL. QUALITY, TOXIC SUBSTANCES 20 (1971) (emphasis in original) [hereinafter CEQ, TOXIC SUBSTANCES], reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, app. 1 at 783.

\(^{19}\) See HOUSE REPORT, supra note 7, at 6, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 414. The House Report noted with respect to pre-TSCA statutes:

[T]here is presently no authority to require manufacturers of potentially dangerous chemicals to test the chemical to determine its health and environmental effects before marketing. Thus, although there is some authority to remove harmful chemicals from the workplace, the home, etc., there is no authority which provides a means of assessing the safety of a chemical before exposure occurs. In addition, since present laws require regulatory agencies to bear the cost of testing to see if a chemical is safe, regulatory action often does not occur until adverse effects of a chemical become evident in the population or the environment.

Id.

posure standards for specific chemicals and substances that "adequate[ly] assur[e] to the extent feasible that no employees will suffer material impairment of health or functional capacity." 21

The standard-setting process under the OSH Act has proved difficult at best for OSHA 22 because of the heavy substantive burden that the Agency faces in promulgating exposure standards. In setting standards, OSHA must consider the effects of such regulatory action on the economy as a whole and the technological burdens imposed on each individual employer concerned. 23 OSHA then bears the burden of showing that a hazard exists, and must convincingly demonstrate that exposure to the chemical at the prevailing level is dangerous. 24 Additionally, the Agency must demonstrate that the benefits of reducing the health threat outweigh the costs of imposing regulatory demands on the employer. 25

Section 5(a)(1) of the OSH Act imposes upon every employer a general duty to provide a safe and healthy working environment for his or her employees. 26 In theory, the general duty clause of section 5(a)(1) applies to chronic health hazards caused by toxic substances, but such a general duty is difficult to enforce. 27 OSHA first must

21 See id. § 655(b)(5). Under the Act, three types of standards may be imposed in order to regulate employee exposure: (1) permanent exposure standards may be imposed through notice and comment rulemaking; (2) temporary standards may be issued while final rules are being promulgated; and (3) emergency temporary standards may be issued to take immediate effect upon the determination that employees "are exposed to grave danger from exposure to substances or agents determined to be toxic." See id. § 655(a)-(c).

22 Charles Adkins, OSHA's Director of Health Standards, has called for a complete overhaul of OSHA's workplace exposure limits. Adkins has stated with respect to existing limits that "it's almost criminal" that OSHA is enforcing exposure limits that are more than 20 years out-of-date. OSHA Seeks To Regain Control of Agenda With Planned June 1 Proposal of PEL Update, 12 Chern. Reg. Rep. (BNA) 286 (May 27, 1988).

Upon announcing the intended promulgation of new exposure limits, OSHA Administrator John A. Pendergrass stated that the proposed action "represents a 20-year leap forward in the levels of protection." The Agency predicts that the new limits would prevent 50,000 work-related illnesses per year including cancer, liver and kidney impairments, and cardiovascular and respiratory diseases. Labor officials have criticized the proposal, however, since OSHA intends to exclude the maritime, construction, and agriculture industries and simply adopts standards already recommended by the American Conference of Governmental Industrial Hygienists (ACGIH). More importantly, although new exposure limits will be implemented by OSHA, the Agency has no intention of issuing a rule requiring corresponding exposure limit monitoring to ensure that the new limits are enforced. OSHA Proposes Lower Exposure Limits for Workplace Exposure to Chemicals, 12 Chern. Reg. Rep. (BNA) 324-25 (June 10, 1988).

23 See id. § 655(b).
24 See id.
25 See id. § 655(b), (f).
27 Id. at 452. Several general duty issues have repeatedly given rise to litigation. The issues
prove that there is no standard covering the hazard involved, and then must prove that the suspected hazard is likely to cause death or serious illness at the existing levels.\textsuperscript{28} Proof based on OSHA data alone, however, cannot satisfy judicial review unless either the particular employer or industry concurs with OSHA's conclusion.\textsuperscript{29} In other words, although OSHA's scientists\textsuperscript{30} may believe that a chronic health hazard exists, a specific toxin generally will not be "recognized" for regulatory purposes under section 5 unless the industry concerned agrees with OSHA's specific conclusion.\textsuperscript{31} Furthermore, upon proving that the hazard is likely to cause death or serious illness, the agency is limited to evaluating the feasibility of a given abatement method only in terms of the particular employer concerned, regardless of industry-wide implications.\textsuperscript{32} Focusing solely on a single employer's health and safety efforts reduces the possibility of broad-scale health and safety improvements in the workplace.

Like other pre-TSCA regulation, the OSH Act affords no opportunity for employee suits,\textsuperscript{33} nor does it call on industry resources to assist in the regulation of toxic chemicals. The employee is left at the mercy of administrative decisions through each step of the regulatory process. Administrators make even the most preliminary decision on whether to attempt to regulate a specific substance\textsuperscript{34} without employee or other public participation.\textsuperscript{35}
Irrespective of the pitfalls in the statutory construction of the OSH Act, the reality of OSHA enforcement has rendered the statute virtually toothless with respect to toxic chemical regulation.\textsuperscript{36} Delays in inspection and litigation due to limited funding and personnel often hamper the effectiveness of agency action and offer little incentive for employer compliance.\textsuperscript{37} Even where OSHA can effectively mandate regulation and flex enforcement muscle against employers and industry, the available penalties are so weak that from an employer’s perspective it actually pays to continue violating the law.\textsuperscript{38}

Only six years after the passage of the OSH Act, it was clear to Congress that additional legislation for toxic chemicals regulation was necessary. The need for such legislation was prompted not only by the inadequacies of existing statutes when considered individually, but also because the combination of such legislation was tantamount to a disjointed and incomplete system of toxic regulation.

\textsuperscript{36} B. Mintz, \textit{supra} note 26, at 340.

\textsuperscript{37} See Some Funding Restrictions ‘Unnecessary,’ Others Limit OSHA Mission, Pendergrass Says, 12 Chem. Reg. Rep. (BNA) 661–62 (July 22, 1988). OSHA Administrator John Pendergrass characterized limits on OSHA’s 1989 financial appropriations as “unnecessary” and stated that the restrictions “limit the agency in carrying out its mission.” Pendergrass noted, for example, that because the agency is financially prohibited by the Office of Management and Budget to conduct safety inspections in firms of 10 or fewer workers, the agency has lost its discretionary power to focus on small workplaces with extremely poor safety records. Id.

\textsuperscript{38} B. Mintz, \textit{supra} note 26, at 341. The failings of OSHA legislation are best articulated in a statement made by Nolan Hancock, Citizenship-Legislative Director of the Oil, Chemical and Atomic Workers International Union, before the Senate Committee on Labor and Human Resources:

The basic problem is that the regulatory structure of the Occupational Safety and Health Act is so weak that it makes little difference to employers, especially in the oil and chemical industry, whether the OSHA inspector comes knocking at the door or not.

The reason why employers assume a combative stance with OSHA has nothing to do with a lack of confidence or trust in OSHA. It simply pays to fight OSHA . . . .

We have established a regulatory system that makes it profitable for a business to fight OSHA rather than comply.


A statement of Senator Schweiker in introducing a bill (which did not pass) to amend OSHA in 1979 is also illustrative of the general sentiment amongst legislative and labor persons that the OSH Act has been a failure: “What is clear 9 years after enactment is that the success of the act in delivering on its promise has been substantially less than overwhelming. Not only has the act failed to produce demonstrable benefits in workers’ safety, it has created extraordinary public controversy.” 125 \textit{Cong. Rec.} 37, 135–36 (1979) (statement of Sen. Schweiker), \textit{cited in B. Mintz, supra} note 26, at 346–47.
Moreover, the growing presence of toxic chemicals required increased regulatory activity to protect human health and the environment. With the enactment of TSCA, Congress intended to provide a regulatory mechanism that, if properly administered, would effectively close the gaps in toxic chemical regulation and provide a comprehensive response to the toxic substances threat.

C. The Regulatory Scheme of TSCA

The Toxic Substances Control Act provides for regulation of toxic substances through a precautionary approach, applying specific regulatory standards where a substantial risk of harm through exposure to a particular substance has been reasonably foreseen. The Act is comprised of a three-part regulatory scheme, with an emphasis on information gathering.

Section 5 of TSCA, entitled “Manufacturing and Processing Notices,” forms the basis for the EPA’s power to control the release of newly-manufactured chemicals into the stream of commerce and the environment. Under section 5, also known as the premanufacture notice provision, a company must notify the EPA of its intent to produce a new chemical prior to its production. If a manufacturer deliberately fails to issue a premanufacture notice, the EPA may impose heavy penalties and may even prosecute the violator criminally.

39 It is estimated that two million chemical compounds are in existence, thousands of which are produced in commercial quantities. It is also estimated that an additional 250,000 new chemicals are being produced annually. GI, HANDBOOK, supra note 13, at 308.

40 See supra note 7 and accompanying text.


42 Toxic Substances Control: Implementing the Regulatory Program, 3 TOXIC SUBSTANCES CONTROL CONF. PROC. 236 (1978) [hereinafter Toxic Substances Control].

43 Section 9(a) Memorandum, supra note 10.

44 15 U.S.C. § 2604(a) (1982). Notification must occur within 90 days. Id. Following notification, the EPA must publish notice in the Federal Register which identifies the proposed chemical product, lists its intended uses, and describes the estimated toxicity of the chemical. Id. § 2604(d).

45 See id. § 2615. The EPA recently instituted a new policy under section 5 which provides that a company which voluntarily discloses its failure to issue a PMN to the Agency will be credited with reduced penalties for the violation. The policy also accounts for the degree of risk presented by a chemical: if the undisclosed chemical is highly toxic, presenting great risk to human health and the environment, the penalty for failure to disclose under section 5 will be adjusted upward corresponding to such risk. New Policy for TSCA Section 5 Violations Reduces Penalties for Voluntary Disclosure, 12 Chem. Reg. Rep. (BNA) 715–16 (Aug. 12, 1988).
The Administrator must then determine whether the chemical presents an "unreasonable risk of injury to health or the environment." In order to make such a finding, the Administrator may demand that the manufacturer conduct additional testing of the chemical under section 4 of the Act, sharing with the Agency the cost of such testing. If the EPA finds that unreasonable risk exists, then section 5 empowers the Administrator to affect introduction of the chemical into the environment through a limit or ban on production and distribution of the chemical.

If a chemical is already in the marketplace, it may be removed or its use may be restricted through section 6, entitled "Regulation of Hazardous Chemical Substances and Mixtures." Again, section 6

46 Section 5(f) of the Toxic Substances Control Act, entitled "Protection Against Unreasonable Risks," provides in part:

(1) If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance with respect to which notice is required by subsection (a) of this section, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or environment before a rule promulgated under [section 6] can protect against such a risk, the Administrator shall . . . take the action authorized . . . to the extent necessary to protect against such risk.

(2) The Administrator may issue a proposed rule under [section 6(a)] to apply to a chemical substance . . .

(A) a requirement limiting the amount of such substance which may be manufactured, processed, or distributed in commerce,

(B) a requirement described in paragraph (2), (3), (4), (5), (6), or (7) of [section 6(a)], or

(C) any combination of the requirements referred to in subparagraph (B)

3) (A) The Administrator may —

(i) issue a proposed order to prohibit the manufacture, processing, or distribution in commerce of a substance with respect to which a finding was made . . .

(ii) apply . . . for an injunction to prohibit the manufacture, processing, or distribution in commerce of such substance.


47 Id. § 2603.

48 Id. § 2604(f).

49 Id. § 2605(a). Section 6(a) provides:

If the Administrator finds that there is a reasonable basis to conclude that the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination of such activities, presents or will present an unreasonable risk of injury to health or the environment, the Administrator shall by rule apply one or more of the following requirements to such substance or mixture to the extent necessary to protect adequately against such risk using the least burdensome requirements:

(1) A requirement (A) prohibiting the manufacturing, processing, or distribution in commerce of such substance or mixture, or (B) limiting the amount of such
is based on the unreasonable risk standard. Further, like section 5, a section 6 EPA action may include a demand for chemical testing in order to determine if a chemical meets the unreasonable risk threshold. When the EPA finds such a risk, section 6 offers the Agency the flexibility to prohibit or limit the manufacture, processing, or distribution of the toxin to limit its use or prohibit a specific use of the chemical, or to require warning labels and instructions for use and disposal of the chemical.

Despite the potential for comprehensive regulation under section 6, the powers it creates have been invoked sparingly by the EPA since the enactment of TSCA. The reason for the Agency’s reluctance in bringing section 6 enforcement actions stems from the burdensome requirement that such regulation be supported by substantial evidence on the entire record in order to satisfy judicial review.
Section 7 of the Act provides the means for the EPA to obtain a judicial order for seizure or recall of a substance that is "imminently hazardous." As with section 6, the degree of proof required to meet the imminent hazard threshold in order to invoke section 7 relief action is high. Consequently, the EPA has yet to regulate under this provision at all, and has rarely even considered doing so.

Significantly, TSCA gives private citizens an opportunity to challenge certain administrative actions under the Act. Any citizen may petition the EPA for issuance, amendment, or repeal of an administrative rule promulgated under TSCA. Furthermore, a private individual has the right to institute suit to compel Agency performance of a nondiscretionary duty, or to sue any party in violation of the Act.

Recognizing that toxic substances are present in a number of different media and may effect several different groups of people, TSCA provided for an Interagency Testing Committee. This committee includes representatives from the EPA, OSHA, the Council on Environmental Quality, the Consumer Product Safety Commission, and a number of other groups that are involved in or affected by toxic substance regulation. Although the Interagency Testing Committee is an important factor in TSCA enforcement, it deals strictly with the testing aspects of the Act, not the general interagency relationships created through TSCA.

A committee designated to deal with broad issues of inter-agency relationships and jurisdictional concerns was created under the Carter Administration. This group, the Toxic Substances Advisory Committee, was assigned to assist the EPA Administrator in TSCA decisionmaking during its short existence. The committee was comprised of members from various governmental sectors, members of industry, labor, academe, and public interest groups. It effectively fulfilled its duty to oversee EPA administration of TSCA.
committee successfully regulated various toxic substances under TSCA rather than under older, less stringent legislation, and thus fulfilled the purposes of the Act. Unfortunately, since the dissolution of the Toxic Substances Advisory Committee, no similar oversight body has been active. Partly as a result of this inactivity, comprehensive regulation of toxic substances under TSCA has been unattainable.

Although the Carter Administration established the committee in the hope of encouraging inter-agency cooperation and harmony, subsequent administrations have largely ignored this goal. Thus, despite the legislative intent that TSCA be administered in a comprehensive manner, the EPA has administered TSCA centrally, and active interdisciplinary evaluation has played only a minor role in enforcement.

III. THE SECTION 9 LOOPHOLE

A. The Section 9 Referral Mechanism

Section 9 of TSCA, entitled "Relationship to Other Federal Laws," prescribes guidelines for referral of regulatory duty for a given toxic substance from EPA to other federal agencies or to regulatory branches of the EPA charged with enforcing other laws. Specifically, section 9(a) provides a mechanism for EPA inter-agency referral, while section 9(b) provides a mechanism for EPA intra-agency referral. Congress included section 9 in the Act to prevent overlap and unnecessary duplication of toxic substance regulation when such regulation might conceivably fall under the jurisdiction of more than one statute. 69

70 Id. § 2608(a)-(b).
71 See Senate Report, supra note 7, at 23, reprinted in TSCA Legislative History, supra note 7, at 179; House Report, supra note 7, at 45, reprinted in TSCA Legislative History, supra note 7, at 452. The Senate Report indicates that section 9 was "intended to minimize overlap and duplication between this act and other Federal laws while assuring protection from environmental and health dangers." Senate Report, supra note 7, reprinted in TSCA Legislative History, supra note 7, at 23. The House Report addresses section 9 in a like manner, noting that:

Because other Federal laws to some extent provide for regulation of toxic chemicals, it is necessary to define the relationship between the regulatory authority of this bill and that provided under other Federal laws. It is the intent of the Committee that any overlapping or duplicatory regulation be avoided while providing for the fullest possible measure of protection to health and the environment. House Report, supra note 7, at 45, reprinted in TSCA Legislative History, supra note 7, at 452.
Under the section 9(a) inter-agency referral provision, the EPA must submit a report to another federal agency and then withhold regulatory action upon making two findings: first, the EPA must determine that the toxic substance meets the unreasonable risk threshold of sections 6 and 7; and second, the EPA must determine whether this risk may be reduced to a sufficient extent under a law administered by a different federal agency. 72

The second of the section 9(a) referral findings is both more critical and more controversial than the first. The sufficient extent standard raises important questions concerning fundamental administrative law issues, and it offers little guidance to the Agency in formulating a specific section 9(a) referral policy. The EPA power to determine, as an administrative agency, whether another administrative agency should regulate a given toxic substance is a questionable procedure according to traditional administrative law principles. 73 Further, because Congress failed to give the EPA direct guidance to determine how another agency can meet the sufficient extent standard, there is a great potential for the agency to ignore the comprehensive purpose of the Act with respect to section 9 decisions. 74

72 15 U.S.C. § 2608(a); see also supra note 6.
73 Although Congress may delegate power to the EPA under TSCA, is it within the EPA's authority to make a seemingly legislative value judgment to redelegate its own authority to another agency?
74 The Agency should look to the statute as a whole, focusing on its comprehensive purpose, in implementing the Act, since such specific guidance is missing. For example, section 6(c) of TSCA, 15 U.S.C. § 2605(c), lists factors which the Administrator must consider in determining whether to promulgate a section 6(a) rule under TSCA to prohibit or limit the manufacture, processing, or distribution of a chemical that presents an unreasonable risk or to leave such regulation for that chemical to a different statute as follows:

If the Administrator determines that a risk of injury to health or the environment could be eliminated or reduced to a sufficient extent by actions taken under another Federal law (or laws) administered in whole or in part by the Administrator, the Administrator may not promulgate a rule under subsection (a) to protect against such risk of injury unless the Administrator finds, in the Administrator's discretion, that it is in the public interest to protect against such risk under this Chapter. In making such a finding the Administrator shall consider (i) all relevant aspects of the risk, as determined by the Administrator in the Administrator's discretion, (ii) a comparison of the estimated costs of complying with actions taken under this Act and under such law (or laws) to protect against such risk of injury.

Id. (emphasis added).

This provision, which states that the Administrator must consider the relative costs and the relative efficiency of a TSCA section 6 rule for a given chemical as opposed to a similar rule for that chemical issued under another law, strongly suggests that relative costs and relative efficiency also be accounted for in the related section 9(a) delegation process. The EPA, however, refuses to assess such concerns under section 9(a). In so doing, the EPA simply ignores a comprehensive reading of the Act. See infra notes 111–17 and accompanying text.

The absence of judicial oversight in this area, however, has left the Agency open to formulate
Following a section 9(a) delegation to another federal agency, the second agency can act either to preclude subsequent EPA regulatory action or to allow it. To block further EPA action, the second agency must issue an order stating that there is no unreasonable risk, or acknowledge that a risk in fact exists and initiate regulatory action within ninety days. The EPA will remain free to act if the second agency chooses to proceed in one of three alternative ways. The second agency may determine that its own law does not provide jurisdiction to act in the particular situation at hand. The second agency may instead acknowledge that it has the authority to act but choose to revert regulatory responsibility to the EPA on public policy grounds. Or, the second agency may simply do nothing, presumably leaving the EPA free to act, as it was before the referral.

The EPA's power to delegate under section 9(a) of TSCA principally affects three other federal agencies. OSHA may be affected through referral from TSCA to the OSH Act if the toxic substance under consideration is designated a workplace problem. As mentioned earlier, the implications of OSHA referrals will be thoroughly discussed throughout the Article. The EPA may also institute a section 9(a) referral to the Consumer Product Safety Commission through the Consumer Product Safety Act and the Federal Hazardous Substances Act. Alternatively, the Department of Transportation may receive section 9(a) referrals under the Hazardous Materials Transportation Act and other federal legislation which it administers.

Section 9(c) of TSCA is specifically targeted at regulatory referral to the OSH Act, and provides for simultaneous regulation under the two statutes. This provision represents a direct congressional re-
response to the jurisdictional limitations set forth in section 4(b)(1) of the OSH Act.86 Section 4(b)(1) precludes OSHA from exercising regulatory authority for a particular workplace where another federal agency has a right to enforce safety and health standards for that same workplace.87 Section 9(c) of TSCA, however, establishes that regulatory action taken under TSCA with respect to a particular workplace is not to be considered a bar to OSHA regulation under section 4(b)(1) of the OSH Act.88 Hence, EPA toxic chemical standards issued under TSCA will not preempt OSHA's authority to regulate a given chemical or workplace.89 Section 9(c) of TSCA, then, exhibits Congress’s intent that TSCA serve as a supplementary regulatory mechanism to provide enforcement strength in areas where OSHA is weak, without completely undercutting the OSH Act.90

Based on the potential for EPA interaction with different federal agencies in administering TSCA, section 9(d) directs the EPA to consult and coordinate routinely with these other agencies while administering the Act.91 Congress demanded such coordinated effort to meet the stated goal of “achieving the maximum enforcement of [TSCA] while imposing the least burden of duplicative requirements on those subject to the Act.”92 The generalized language of 9(d) affords the Administrator an alternative means of referring regulation from TSCA to a law administered by a different agency. The language of section 9(d), which is less rigorous than that of section 9(a) from an administrative perspective, provides for referral action based on policy concerns. Such 9(d) referrals are known as “informal referrals” because they are policy-based.

Section 9(b) governs regulatory referral from TSCA to other EPA-administered statutes, rather than to a statute administered by a

the Administrator shall not, for the purposes of section 653(b)(1) of Title 29, be deemed to be exercising statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.” Id.

86 Section 9(a) Memorandum, supra note 10.
87 29 U.S.C. § 653(b)(1) (1982). This OSHA jurisdictional provision states that “[n]othing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under [section 274 of the Atomic Energy Act of 1954] exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.” Id.
89 Section 9(a) Memorandum, supra note 10.
90 See supra note 7 and accompanying text.
different agency.\textsuperscript{93} EPA-administered statutes that regulate exposure to toxic chemicals include the Clean Air Act,\textsuperscript{94} the Federal Water Pollution Control Act,\textsuperscript{95} the Safe Drinking Water Act,\textsuperscript{96} the Federal Insecticide, Fungicide, and Rodenticide Act,\textsuperscript{97} the Resource Conservation and Recovery Act (RCRA),\textsuperscript{98} and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{99} With the exception of CERCLA, each of these laws regulates toxic chemicals, at least to some extent, in a precautionary fashion as TSCA does. Each of these laws, however, addresses only a single medium, such as air or water, and, therefore, fails to provide a check on toxins that encompasses all media as TSCA does.

The section 9(b) intra-agency referral standard is similar to the section 9(a) standard in that the Administrator is required to refer regulation where the toxic hazard “could be reduced to a sufficient extent by the actions taken under authorities contained in . . . other federal laws.”\textsuperscript{100} Unlike section 9(a), however, section 9(b) allows the Administrator to consider whether a proposed regulatory referral is in the public interest.\textsuperscript{101} In determining whether it is in the public interest to regulate a chemical under TSCA rather than under other EPA-administered laws, the Administrator may consider all relevant aspects of the risks presented by the chemical, the costs of regulating under TSCA as compared to other laws, and the relative effectiveness of other laws.\textsuperscript{102}

\section*{B. Problems of Section 9(a) Referral Arising From Statutory Language}

1. Lack of Judicial Review

The most significant drafting deficiency with respect to section 9 is the lack of judicial review of such referral action. Neither inter-

\textsuperscript{93} Id. § 2608(b). For the text of section 9(b), see \textit{supra} note 6.
\textsuperscript{94} 42 U.S.C. §§ 7401–7642 (1982).
\textsuperscript{95} 33 U.S.C. §§ 1251–1376 (1982).
\textsuperscript{100} 15 U.S.C. § 2608(b).
\textsuperscript{101} Section 9(b) allows for referral of a potential TSCA problem to another EPA-administered statute “unless the Administrator determines, in the Administrator’s discretion, that \textit{it is in the public interest to protect against such risk by actions taken under [TSCA].} 15 U.S.C. § 2608(b) (emphasis added).
agency nor intra-agency referrals are subject to judicial review. Judicial review under TSCA is limited to EPA rulemaking under sections 4, 5, 6, and 8, and rulemaking under Title II. Where administrative action under these provisions occurs, an aggrieved party may obtain review before the Court of Appeals for the District of Columbia or the district in which the party resides. In determining whether a particular toxic substance will be referred away from TSCA, however, the EPA Administrator acts entirely within his or her own discretion.

The absence of judicial review under section 9(a) places a party who may be directly affected by such action in a helpless situation. For example, a group of exposed employees may urge that a chemical can be more effectively regulated through TSCA rather than through the OSH Act because of an OSHA proposal for a weak exposure limit for the chemical. Indeed, as has been the case in the past, industry may concur with employees in such a situation. If the EPA chooses to refer sole regulatory responsibility to OSHA, perhaps only for budgetary reasons, then the parties are left with less stringent standards and no means of challenging such EPA action.

Section 9(b) intra-agency referral lacks not only a formal judicial check, but also a requirement that such referrals be documented by the Agency. Accordingly, the EPA may completely shut out public participation in this referral arena.

Acknowledging, at least to some extent, that inter-agency referral through section 9(a) is more complex than 9(b) intra-agency referral, Congress required that a minimal record must accompany section

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103 Id. § 2618 (1982 & Supp. V 1987). The section 19 judicial review provision limits such review as follows:

(a) In General

(1)(A) Not later than 60 days after the date of the promulgation of a rule under section 2603(a), 2604(a)(2), 2604(b)(4), 2605(a), 2605(e), or 2607 of this chapter, or under subchapter II of this chapter, any person may file petition for judicial review of such rule with the United States Court of Appeals for the District of Columbia Circuit or for the circuit in which such person resides or in which such person's principle place of business is located. Courts of appeals of the United States shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of such a rule if any district court of the United States would have had jurisdiction of such action but for this subparagraph.

Id. § 2618(a) (Supp. V 1987).


105 See supra note 103.


107 Id. § 2608(b).
9(a) activity. Prior to delegating regulation of a chemical to a different agency under section 9(a), the Administrator must complete a detailed report documenting the specific risks presented by the chemical.\textsuperscript{108} This report is then published in the Federal Register presumably to give interested parties notice of the proposed regulation and an opportunity to comment on it. Of course, because no right to substantive judicial review exists, the Administrator's obligation to consider public comment cannot be enforced. An agency to which a referral is made then evaluates the EPA report and responds with a statement of findings and conclusions with respect thereto, which is also published in the Federal Register.

Serious complications in the referral process may arise at the point where the second agency issues a response to the EPA's proposed 9(a) action. The ultimate status of a chemical considered for section 9(a) referral turns upon the behavior of the second agency. If the second agency disputes the Administrator's referral proposal, then it may challenge the 9(a) action explicitly by declaring its refusal to accept regulatory responsibility and thereby returning responsibility to the EPA. Alternatively, the second agency may implicitly refuse responsibility by taking no action upon initial EPA referral.

These negative responses in no way ensure that the EPA will act subsequently to regulate on its own.\textsuperscript{109} The distressing result is that regulation of a specific toxic substance that presents an unreasonable risk does not occur. Potential regulation falls instead into an inter-agency "black hole" rendering future regulatory action by the EPA doubtful, and any means to force such action impossible.\textsuperscript{110}

2. Failure to Consider the Public Interest in Inter-Agency Referral

A significant complication in section 9(a) inter-agency referral arises from the fact that it does not permit the Agency to consider

\textsuperscript{108} Id. § 2608(a). Section 9(a) requires a report where referral is suggested by the Administrator. See supra note 6.

\textsuperscript{109} The only guidance provided in section 9 as to EPA action following a determination by a second agency is within section 9(a)(2), which precludes EPA action under sections 6 or 7 of TSCA when the second agency declares that no risk exists or when the second agency initiates action to regulate the referred chemical. 15 U.S.C. § 2608(a)(2); see supra note 6.

\textsuperscript{110} The difficulty in achieving coordinated inter-agency action under the mandates of section 9(a) is further complicated by the fact that an agency to which the EPA delegates regulatory responsibility under this section has only 90 days to respond to such EPA action. See 15 U.S.C. § 2608(a)(2)(B). Indeed, in considering the complexities of administrative agency action and the significant amount of red tape which must be dealt with in seeing through virtually all administrative tasks, 90 days is a very short period of time.
public interest concerns when acting under the provision. As previously noted, however, section 9(b) allows consideration of the public interest as a factor in making referral decisions. This is an important distinction between 9(a) and 9(b) action. Inclusion of this public interest factor in the section 9(a) inter-agency regulatory decisionmaking process is necessary if the Administrator is to have enough flexibility to properly apply TSCA as a supplement to inadequate regulatory schemes.

Once again, a comparison of toxics regulation in the workplace under TSCA and the OSH Act is illustrative of the need for evaluation of public interest concerns in the section 9(a) referral process. Under TSCA, any citizen may demand that the EPA regulate a specific chemical, or, if regulation is already taking place, may demand more stringent safeguards for a particular chemical. For the concerned worker in an industry subject only to OSHA regulation, however, no similar right exists. Further, because a chemical manufacturer or distributor regulated under TSCA is forced to donate its own resources in order to enforce regulations, such employers are presumably aware of TSCA compliance requirements to which they are subject. It is less likely that an OSHA-regulated employer will be fully aware of regulatory requirements because they are not required to take part in enforcement of the OSH Act. Accordingly, in some situations public interest concerns dictate that regulation of a particular chemical should be reserved for TSCA rather than referred to another agency through section 9(a). Nonetheless, these public interest concerns are ignored when the Agency makes a 9(a) decision.

Moreover, it would seem clear that referral from the EPA to a different agency should require consideration as to whether such action is in the public interest. Each regulatory agency operates under completely different statutory and policy guidelines and budgetary constraints. The general policy concerns of the Department of Transportation, for example, do not encompass the same scope of toxic chemical regulation involved in TSCA, despite the fact that the Department is charged with enforcement of the Hazardous Waste Management Transportation Act. Severe budget cuts have

111 See supra note 101 and accompanying text.
113 See supra note 33 and accompanying text.
115 See CEQ, TOXIC SUBSTANCES, supra note 18, at 20, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 783. The Council on Environmental Quality explained the differ-
seriously impaired OSHA enforcement efforts, which should be recognized in considering OSHA as a regulatory alternative.116 Such policy and budgetary variables should be accounted for in the section 9(a) referral process through evaluation of public interest concerns.

The exclusion of a public interest review in TSCA referral, except when the EPA is delegating regulatory responsibility within the confines of its own agency, may have been the product of legislative oversight. The public interest factor must be included in the section 9(a) referral process so that TSCA can effectively supplement weaker pre-existing statutes in controlling exposure to toxic chemicals as it was intended to do.117

IV. REGULATORY ACTION TAKEN UNDER SECTION 9: USE AND MISUSE OF SECTION 9 BY THE EPA

A. The Attempted Referral of Asbestos in Schools

The best example of the potential for misuse of section 9 occurred when the EPA attempted to thrust upon OSHA significant regulatory responsibility for handling the pervasive asbestos problem in the schools. On February 1, 1985, EPA Deputy Administrator A. James Barnes announced plans to refuse to regulate asbestos in schools under TSCA, and instead to hand over this complex task to OSHA.118 The EPA’s action was based on the contention that exposures in the scope and approach of pre-TSCA laws which often render these laws inefficient for regulation of a specific chemical, addressing the Department of Transportation specifically, stating that:

The Department of Transportation (DOT) regulates interstate transportation of hazardous substances under several authorities, including the Department of Transportation Act, the Transportation of Explosives Act, and the Hazardous Cargo Act. DOT has defined several classes of hazardous materials, and its Hazardous Materials Regulations Board plans further classification based upon health hazards. Although some testing for effects of hazardous substances is involved in the implementation of these regulations, substances are classified primarily from the perspective of hazards involved in their transportation and possible spills from accidents. Most of the problems of toxic substances discussed in this report relate to aspects of their use rather than to transportation and spills.

Id. (citations omitted).

116 See supra note 37 and accompanying text.
117 See supra note 13 and accompanying text.
sure to asbestos was affecting or had affected a great number of school employees in their workplace. It was thus a workplace problem, which should be handled pursuant to the OSH Act. The EPA made this decision despite comments from several sources stating that exposure to the carcinogen was occurring through the use of certain consumer products, through ambient air concentrations, and through other environmental avenues besides the workplace.

The Oversight and Investigations Subcommittee of the House Committee on Energy and Commerce became alarmed when it learned of the EPA's questionable administrative decision. This subcommittee called for an investigatory hearing on the matter. The congressional investigation revealed that the Office of Management and Budget (OMB) applied a cost-benefit formula to convince the EPA not to regulate this particular asbestos problem through TSCA. The OMB found that the cost of removing or sealing the asbestos ranged from $96,000 to $206,000 for each case of student cancer that would be avoided, but that the value of the average student's life was only estimated to be $22,000.

OMB's calculation of the actual value of a student's life notwithstanding, the subcommittee became outraged when it discovered the EPA's true basis for referral. The subcommittee noted that the EPA's behavior was "directly contrary to the law, the legislative history of that law, and prior interpretation of that law by [the EPA]." The subcommittee further stated that it was very troubled by the fact that OMB officials distorted section 9 of TSCA to suit their own budgetary approach.

Despite a denial from Deputy Administrator Barnes that the regulatory referral of asbestos in schools was based on the OMB cost-benefit analysis rather than on a valid finding of jurisdictional overlap, the EPA revoked the referral in March of 1985. The EPA issued proposed rulemaking regarding the school asbestos problem under section 6 of TSCA in January of 1986. At that time, the

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119 Id. at 3752.
121 Id. at 70.
122 Id. at 69.
123 Id. at 69–70.
124 Id.
125 Id. at 69.
126 Asbestos: Proposed Mining and Import Restrictions and Proposed Manufacturing, Im-
EPA identified asbestos as a clear TSCA problem because of the broad degree of exposure of people to the substance in numerous and varied situations. In direct contradiction to earlier EPA statements, the Agency indicated that statutes limited to specific forums of exposure, such as OSHA, which addresses only the workplace, as well as single-media statutes, such as the Clean Air Act, are insufficient to check the pervasive presence of the substance.

The EPA's attempted referral of regulatory responsibility for asbestos in schools exemplifies the disquieting potential for abuse through delegation of responsibility under section 9 of TSCA. By labelling a toxic substance threat as a workplace issue, the EPA can ignore the legislative objectives of TSCA. With a referral to OSHA, the inadequacies of the OSH Act and the budgetary problems faced by the agency threaten adequate regulation of harmful toxic chemicals.

**B. Other Section 9 Referrals to OSHA**

In addition to the attempted asbestos referral, the EPA has avoided regulatory responsibility under TSCA by invoking its section 9 authority on six other occasions. Through formal section 9(a) procedures, the Agency has issued three referrals, all of which transferred authority to OSHA. Based on the flexible language of section 9(8), the EPA has informally referred regulatory responsibility for three other chemicals. Again, each of these referrals was directed...
toward OSHA. This section 9 activity prompted substantial delay in
the execution of affirmative regulatory measures to control these
harmful toxins, and, in most cases, subsequent regulatory efforts
have been criticized as less than satisfactory solutions to health and
safety concerns.

1. Section 9(a) Formal Referrals

Since the enactment of TSCA, the three formal section 9(a) regu­
larly referrals to OSHA have transferred regulatory authority for
the following chemicals: 4,4’–Methylenedianiline (4,4’–MDA), 1,3-
butadiene, and a group of glycol ethers.\(^{130}\)

In 1985 the EPA conducted its first formal referral to OSHA by
deleagating regulatory responsibility of 4,4’–MDA.\(^{131}\) 4,4’–MDA is an
industrial chemical used in the production of polyurethane foams,
epoxy resins, wire coatings, and dyes.\(^{132}\) According to the EPA, 660
workers are exposed to the toxin in manufacture and thousands of
others are exposed in processing procedures.\(^{133}\) In July, 1975, the
EPA conceded that 4,4’–MDA presents an unreasonable risk to ex­
posed workers and that “a workplace standard may prevent or re­
duce the risks to a sufficient extent.”\(^{134}\) The Agency noted that
because the toxic substances were only found in the workplace,
OSHA referral would be appropriate.\(^{135}\)

Since the EPA’s referral of 4,4’–MDA, it has taken OSHA over
three years to promulgate workplace safety regulations for the chem­
ic.\(^{136}\) Even after the proposed regulation was finalized by OSHA,
publication of the regulation was delayed for a year by OMB, which
deemed the action to be a low priority.\(^{137}\) OMB’s refusal to act
subsequent to OSHA’s completion of the project resulted in harsh

\(^{130}\) 4,4’–Methylenedianiline; Decision to Report to the Occupational Safety and Health Ad­
ministration, 50 Fed. Reg. 27,674 (1985); 1,3 Butadiene; Decision to Report to the Occupational
Safety and Health Administration, 50 Fed. Reg. 41,393 (1985); Toxic and Hazardous Sub­
stances Control; 2-Methoxyethanol, 2-Ethoxyethanol and Their Acetates; Referral for Addi­

\(^{131}\) 4,4’–Methylenedianiline; Decision to Report to the Occupational Safety and Health Ad­

\(^{132}\) Id. at 27,675.

\(^{133}\) Id.

\(^{134}\) Id.; see also EPA Announces Regulatory Referral of 4,4’–MDA to OSHA Under TSCA


\(^{136}\) 4,4’–MDA: OSHA, OMB Finishing Work on Proposal; CMA, Steelworkers Criticize

\(^{137}\) Id.
criticism of both agencies by the chemical industry and workers alike.\textsuperscript{138}

The delay in regulation of 4,4′-MDA subsequent to referral from the EPA to OSHA typifies the problems that result when regulatory activity is simply passed from one agency to another. Ultimately, delay in regulation for a given chemical increases the degree and scope of harmful health effects from exposure to the chemical. This "regulatory lag" is particularly troublesome with respect to OSHA, because the agency faces numerous hurdles in the standard-setting process. As the 4,4′-MDA referral further demonstrates, the prominent role of OMB as overseer of such regulatory activity poses an even more serious threat to checking exposure through prompt regulatory activity.

In October, 1985, the EPA formally referred regulation of 1,3-butadiene, a chemical used in the synthetic rubber industry, to OSHA.\textsuperscript{139} Between 4,800 and 7,800 workers in the synthetic rubber industry are exposed to the toxin.\textsuperscript{140} Although OSHA already regulated the chemical, the EPA believed that the OSHA standard was unreasonably high, and considered regulating 1,3-butadiene under TSCA.\textsuperscript{141} The OSHA standard was 1,000 ppm for 1,3-butadiene.\textsuperscript{142} OSHA refused to lower the standard even in the face of EPA advice that the standard should be 1 ppm rather than 1,000 ppm.\textsuperscript{143} Exposed workers attempted to fight for reduction of the standard through a labor union petition for a lower emergency temporary standard, but OSHA ignored their efforts.\textsuperscript{144}

There is probably no hope of effective regulation of 1,3-butadiene under TSCA because the EPA formally surrendered regulatory responsibility to OSHA by withdrawing its proposed rulemaking. Naturally, industry-affiliated commentators view regulation under OSHA as the most viable alternative for the chemical, due to the lower financial burden of maintaining a 1,000 ppm OSHA standard


\textsuperscript{139} 1,3-Butadiene; Decision to Report to the Occupational Safety and Health Administration, 50 Fed. Reg. 41,393 (1985).

\textsuperscript{140} Id.

\textsuperscript{141} See Rulemaking Begins on Potential Carcinogen 1, 3-Butadiene, Empl. Safety & Health Guide (CCH) No. 779, at 1 (Apr. 15, 1986).

\textsuperscript{142} OSHA Seeks Comments on 1, 3-Butadiene Risks, Empl. Safety & Health Guide (CCH) No. 764, at 1 (Dec. 31, 1985).

\textsuperscript{143} See id.

\textsuperscript{144} See Rulemaking Begins on Potential Carcinogen 1, 3-Butadiene, Empl. Safety & Health Guide (CCH) No. 779, at 1 (Apr. 15, 1986).
as compared to a 1 ppm TSCA standard. Conversely, the Natural Resources Defense Council, an environmental interest group, argues that only TSCA will adequately protect workers and the environment from the toxin.

The circumstances surrounding the 1,3-butadiene referral belie the fact that political maneuvering, rather than pursuit of legislative goals with regard to toxic chemical regulation, is the order of the day. One must puzzle at an agency charged with a mandate to preserve the safety of the workplace that accepts a 1,000 ppm standard as appropriate in the face of a recommended 1 ppm standard. Had regulation of the chemical been retained under TSCA, manufacturers of the chemical would be forced to participate in the rulemaking process, thereby easing the rulemaking burden on the agency and encouraging the agency to pursue a more reasonable regulatory plan for the chemical. If the regulatory plan for 1,3-butadiene under TSCA remained unacceptable based on public safety and health considerations, the regulations would be open to challenge through TSCA’s citizen suit provision.

The most recent formal referral to OSHA was the glycol ether referral in May, 1986. Glycol ethers are used in solvents for printing, painting, woodworking, and for finishing paint coatings on automobiles. Following the TSCA requirement, the EPA found that OSHA could reduce the health risks of the toxin to a sufficient extent, and referred regulation to that agency. The EPA made this finding in spite of its earlier admission that it was unaware of the impact of glycol ethers used in consumer products. The EPA deemed consumer exposure irrelevant because it perceived none to exist, and referral soon followed.

Once again, manufacturers claimed that if any regulation had to be implemented for glycol ether it should be through OSHA. Another environmental interest group, the Environmental Defense Fund, commented to the contrary that the EPA should utilize TSCA to solve the glycol ether problem. Without an opportunity for judicial

145 See 1,3-Butadiene Risks; Decision to Report to the Occupational Safety and Health Administration, 50 Fed. Reg. 41,393 (1985).
146 See id.
148 Id.
149 Id. at 18,495.
150 Id. at 18,488.
151 Id.
review or an ability to bring citizen suits, the opposition had no way to prevent the OSHA referral.

2. Section 9(d) Informal Referrals to OSHA

Section 9(d) informal referral differs from section 9(a) referral because informal referrals are based purely on policy grounds. Informal referrals occur prior to any EPA determination as to whether a chemical poses an unreasonable risk under TSCA section 4(f). These informal referrals are the most convenient method for Agency diversion of regulatory responsibility under TSCA. To date, there have been three section 9(d) referrals to OSHA.

The EPA issued its first informal section 9(d) policy-based referral to OSHA in July, 1986, for toluenediamine (TDA). Manufacturing of TDA exposes approximately 750 workers, and 750 more are exposed in the use and processing of the chemical. According to the EPA, it referred TDA regulation under section 9(d) rather than under section 9(a) for expeditious purposes.

Curiously, the EPA initially proposed rulemaking for TDA under TSCA, but terminated the project because attempts at negotiation, rather than formal rulemaking, failed. It is not clear why the Agency did not pursue formal TSCA rulemaking for TDA. The absence of judicial review for section 9 makes any clarification difficult. The EPA has not offered an explanation as to why formal TSCA rulemaking was not pursued, and, indeed, it need not do so. The toluenediamine referral demonstrates the tremendous discretion of the EPA in controlling the impact of toxic chemical regulation in a given situation.

In June, 1986, the EPA referred 4,4’-methylene bis (2-chloroaniline), known as MOCA, to OSHA through section 9(d). MOCA is used to manufacture polyurethane articles and surface coatings, and workers in 400 United States companies are exposed to the sub-

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154 Id. at 25,071.
155 See id.
156 Id.
157 See supra notes 104–10 and accompanying text.
MOCA is a carcinogen which presents a significant threat to workers when inadequately contained in dispensing drums. Although the presence of MOCA in the environment is prominent, the EPA refused to determine whether it met the unreasonable risk threshold, and instead simply transferred the problem to OSHA on policy grounds.

The EPA chose to defer to OSHA in this manner, ignoring strong overtures from industry calling for regulation of the chemical under TSCA rather than the OSH Act. The Polyurethane Manufacturers Association (PMA) specifically asked the EPA to consider issuing a comprehensive MOCA packaging and labeling rule under TSCA that would incorporate dispensing drum specifications. Only under TSCA could such a broad rule be produced, which would both address worker protection and facilitate industrial management. The EPA, however, ignored both industry and environmentalist pleas for comprehensive regulation of MOCA through TSCA, and relieved itself of responsibility for the chemical through a convenient 9(d) referral.

OSHA's treatment of MOCA over the sixteen-year period that has elapsed since serious concerns over the chemical were first voiced has been highly criticized. This criticism has resulted in part from the leak of an internal OSHA report that included the chemical in its “dormant standards project,” by which OSHA simply shut down its regulatory efforts for certain chemicals. Because MOCA was referred back to OSHA from the EPA, little action has been taken with respect to the chemical even though it has been more solidly linked to cancer. Accordingly, labor unions have been forced to petition OSHA for an emergency standard to check MOCA exposure. A ban or limitation of MOCA under TSCA would have put an end to the regulatory follies surrounding MOCA, and, more im-
portantly, finally would have addressed health and safety concerns regarding the chemical.168

In March, 1986, the EPA referred the regulation of formaldehyde to OSHA through a section 9(d) informal referral procedure.169 Exposure to formaldehyde occurs in the production of disinfectants, preservatives, textiles, and in the manufacture of apparel.170 The EPA has designated formaldehyde to be a carcinogen.171 According to the EPA, 800,000 workers are exposed to formaldehyde in the apparel manufacturing industry alone, as well as workers in thirty other industries.172

The EPA stated that because OSHA issued a proposal for a general formaldehyde standard, OSHA thus demonstrated that its statutory authority could prevent the formaldehyde risk to workers engaged in apparel manufacturing to a sufficient extent.173 This basis for referral implies that any agency that can issue a proposed regulatory standard for a toxic substance is capable of regulating that substance to a sufficient extent. One must question whether Congress intended this type of mechanical policy approach in laying the guidelines for the section 9(d) referral process. It simply makes no sense to suggest that Congress enacted TSCA as a comprehensive statute for the regulation of toxic chemicals in a broad spectrum of situations, and yet included a provision by which the EPA could summarily dismiss regulation based on the wholly unsupported representations of another agency.174

168 EPA has included MOCA as a chemical subject to its new Comprehensive Assessment Information Rule under section 8(a) of TSCA. This rule, however, is merely a data organization measure, taken by the Agency to reduce duplicative reporting requirements. See EPA Administrator Signs Final Version of Comprehensive Assessment Information Rule, 12 Chem. Reg. Rep. (BNA) 1195–96 (Nov. 4, 1988).


170 Id.

171 Id.

172 Id.

173 Id. at 9470.

174 Since referral from the EPA, OSHA’s handling of formaldehyde has been attacked in administrative policy circles as well as in the courts, casting further doubt on the EPA’s referral logic. The U.S. Court of Appeals for the District of Columbia Circuit recently heard argument between union workers, OSHA, and industry on the formaldehyde standard in Auto Workers v. OSHA, No. 87–1743 (D.C. Cir.). OSHA’s November, 1987, reduction of the formaldehyde standard from 3 parts per million (ppm) to 1 ppm still leaves 20 to 30 percent of the working population unprotected, according to J. Davitt McAteer of the Occupational Safety and Health Law Center, who argued for the Amalgamated Clothing and Textile
V. TRACING THE SECTION 9 PARADOX THROUGH THE LEGISLATIVE AND ADMINISTRATIVE HISTORY OF TSCA

A. Congressional Intent in Including Section 9

The legislative history of TSCA cites the Act as a solution to the problematic loopholes of prior legislation regulating toxic substances, as well as a response to increasing public health concerns about the substantial amount of toxic substances being introduced into the environment. Both the House and the Senate noted that no federal law regulating toxic substances at that time provided comprehensive control, and that it was their intent that TSCA would achieve this purpose. With regard to the OSH Act specifically, it is apparent, through examination of both the Senate and House reports, that Congress intended TSCA to be a supplement to existing OSHA law.

The committee reports all describe section 9 as a mechanism to prevent duplicative regulation and wasted resources. Although some early versions of TSCA prohibited any EPA action arguably within the jurisdiction of another agency, these proposals were dismissed. Such proposals conflicted with the central congressional intent of providing legislation that would cure the ills of prior toxic substance laws. Accordingly, the final version included section 9(d) to require annual reports to Congress concerning the efforts of the


175 House Report, supra note 7, at 3-4, reprinted in TCSA Legislative History, supra note 7, at 411-12; Senate Report, supra note 7, at 3-4, reprinted in TCSA Legislative History, supra note 7, at 159-60.

176 See House Report, supra note 7, at 6, reprinted in TCSA Legislative History, supra note 7, at 414; Senate Report, supra note 7, at 2, reprinted in TCSA Legislative History, supra note 7, at 158.

177 Senate Report, supra note 7, at 77, reprinted in TCSA Legislative History, supra note 7, at 198. The Senate Report repeatedly cites the purpose of inter-agency amendments to maximize the effectiveness of TSCA as a supplement to OSHA: "These amendments . . . would clarify that the Act is intended to complement and supplement existing laws and regulations such as occupational, health and safety requirements." Id.

178 "All three committee reports—House, Senate and Conference—describe the purpose of section 9(a) as being to avoid overlapping or duplicating regulation while providing full protection for health and the environment.” Section 9(a) Memorandum, supra note 10 (quoting House Report, supra note 7, at 45, reprinted in TCSA Legislative History, supra note 7, at 452).

179 See House Report, supra note 7, at 10, reprinted in TCSA Legislative History, supra note 7, at 418.
EPA Administrator to consult with other agencies so that “maximum enforcement of th[e] act” would be achieved. 180

B. The Post-Enactment History of Section 9

Section 9 of TSCA has never been construed by a court, nor has the EPA ever issued formal regulations interpreting the provision. 181 The EPA has, however, issued two policy statements on the section. The first was a 1984 Statement by Deputy Administrator Alvin Alm, which briefly touched on section 9 issues. 182 The second was a 1985 statement directly addressing section 9(a) by Acting General Counsel Gerald H. Yamada. 183 The EPA also issued a memorandum of understanding (MOU) in 1986 that specifically addressed section 9(a) referrals between the EPA and the Department of Labor (DOL). 184 A memorandum of understanding is an administrative policy document that addresses the approach that two or more agencies will take with respect to an area of regulatory overlap.

Policy statements by the EPA addressing section 9 of TSCA vary greatly in the degree of guidance that they offer the Agency with respect to a referral decision. The earlier “Alm Policy” offered minimal direction, stating generally that the EPA is to refer regulatory responsibility to the DOL when “occupational exposures constitute all or most of the hazards posed by the chemical,” and when a workplace standard would be the most effective method of regulation. 185 The “Yamada Policy,” however, issued specific section 9(a) referral guidelines and stated that the EPA has the obligation to liberally use the section to refer regulatory responsibility. 186 The 1985 Yamada Policy of frequent referral is possible largely because of the tremendous amount of Agency discretion with respect to section 9 flowing from the absence of judicial review. 187 Not only does the policy urge referral away from the EPA whenever feasi-

181 Section 9(a) Memorandum, supra note 10.
182 See id. (citing Alvin Alm, Deputy Administrator, EPA Interim Policy for Referring Workplace Exposure Problems to the Department of Labor (Aug. 22, 1984)).
183 Id.
185 Section 9(a) Memorandum, supra note 10 (citing Alm, supra note 182).
186 Id.
187 Id.
ble, particularly if the OSH Act is involved, but the policy also stresses that EPA disagreement with the regulatory approach of another agency is not a sufficient basis to withhold referral. In the face of this pro-referral mandate, the Agency does concede that situations may exist where section 9(a) referral is not appropriate.

One basis given for the Yamada Policy was a subtle difference in the language of sections 9(a) and 9(b). The statutory language distinction relied upon by the Agency as dictating referral under all circumstances is largely a semantical one. Section 9(a) requires an EPA report documenting the prospect of referral where a non-EPA statute "may" adequately regulate a chemical, while section 9(b) requires such a report when an EPA-administered statute other than TSCA "could" adequately regulate. The Yamada Statement magnifies this distinction to the point of considering it the equivalent of a congressional order for referral away from TSCA under section 9(a) at every opportunity.

The Agency's reliance on the difference between sections 9(a) and 9(b) for this proposition is misplaced for two reasons. First, the distinction relates to reporting requirements, not to referral itself. If Congress had intended an across-the-board referral approach with respect to section 9(a) jurisdictional overlap, it would not have demanded a simple report documenting referral prospects. To effectuate such an approach, Congress would have demanded referral outright whenever it appeared that another agency could regulate a chemical. The requirement of a report evaluating referral prospects, on the other hand, permits at least limited oversight of EPA action. At the same time, the reporting requirement forces the EPA to make a reasoned assessment of regulatory alternatives for a specific chemical.

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188 See id. "TSCA would not create 'overlap' [but rather] TSCA would be restricted to filling 'gaps' in existing statutory authority." Id.
189 See id.
190 See id. EPA's policy choices are subordinated to those of other agencies in many cases of potentially overlapping jurisdiction. Id.
191 See id.
192 See id.
194 See Section 9(a) Memorandum, supra note 10.
195 Contrary to the Yamada Statement, the EPA itself noted the need for an efficient approach to interagency cooperation in commenting on the Senate Bill, S.766, that:

Several amendments are being proposed to the act to provide for the maximum cooperation and coordination among the several agencies of the Federal Government which have programs and responsibilities concerned with toxic substances. These
TSCA may not be enforced as a gap-filler for prior inefficient toxic chemical legislation.\(^\text{196}\)

Second, the legislative history indicates that Congress was particularly concerned with the potential for abuse through convenient undocumented 9(b) inter-agency referral.\(^\text{197}\) Contrary to the Yamada Statement's position that the "could regulate" language points to a lower standard for 9(a) intra-agency referral, it is equally plausible that the 9(b) "could regulate" language is a legislative response to address congressional concern about undocumented proceedings within the EPA.

In further support of the pro-referral mandate, the Yamada Policy Statement proposed a puzzling "attention-forcing" theory analogizing section 4(f) to section 9.\(^\text{198}\) TSCA section 4(f) requires that test data on toxins be submitted to the Administrator, and, upon a determination that regulation is appropriate, that action to regulate must be initiated by the Agency within 180 days.\(^\text{199}\) This provision...
may be called an attention-forcing provision because it requires the EPA to devote immediate attention to a specific toxin and make a prompt decision as to regulation. Offering little explanation, the Policy Statement submits that the section 4(f) purpose should be attributed to section 9. In other words, the Yamada Policy indicates that the Agency should interpret section 9 as mandating a prompt decision, and that decision should be in favor of referral whenever possible.

The Agency's attention-forcing theory ignores the central regulatory scheme of the Act, under which section 4 both provides for aggressive testing of potential hazardous chemicals and forces active regulation. The legislative history of the Act does not support the Yamada interpretation, as there is no indication whatsoever that the section 4(f) mandates should apply to section 9(a). On the contrary, the attention-forcing theory directly contravenes the congressional directive that cooperation with other agencies should be conscientiously conducted to achieve the primary goal of maximum enforcement of TSCA.

As discussed in Part III, the ambiguity of the sufficient extent standard of section 9(a) has left the Agency free to establish its referral policy without regard to the broadbased legislative objectives of the Act. Accordingly, the 1985 Yamada Statement maintained that the Agency has no affirmative responsibility in making a section 9(a) referral decision to consider either the practical ability of the second agency to regulate or the cost-effectiveness of regulation by the second agency. In so doing, the Agency rejected a

that a chemical substance or mixture presents or will present a significant risk of serious or widespread harm to human beings from cancer, gene mutations, or birth defects, the Administrator shall, within the 180-day period beginning on the date of the receipt of such data or information, initiate appropriate action under section 2604, 2605, or 2606 of this title to prevent or reduce to a sufficient extent such risk or publish in the Federal Register a finding that such risk is not unreasonable. For good cause shown the Administrator may extend such period for an additional period of not more than 90 days. The Administrator shall publish in the Federal Register notice of any such extension and the reasons therefor. A finding by the administrator that a risk is not unreasonable shall be considered agency action for purposes of judicial review under chapter 7 of title 5. This subsection shall not take effect until two years after January 1, 1977.

Id.

200 OTS, TSCA, supra note 2, at 14.
201 The Toxic Substances Control Act, 7 Env't Rep. (BNA), Monograph No. 24, at 37 (1977).
202 Section 9(a) Memorandum, supra note 10.
203 See supra notes 69–117 and accompanying text.
204 Section 9(a) Memorandum, supra note 10.
reading of section 9(a) based on TSCA provisions as a whole. Under a more broad reading, provisions such as section 6(c) strongly suggest that factors like the capability of the second agency to regulate and the cost-effectiveness of regulation by that agency should be recognized in the section 9(a) decisionmaking process.

The Agency relies on its argument concerning 9(a) reporting requirements and the absence of a public interest evaluation under section 9(a) to support its dismissal of the section 6(c) concerns. This approach flies in the face of legislative interpretation principles, and, more importantly, is repugnant to the purpose of TSCA. There is no reason to avoid consideration of the ability of a second agency to handle regulation. Nor is there reason to downplay the costs and benefits of regulating under TSCA as compared to a different statute. Certainly, if the purpose of enacting TSCA was to fill the regulatory gaps left by other statutes, then ignoring the costs and benefits of operating under a different statute renders the Act useless.

Finally, the 1985 Policy Statement discussed the significance of TSCA section 9(c), which specifically cites the congressional intent to prevent interference with OSHA's jurisdiction in administering TSCA. The EPA's position is that its pro-referral policy will be enforced even more strongly where OSHA is concerned because the entire process of EPA regulation of the workplace by setting "OSHA-type" standards under TSCA is suspect. The legislative history of the Act, however, specifically states that in certain situations a chemical ban or use limitation under TSCA is preferable to an exposure limit, such as those set under OSHA, to protect human health and safety and the environment. In acknowledging the

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205 Id.

206 See id. Yamada contends that since section 6 of TSCA describes EPA regulations for "manufacturing," "processing" and "distribution in commerce" or "disposal" and section 6(a)(5) provides only for regulation of "commercial use," and not "manufacturing," then, in reading section 6(a)(5) against the whole section 6 provision, one may conclude that section 6(a)(5) does not extend to regulation of the workplace. Id. at 189.

207 See SENATE REPORT, supra note 7, at 1-2, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 157-58. The Report from the Senate Committee on Commerce emphasized the need for TSCA regulation in lieu of exposure-limit regulation under a different statute:

While air and water laws authorize limitations on discharges and emissions, the Occupational Safety and Health Act authorizes the establishment of ambient air standards for the workplace, and the Consumer Product Safety Act authorizes standards with respect to consumer products, there are no existing statutes which authorize the direct control of industrial chemicals themselves for their health or en-
express concerns of Congress as dictated through the legislative history, yet, at the same time, wholly dismissing TSCA as a control mechanism for the workplace, Yamada's OSHA argument loses credibility.

The Agency has consistently followed the pro-referral directive of the 1985 Yamada Policy Statement in enforcing TSCA. This sec-

environmental effect (except section 211 of the Clean Air Act, which authorizes the regulation of fuel additives).

While these other authorities will in many cases be sufficient to adequately protect health and the environment, the alternative of preventing or regulating the use of the chemical in the first instance may be a far more effective way of dealing with hazards. If expensive sewage treatment facilities can be avoided, for example, through removing dangerous materials from household and industrial wastes, the authority to do so ought to be provided.

Id.  

The House discusses this need by specifically referring to the failure to adequately regulate PCB's under pre-TSCA statutes:

The inadequacies in current authorities to deal with the recognized harm presented by polychlorinated biphenyls (PCBs) illustrates the deficiencies in present law to deal with known harmful chemicals. Under the Federal Water Pollution Control Act, the Administrator of the Environmental Protection Agency has authority to control the discharge of PCBs into the waters. However, there is no means for regulating other avenues through which the environment is exposed to PCBs. For example, an estimated three-fourths of the amount of discarded PCB's [sic] have been disposed of in landfills. Under existing law there is no authority to deal with such disposal and even though water emissions may be restricted, environmental exposure through seepage from landfills will continue to occur.

Intelligent standards for regulating exposures to a chemical in the workplace, the home or elsewhere in the environment cannot be set unless the full extent of human or environmental exposure is considered.

HOUSE REPORT, supra note 7, at 6, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 414.  

Perhaps the most enlightening comments in this regard come from the Council on Environmental Quality report which spawned TSCA legislation:  

It is clear that current laws are inadequate to control the actual and potential dangers of toxic substances comprehensively or systematically. The controls over manufacture and distribution pertain to only a small percentage of the chemical substances which find their way into the environment . . . . For example, the Food and Drug Administration carefully examines food containers for their effect on food but does not address the environmental and health effects of incinerating the containers. With an exception of radioactive materials, disposal is not a consideration in any programs controlling manufacture.

But the problems of focus are broader than specific examples. Setting rational standards for many pollutants under existing legislation is almost impossible. The key factors involved in setting standards are the total human exposure to a substance and its total effect on the environment. The focus must be on a particular pollutant and all the pathways by which it travels through the ecosystem. Controls over distribution approach this perspective, but most fail to consider important environmental factors adequately.

CEQ, TOXIC SUBSTANCES, supra note 18, at 20, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 783 (emphasis in original).  

Section 9(a) Memorandum, supra note 10.

See supra notes 186–94 and accompanying text.
tion 9(a) policy results from linguistic hair-splitting of referral language. Additionally, the policy hinges on an isolated reading of section 9 while ignoring a proper interpretation of the provision in the context of the entire TSCA statutory scheme. These factors suggest that the 1985 Policy Statement was assimilated as a means of legitimizing a preconceived regulatory end, that being minimal use of TSCA, based on political and budgetary concerns.

The memorandum of understanding promulgated with respect to section 9 sets forth structured procedural guidelines for referral between the EPA and the DOL.\footnote{Memorandum of Understanding Between the Environmental Protection Agency and the Department of Labor, supra note 184, ¶ 8804, at 8713–16.} The EPA-DOL memorandum specifies four stages in which the EPA and OSHA are required to cooperate in carrying out section 9 action: pre-report notification,\footnote{Id. ¶ 8804, at 8715.} pre-report consultation,\footnote{Id. ¶ 8804, at 8715–16.} post-report notification,\footnote{Id. ¶ 8804, at 8716.} and post-report consultation.\footnote{Id.} Through this four-stage process it is hoped that the agencies will make a reasoned assessment of their regulatory capabilities with respect to a given chemical. The EPA Administrator then relies on the information shared by the agencies in deciding the ultimate regulatory fate of the chemical.

A review of the post-enactment history of section 9 in the context of the EPA’s actual use of section 9 indicates that the Yamada Statement has been the driving force behind the Agency’s questionable section 9 track record. The 1985 pro-referral mandate has proven to be an advantageous policy tool by which the Agency may refer regulation at every turn despite legislative objectives. While the EPA-DOL memorandum is instructive as to the inter-agency technicalities that must be met to invoke referral activities, it is quite clear that the Yamada pro-referral mandate, as a deregulation tool, is the precept upon which all section 9 decisions are based.

VI. ALTERNATIVES TO PREVENT THE MISUSE OF SECTION 9 OF TSCA

Since the passage of the Clean Air Act of 1970,\footnote{42 U.S.C. §§ 7401–7642 (1982).} the first comprehensive environmental statute, federal regulation of toxic substances has proven to be an exceedingly complex and often disap—
pointing endeavor.\textsuperscript{216} The difficulty in mounting an effective attack against toxic substances is partly attributable to their ubiquitous nature. Toxic substances present themselves in virtually every type of medium throughout the course of their existence.\textsuperscript{217} Because of this fact, federal regulation focussing solely on a single medium, such as air, water, or soil, has proven too narrow in scope and less successful than originally was hoped.\textsuperscript{218}

The passage of TSCA stands as a formal recognition by Congress that, based on their complex nature, toxic substances require a multi-media regulatory approach.\textsuperscript{219} TSCA exists on paper as a notable policy breakthrough in toxic substance control. Nevertheless, the Act essentially has failed to provide for comprehensive regulation of toxic substances during its thirteen years on the books.\textsuperscript{220}

\textsuperscript{216} See D. DONIGER, supra note 4, at 21. In summarizing the problems of toxic substances regulation, Doniger notes: "[t]oxic substances regulation . . . is characterized by . . . problems of technological, medical, and economic uncertainty and by the difficulty of balancing incommensurable interests in standard-setting." Id.

\textsuperscript{217} V. YANNACONE, B. COHEN & S. DAVISON, 2 ENVIRONMENTAL RIGHTS & REMEDIES § 8.1, 1–2. Through their analysis of environmental toxicants, the authors observe that:

Man's physical environment is now contaminated with a myriad of potentially toxic substances. These substances are now constituents of nearly everything that man uses . . . . Toxi[ns] enter the environment through complex and interrelated pathways.

Among the key processes for which man himself is responsible are manufacture, consumption and disposal.

\textsuperscript{218} CEQ, TOXIC SUBSTANCES, supra note 18, at 21, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 784. In their 1971 Report on toxic substances, the Council on Environmental Quality concluded that:

The characteristic pervasiveness of toxic substances makes it difficult for the media-oriented programs to engage in adequate and efficient research, monitoring, and control activities for such substances . . . .

The scope of EPA's authority provides a basis for an integrated approach to toxic substances. However, such an approach cannot be accomplished simply by coordinating the activities of existing media-oriented programs. The activities themselves must be conducted on an integrated basis.

\textsuperscript{219} SENATE REPORT, supra note 7, at 2, reprinted in TSCA LEGISLATIVE HISTORY, supra note 7, at 158. In passing TSCA the Senate noted the inadequacies of media-oriented or "non-comprehensive" regulation of toxic substances and expressed their intent that TSCA serve as a mode of comprehensive regulation:

While individual agencies may be authorized to regulate occupational, environmental, or direct consumer hazards with respect to a chemical substance, there is no agency which has the authority to look comprehensively at the hazards associated with the chemical . . . . The bill would grant the Environmental Protection Agency the authority to look at the hazards in total.

\textsuperscript{220} See D. DONIGER, supra note 4, at 144. In his case study of VOC regulation, David D. Doniger examines how the separate treatment of VOC regulation by OSHA and the EPA resulted in ineffective overall control of VOCs. Upon making this conclusion, Doniger goes on
The ineffectiveness of TSCA is primarily attributable to poor legislative drafting and inappropriate enforcement of the Act's provisions.\textsuperscript{221} Section 9 suffers from both of the aforementioned regulatory inadequacies. The section 9 legislative loophole facilitates deregulation by enabling the EPA to ignore a toxic hazard through referral to another agency whose powers overlap with those of the EPA's. Because toxic substances simultaneously present themselves in several areas, jurisdictional overlap occurs fairly often, making such an approach quite convenient.\textsuperscript{222} Although the Agency's manipulation of section 9 in this manner directly contradicts the purpose of the Act, this activity continues unchecked.

Recognition of a problem is the first step on the path to its solution. Hence, increased public awareness and involvement is the first step toward remediation of the section 9 loophole. The second step is congressional action in response to public concerns. TSCA must be amended to afford judicial review of section 9 delegations. The third

to point out that TSCA has failed as a means of solving the problems of fragmented federal regulation of toxic substances:

At no point did Congress take a comprehensive look at the entire problem and attempt to design a single control system that covers the full life-cycle of a chemical, from invention to disposal, through all the media in which it may be found. Even the far-reaching 1976 Toxic Substances Control Act is not such a system. It fills the gaps in the network of controls created by other laws . . . . But the enormously complex patchwork remains in effect.

\textit{Id.}

\textsuperscript{221} See Silbergeld Calls on Congress to Examine EPA Administration of Chemical Control Law, 12 Chem. Reg. Rep. (BNA) 36 (Apr. 8, 1988). At a hearing of the Science, Research and Technology Subcommittee of the House Science, Space and Technology Committee, Ellen K. Silbergeld, who is a senior Environmental Defense Fund scientist, a member of the EPA Science Advisory Board, and President-elect of the Society for Occupational and Environmental Health, testified that Congress must examine the gaps and loopholes in TSCA. According to Silbergeld, the EPA has improperly interpreted the law, assuming the burden of proof of thoroughly demonstrating chemical toxicity prior to regulating rather than considering a chemical “guilty until proven innocent.” Silbergeld told the subcommittee that, at the hands of EPA, “the decade history of [TSCA] has been abused of discretion.” \textit{Id.}

In an oversight hearing on TSCA held by the House Government Operations Subcommittee on Environmental, Energy and Natural Resources the Act was labeled an “underachiever” by Rep. Edolphus Towns (D-N.Y.) and Rep. Mike Synar (D-Okla.). Charles L. Elkins, the Director of the Office of Toxic Substances, agreed with the Subcommittee, testifying that “it is clear . . . that the current level of accomplishment of the existing chemical program is inadequate.” According to Elkins, the TSCA requirement that EPA rulemaking be supported by substantial evidence on the entire rulemaking record has significantly slowed progress under the Act. The administration, stated Elkins, not the EPA, has refused to seek a legislative amendment of the substantial evidence requirement. \textit{Elkins Says Some TSCA Requirements Slow Action on Suspect Existing Chemicals} 12 Chem. Reg. Rep. (BNA) 1012–13 (Oct. 7, 1988).

\textsuperscript{222} See D. DONIGER, supra note 4, at 144–45 (citing Interagency Regulatory Liaison Group, Joint Regulatory Developments, 1 Chem. Reg. Rep. (BNA) 1916–21 (Mar. 1, 1978)). In 1978 EPA, OSHA, FDA and CPSC reported that regulations were being developed by two or more of these agencies for at least 23 substances or groups of substances. \textit{Id.}
and final step is amendment of section 9(a) to include the public interest as a factor in making inter-agency referrals so that important considerations, such as public safety and health concerns, will not be dismissed by the Agency in making such regulatory decisions.

The only way to effect change in TSCA enforcement is to raise public awareness and activity so that Congress will be influenced to take action. With respect to the OSH Act, particularly, workers and their representatives, unions and public interest groups, must recognize the negative impact of section 9 referrals to OSHA, and must pressure Congress into acting to solve this distressing situation. As examination of the legislative history of the Act demonstrates, the legislators who enacted TSCA intended to remedy the inadequacies of prior laws such as the OSH Act. Certainly, these legislators would be anxious to see to it that their efforts are not rendered meaningless because of administrative abuse through section 9.

Review of the section 9 loophole by the Administrative Conference of the United States is the appropriate vehicle for bringing about TSCA reform. Recommendations by the Conference to Congress with respect to the section 9 referral problem would assuredly prove helpful in amending the law. If an amendment for judicial review of section 9 is not pursued successfully, the Administrative Conference could act as an independent overseer of section 9 action and check potential regulatory abuses. Additionally, the EPA could look to recommendations of the Administrative Conference to amend its internal section 9 policy.

A. Congressional Action as an Effective Solution

1. Judicial Review of Section 9 Actions

The strongest check that Congress could place on section 9 referrals would be denial of complete administrative discretion by pro-

viding for judicial review of these actions. Removing the discretionary language from section 9 and inserting a provision for judicial review will give interested parties directly affected by referrals an opportunity to challenge abuses.

It may be argued that judicial review would unreasonably prolong active regulation by either the EPA or an alternative agency. This contention, however, carries little weight in view of the administrative neglect of legislative intent that has been characteristic of section 9 activity. The history of section 9 referral attempts amply demonstrates that the EPA is able to disregard the congressional intent underlying TSCA by implementing an across-the-board referral approach. With a judicial review provision in section 9, the Agency would be forced to more carefully analyze referral alternatives. At a minimum, judicial review would serve as an obstacle to instances of extreme administrative abuse.

2. Inclusion of a Public Interest Factor in the Section 9(a) Referral Process

Section 9(b) allows for a consideration of the public interest in making an intra-agency delegation decision. Why Congress chose to disregard public interest concerns in the inter-agency referral provision is unknown, but it makes little sense nevertheless. Consideration of the public interest in deciding which agency's statute will better control a toxic substance is clearly necessary to achieve the purposes of TSCA. Section 9(a) should be amended to mandate such a public interest consideration.

3. Directives for EPA Action Upon Re-Referral of Regulatory Responsibility From a Second Agency

The problem of continuously shifting regulatory responsibility for a particular toxic substance from one agency to another, ultimately resulting in no regulation whatsoever, also must be recognized and dealt with by Congress. As TSCA is written, the EPA may refer regulatory responsibility to a second agency on jurisdictional grounds through section 9(a), and the second agency may decide not to regulate on policy or other grounds. This has the effect of handing the problem back to the EPA, and the statute does not address what the Agency is then required to do. To provide guidance in these grey areas, TSCA must be amended to directly address requisite

224 15 U.S.C. § 2608(b) (1982); see also supra note 111 and accompanying text.
225 POLICY RESEARCH PROJECT, supra note 12, at 160.
EPA action upon re-referral by another agency. If the EPA and the second agency agree that action should be taken, then upon re-referral the EPA must be required to initiate action under TSCA within the same 180-day period that section 4 requires.226

B. Review and Reform of Section 9 By The Administrative Conference of the United States

The eight-year Reagan Administration successfully implemented a powerful political mandate for deregulation.227 This mandate prompted administrative agencies to ignore, through inaction, the legislative directives to which they are subject.228 As a result of the Reagan initiative, enforcement in the environmental and occupational safety and health regulatory areas was substantially weakened.229 Although improvement in these regulatory areas is predicted under the Bush Administration,230 the Reagan era has left an indelible mark on such regulation. It is difficult to conceive of changes in enforcement policy under President Bush that will be so significant as to markedly alter the Reagan atmosphere of governmental indifference to environmental and occupational safety and health concerns.231 Accordingly, the need for independent oversight of regulatory agencies remains strong.


227 See Citizen's Group Accuses Administration of Foot Dragging on Health, Safety Rules, 12 Chem. Reg. Rep. (BNA) 1064–65 (Oct. 14, 1988). According to an October 14, 1988 study by Public Citizen, a consumer safety group, the environmental policies of the Reagan Administration may have cost the lives of thousands, and injured millions more. The report documents 20 instances in which the Administration, through the Presidential Task Force on Regulatory Relief headed by then Vice President George Bush and the Office of Management and Budget, thwarted the implementation of federal health and safety regulations on the basis of economic concerns. Examples cited by the study included a two-and-one-half year delay in the promulgation of OSHA’s hazard communication standard, a delay in the implementation of OSHA’s Ethylene Oxide standard that involved an OMB effort to delete the short-term ethylene oxide standard completely, and a delay in asbestos regulation. Id.

228 In discussing increasing congressional oversight of the EPA as a reaction to the deregulation mechanisms implemented by the Reagan Administration, a House staff member observed:

Lots of people lost faith in the agencies in the 1980s . . . [t]hat led to an increased amount of vigilance . . . Congress believes that the agency should be doing all the tasks given it. There are more mandates than the agency has resources, and the Hill believes that the administration ought to put the resources that are needed there. Report on Congressional Oversight Role Shows Polar Perspectives of EPA, Congress, 12 Chem. Reg. Rep. (BNA) 1350 (Dec. 9, 1988).

229 See id. at 1349.


231 It has been reported that Frederick Stiehl, EPA associate enforcement counsel for
In the case of TSCA enforcement, an independent evaluation of section 9 referrals is necessary if regulatory abuse is to be checked. In addition to the inefficiencies inherent in the statutory structure of section 9, consideration of past section 9 referrals indicates that political influence on Agency action is quite strong. The powerful input of the Office of Management and Budget has shifted the focus of EPA action under TSCA away from prevention of health hazards caused by exposure to toxic substances to an economic approach of cost-benefit analysis.\textsuperscript{232} OMB has decreed a new administrative maxim that ignores TSCA’s power to control hazardous substances, recognizing the Act only as a data-collecting device that facilitates regulatory referral. The General Counsel of the EPA has commended this approach by indicating an intent to conform TSCA activity to OMB policy.\textsuperscript{233} Specifically with regard to the TSCA-OSH Act relationship, OMB has encouraged meetings between EPA, OSHA, and OMB officials to discuss section 9 referral policy.\textsuperscript{234} The questionable pesticides and toxic substances, stated at a Government Institutes sponsored TSCA compliance course that he does not expect the Bush Administration to bring about a significant improvement in enforcement of the Act:

Even if President-elect George Bush makes the EPA administrator a member of the cabinet—a move Stiehl called unlikely—environmental enforcement would remain at current levels, the EPA attorney said.

Although Bush has expressed concern about the environment, Stiehl said, budget deficit-related resource constraints make it unlikely that significantly increased enforcement would occur.\textit{Investigators Increasingly Emphasize TSCA Criminal Violations, EPA Attorney Says}, 12 Chem. Reg. Rep. (BNA) 1349 (Dec. 9, 1988).

In recognition of predictions that TSCA enforcement will continue to be weak under the Bush Administration, a state environmental official has called for Congress to amend TSCA to include a role for state level enforcement of the Act. Roger Kanerva of the Illinois Environmental Protection Agency told a House subcommittee in an oversight hearing that control of the emission, discharge, and disposal of toxic chemicals (under state clean air and clean water acts, for example), is not complete if the state regulatory agency has no power to limit the introduction of toxins into the environment at the production stage. \textit{See Elkins Says Some TSCA Requirements Slow Action on Suspect Existing Chemicals}, 12 Chem. Reg. Rep. (BNA) 1013 (Oct. 7, 1988).


\textsuperscript{234} A 1984 OMB memorandum recommends that a three way meeting between the budget office, EPA, and the Occupational Safety and Health Administration should be held to discuss to “what degree EPA needs to develop occupational standards for chemicals to supplement OSHA’s standards.” \textit{TSCA’s Use For Occupational Hazards Endorsed by Senators in Letter to EPA}, 8 Chem. Reg. Rep. (BNA) 277 (June 1, 1984).
behavior of OMB clearly demands aggressive congressional oversight action.\textsuperscript{235}

The Administrative Conference of the United States is an appropriate independent oversight body to check procedural deficiencies in administering TSCA arising from the EPA's improper manipulation of section 9 of the Act. The Administrative Conference was created by Congress to study and solve problems shared by interacting administrative agencies so that regulatory responsibility will truly honor the public interest.\textsuperscript{236} The Conference is governed by a Council comprised of eleven members appointed by the President, half of whom are members of federal regulatory agencies or executive departments.\textsuperscript{237} The Conference itself is comprised of 75 to 101 members who are experts in the field of administrative law, such as attorneys and scholars, with diverse professional backgrounds.\textsuperscript{238}

The Administrative Conference has the power to evaluate administrative procedure not only for technical inefficiency but also with

\textsuperscript{235} A report prepared by the National Academy of Public Administration which studied the relationship between the EPA, Congress and OMB concluded that the EPA is an underfunded agency struggling to meet congressionally set regulatory guidelines while at the same time satisfying a "powerful, cost-conscious, and anti-regulatory OMB." Report on Congressional Oversight Role Shows Polar Perspectives of EPA, Congress, 12 Chem. Reg. Rep. (BNA) 1349 (Dec. 9, 1988) (discussing National Academy of Public Administration, report of Nov. 22, 1988 (40-year history of congressional oversight of executive branch)). According to the report, the Reagan Administration has positioned OMB in a supervisory role to monitor all EPA regulatory behavior: "In 1984, OMB reviewed 302 rules, and 74 percent were subsequently changed; in 1985, 302 rules were reviewed, two-thirds of which were modified after review; in 1986, there were 197 reviews with two-thirds changed after review." \textit{Id.}

EPA Assistant Administrator Milton Russell, who was interviewed by the National Academy in preparing the report, observed that Congress and OMB together formed a fragmented oversight mechanism which often requires the Agency to waste time and resources meeting duplicate oversight demands. \textit{See id.} The report urges Congress to draft specific legislation that will impose statutory limitations on OMB power and procedure. \textit{Id.} at 1350.

\textsuperscript{236} The purpose of the Administrative Conference is stated in the Administrative Conference Act, 5 U.S.C. \textsection{}571-76 (1988), as follows:

\begin{quote}
It is the purpose of this subchapter to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.
\end{quote}

\textit{Id.} \textsection{}571.

\textsuperscript{237} \textit{Id.} \textsection{}575(b).

\textsuperscript{238} The statute provides:

\begin{quote}
The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.
\end{quote}

\textit{Id.} \textsection{}573(b)(6).
respect to its fairness in light of public interest concerns. The Conference, by virtue of its information-gathering function, may structure a more productive and fair strategy for regulation that involves an area of administrative interchange. On this basis, the Conference could act as an independent oversight body focussing on the section 9 problem. Following an evaluation of prior section 9 referrals, and an assessment of the EPA's section 9 policy, specific suggestions for reform would prove useful to Congress in amending TSCA.

If Congress refuses to act on the suggestions of the Conference, then the EPA could remedy past administrative inadequacies by revising its section 9 referral policy. In view of the political overtones that have shaped past EPA enforcement of TSCA, however, positive reform through Congress based on the suggestions of the Administrative Conference is both more preferable and more likely to occur.

VII. CONCLUSION

The Toxic Substances Control Act was created to provide comprehensive control of toxic substances, acting as both a complement and a supplement to prior ineffective legislation. Although TSCA was initially designed as the appropriate remedy for the prior system of toxic substance regulation, which was too dispersed to be successful, the Act has proven disappointingly ineffective. TSCA failed for two central reasons. First, the unartful drafting of the Act resulted in legislative loopholes, such as section 9. Second, the political nature of the administrative agency enforcing the Act has served to magnify TSCA's legislative loopholes to further specific political aims contrary to the goals of the Act.

Section 9 of TSCA, although intended to prevent jurisdictional overlap and waste of administrative resources by means of regulatory referral, has instead become a convenient method to avoid

239 The Act empowers the Administrative Conference to:
(1) study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate;
(2) arrange for interchange among administrative agencies of information potentially useful in improving administrative procedure; and
(3) collect information and statistics from administrative agencies and publish such reports as it considers useful for evaluating and improving administrative procedure.

Id. § 574.
240 Id. § 574(3).
241 Id. § 574(2).
regulatory responsibility and hamper the overall goals of the Act. The EPA's increasing use of section 9 will not only serve to weaken significantly the overall regulatory potential of the Toxic Substances Control Act, but will help also to encourage lame regulatory activity pursuant to earlier inadequate federal legislation.

The EPA has most often taken advantage of section 9 by characterizing a given problem as a workplace problem and then delegating regulatory responsibility to the Occupational Safety and Health Administration. Because of the many inadequacies of the OSH Act, this referral activity is particularly unfortunate and certainly has a negative effect on the status of toxic substance regulation in the workplace, and, in turn, on the workplace itself. As the number of section 9 referrals to OSHA increases, toxic substances problems in the workplace will intensify since there is no realistic prospect of OSHA reform in the future. Indeed, the Toxic Substances Control Act was supposed to be a substantial OSHA reform.

In order to effect a change in the section 9 provision that will prohibit unnecessary referral of regulatory responsibility away from TSCA, there must be an increase in public awareness of the problem. Particularly, the public should be informed of the direct effect of referral to OSHA on the status of toxic substances regulation in the workplace. Heightened public awareness will pressure Congress to take action to amend TSCA.

Congress should direct the Administrative Conference of the United States to review the EPA's section 9 referral policy. Specifically, the Conference should assess the need for amendment of TSCA to include a provision allowing for a public interest inquiry in the inter-agency referral process. Even more importantly, the Conference should investigate permitting judicial review of EPA referrals to other agencies and other EPA-administered statutes.

With the findings of the Administrative Conference as a guide, Congress could amend TSCA to correct the failings that have kept it from meeting its potential for controlling toxic substances comprehensively. In any case, aggressive congressional action is imperative to stop the misuse of section 9 and to attain the goals of the Toxic Substances Control Act.