Use of Professional Judgement

The following information provides guidance on the use of professional judgement in the classification of controlled products under WHMIS. It is an amplification and clarification of the requirements found in section 33 of the *Controlled Products Regulations* entitled "Manner of Establishing Classification".

This information was developed by a tripartite technical subcommittee and endorsed by the WHMIS Current Issues Committee, a committee made up of representatives of industry, organized labour and federal, provincial and territorial governments. It was originally issued as a WHMIS Information Bulletin.

Note: The WHMIS legislation does not prohibit a supplier from including a product in any WHMIS class, division or subdivision even though it does not strictly meet the hazard criteria in the *CPR*. However, suppliers should avoid including products that are clearly beyond the scope of the hazard criteria that define a class. Otherwise, the overall effectiveness of WHMIS in accurately warning workers of the hazards inherent in workplace products will be diminished.

If a supplier's product falls just outside the criteria which define any class, a supplier may use professional judgement to decide that the product should nonetheless be included in the class.

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USE OF PROFESSIONAL JUDGEMENT IN THE CLASSIFICATION OF CONTROLLED PRODUCTS UNDER WHMIS

A supplier who intends to sell or import a product for use in a workplace in Canada must classify his product to decide if it is a WHMIS controlled product and therefore subject to WHMIS requirements. In classifying a product the supplier must consider all of the criteria listed in Part IV of the *Controlled Products Regulations* (*CPR*). Prior to classifying a product, the supplier may want to consider if the product is exempt from WHMIS requirements under section 12 of the *Hazardous Products Act*.

The extent to which professional judgement is used by the supplier will depend on the specific criteria being considered. Because of this, the discussion of professional judgement will be focused under the different kinds of criteria.

I. Non-toxicological Criteria that Define the Limits for a Measurable Product Property when Subjected to a Specific Test Method

Includes *CPR* sections: 34(*d*), 37, 38, 39(*c*), 40, 65(*a*)

A hierarchical approach to the consideration of test results should be used. The approach is described below and shown in flow chart format in Figure 1.

(1) Use test results on the product carried out in accordance with the specified test methods (either by conducting the test or using available test results). Professional judgement may be required to interpret results where, for example, there are varying test results for a product that has been subjected to the same specified test method.

(2) In the absence of test results referred to in (1), use test results on the product from relevant but non-specified test methods. Professional judgement must be used with these results to classify the product.

(3) In the absence of test results referred to in (1) or (2), where appropriate, extrapolate test results on a product with similar properties to classify the product. Professional judgement must be used to carry out such an extrapolation.

(4) In the absence of being able to classify a product by steps (1), (2) or (3) above, a supplier must recognize that if the supplier sells the product and has classified it as not meeting the criterion and the product does in fact meet the criterion, the supplier will be in violation of the law.

II. Toxicological Criteria that Define the Limits for a Measurable Product Property when Subjected to a Specific Test Method

Includes *CPR* sections: 46, 49, 52, 53, 55(*b*), 57(1)(*b*), 59, 60, 61(*a*), 62, 65(*b*), 66(*c*)

A supplier must use a hierarchical approach to the consideration of test results as shown in steps (1) to (4) below **or** the approach shown in (5) below. Both of these approaches are summarized in flow chart format in Figure 2.

(1) Use test results on the product carried out in accordance with the specified test methods (either by conducting the test or using available test results). Professional judgement may be required to interpret results where, for example, there are varying test results for a product that has been subjected to the same specified test method.

(2) In the absence of test results referred to in (1), use test results on the product from relevant but non-specified test methods. Professional judgement must be used with these results to classify the product. Examples of relevant test methods are given in *CPR* paragraph 33(3)(*b*).

(3) In the absence of test results referred to in (1) or (2), where appropriate, extrapolate test results on a product with similar properties to classify the product. Professional judgement must be used to carry out such an extrapolation. (Although suppliers are not obliged, they are encouraged to make use of available quantitative structure-activity relationship (QSAR) systems

to estimate the toxic effects of chemicals. Professional judgement is required to assess the value of such estimates.)

(4) For Class D criteria, if it is not possible to classify a product by steps (1), (2) or (3), a supplier is not required to undertake toxicological testing. The product can be considered as not meeting a Class D criterion, if the supplier has no "information of which the supplier is aware or ought reasonably to be aware". Every supplier "ought reasonably to be aware" of appropriate published literature. The Canadian Center for Occupational Health and Safety (CCOHS) is one organization capable of conducting a comprehensive literature search. When additional information is made available to the supplier by the appropriate regulatory agencies, by industry or trade association(s), and by labour organization(s), the supplier is expected to evaluate that information.

OR

(5) For Class D criteria, a supplier may use an alternate strategy **in place of** steps (1) to (4) above. A supplier may undertake a search of information he "ought reasonably to be aware of" (as in (4) above). If the supplier finds "sufficient" human data to show that the product meets or does not meet a criterion, the supplier may use this information to classify the product. Professional judgement must be used in making an assessment of what is "sufficient" in each case and taking into account animal test results.

III. Criteria that Define the Limits for a Measurable Property or Qualitative Characteristic of a Product without Specifying a Test Method

Includes *CPR* sections: 34(*a*)(*b*)(*c*), 36, 39(*a*)(*b*), 41, 42, 66(*a*)(*b*)(*c*)

None of these *CPR* criteria relate to Class D and therefore the supplier is obliged to use the direction provided in *CPR* paragraph 33(1)(*b*).

For the above criteria other than paragraphs 39(*b*) and 66(*a*)(*c*), the use of professional judgement in classification is addressed in **I.**(2) and (3) above.

For paragraphs 39(*b*) and 66(*a*)(*c*), it is clear the professional judgement must be used to decide if the qualitative criteria properly describe the properties of the product.

IV. Criteria which State that "There is Evidence" of a Physiological Effect, without Specifying a Test Method

Includes *CPR* sections: 55(*a*), 56, 57(1)(*a*), 61(*b*), 64, 65(*e*)

The supplier must use professional judgement to decide if test results or studies on the product

signify "evidence" of an effect. This would include giving consideration to the particulars of the test method or study and the relevance of the results or conclusions in the occupational situation. There is nothing in the *CPR* to prevent a supplier from over-classifying a product.

Where the supplier finds "evidence" that the product meets a criterion and also finds "evidence" to the contrary, the supplier must consider the product as meeting the criterion for the purpose of classification. The supplier may make reference to the contrary evidence on the MSDS, but such disclosure must be done in accordance with the qualifications referred to in section 13 of the *CPR*.

Where a supplier cannot find test results, conclusions from a study or other evidence on the product for one of these criteria, the supplier is not required to test the product but may assume, for the purposes of classification, that the product does not meet that criterion.

V. Criteria for Carcinogenicity

***CPR* section 54**

There is no opportunity to use professional judgement in the classification of carcinogens when the substance or tested mixture is included in the referenced lists. The WHMIS criteria for carcinogens apply only to products or substances, not to processes listed by IARC or ACGIH, such as "antimony trioxide production" or "manufacture of magenta".

Where a substance or tested mixture does not appear on the referenced lists and the supplier has information to show that the product may be a carcinogen, the supplier should use professional judgement to decide if the product should be classified as carcinogenic. While it is required that such information be disclosed on the MSDS of a product, a classification of the product as carcinogenic would not be required by WHMIS legislation.

VI. Criteria that Refer to Transportation of Dangerous Goods (TDG) Regulations Criteria

Includes *CPR* sections: 39(*d*), 47, 50, 65(*c*)(*d*)

The referenced TDG criteria are of the type referred to in **III** above or, in the case of section 65, of the type referred to in **IV** above. The same appropriate rules for the use of professional judgement apply to these criteria.

In addition to containing scientific criteria, the *TDG Regulations* contains a list of specified dangerous goods in Schedule II with designated primary classifications. If a product is listed in Schedule II to the TDG Regulations as meeting one of the referenced TDG criterion, the supplier cannot use professional judgement to decide that the product does not meet that criterion.

Suppliers should be cautious when reading the TDG classification in Schedule II. TDG prioritizes the hazards and only lists the most severe hazard in Schedule II. Thus, when assessing a product against a particular TDG criterion, a supplier should first refer to the Schedule II list and, where the product is not listed as meeting the criterion, also refer to the TDG criterion in the *TDG Regulations* before concluding the product does not meet the criterion.

VII. Criteria for Ingredients in a Product that is an Untested Mixture

Including *CPR* sections: 48, 51, 58, 63, 65(*f*)

The same rules for use of professional judgement that applied when deciding if a tested product meets a criterion will apply when deciding if an ingredient is a controlled product.

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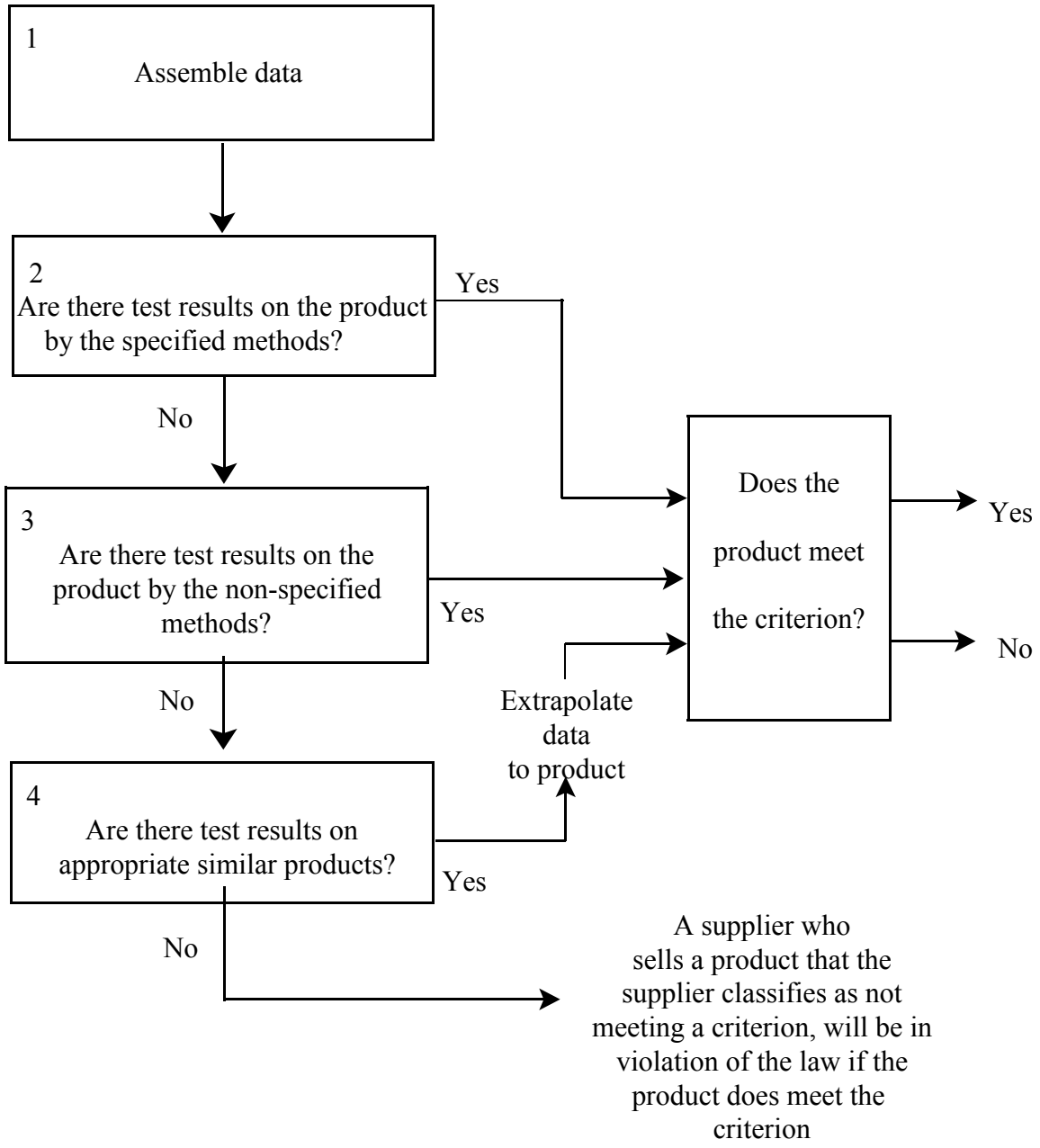
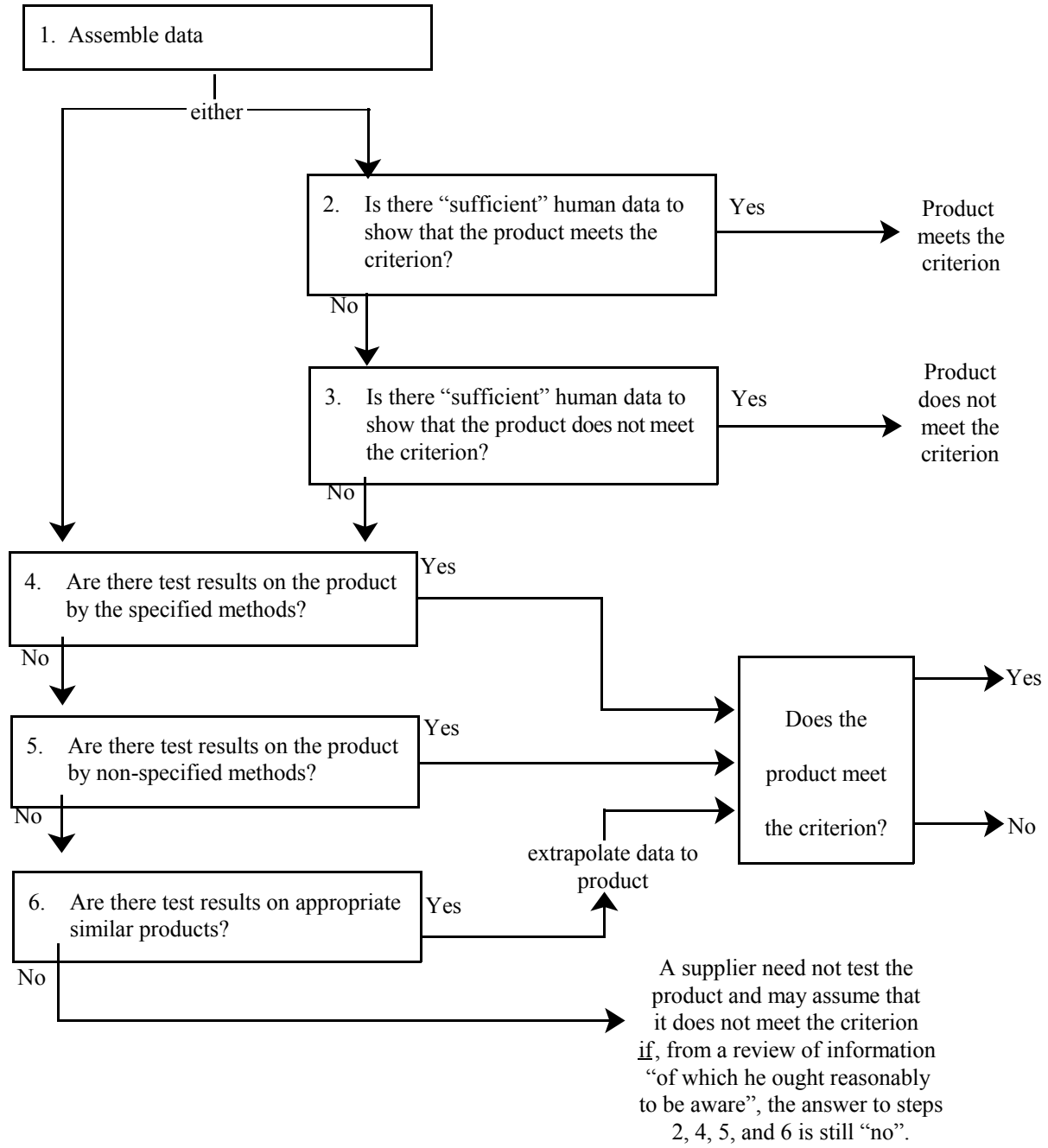

1
Assemble data
2
Are there test results on the product by the specified methods?
Yes
No
3
Are there test results on the product by the non-specified methods?
Yes
No
4
Are there test results on appropriate similar products?
Yes
No
Extrapolate data to product
Does the product meet the criterion?
Yes
No
A supplier who sells a product that the supplier classifies as not meeting a criterion, will be in violation of the law if the product does meet the criterion


1. Assemble data
either
2. Is there "sufficient" human data to show that the product meets the criterion?
Yes
Product meets the criterion
No
3. Is there "sufficient" human data to show that the product does not meet the criterion?
Yes
Product does not meet the criterion
No
4. Are there test results on the product by the specified methods?
Yes
No
5. Are there test results on the product by non-specified methods?
Yes
No
6. Are there test results on appropriate similar products?
Yes
No
extrapolate data to product
Does the product meet the criterion?
Yes
No
A supplier need not test the product and may assume that it does not meet the criterion if, from a review of information "of which he ought reasonably to be aware", the answer to steps 2, 4, 5, and 6 is still "no".