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Subject: FYI - EPA TO PURSUE NEW PCB RULE AMID LEAKAGE CONTAMINATION CONCERNS - Inside EPA

Monsanto Mentioned toward the bottom of the story.

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EPA TO PURSUE NEW PCB RULE AMID LEAKAGE CONTAMINATION CONCERNS

EPA is planning to pursue a new regulation to address products continuing polychlorinated biphenyls (PCBs) in order to respond to concerns that PCB-containing paints and caulks are leaking into schools and homes, amid growing controversy over health risks at New York schools contaminated by decades-old caulking.

However, given the time necessary to develop, propose and finalize a rulemaking, one environmental attorney says it may be necessary as an interim measure for EPA to issue an emergency enforcement order under the Toxic Substances Control Act (TSCA) to require schools to test for the presence of PCBs. The source also says some House lawmakers are weighing whether to introduce legislation that would mandate such testing.

EPA is developing an advance notice of proposed rulemaking on the continuing uses of PCBs, according to the agency's Sept. 30 draft strategic plan for 2009-2014. "EPA will explore more aggressive approaches to address legacy risks and phase out the ongoing use of [PCBs] to address new concerns about the presence of PCBs in caulks and paints used historically in schools and in gas lines that have leaked into homes," the plan says.

The environmental attorney involved in the issue says that following discussions with EPA Regions I, II, and headquarters, it appears EPA may propose a temporary abatement of PCBs in schools -- for example, covering PCB-containing caulk with a sealant -- rather than require immediate remediation of the caulk. Such an approach would reduce children's exposure and possibly delay liability for cleaning up the contamination until school is out of session, a move that could avoid interruption of education and extra financial burdens for schools, the attorney says.

EPA's upcoming rule comes as Region II works with New York schools to ensure proper PCB testing at the sites. And one New York school district is pursuing a product liability case against Monsanto, the company that manufactured PCB-containing caulk, in an effort to force the company to pay for remediation at the schools.

Attention has been building around the issue since high levels of PCBs were found in numerous schools in New York and Massachusetts. Although the manufacturing of PCBs in caulks and paints was banned in 1979, some caulks that were used in schools before that date contained PCBs. Now, as the caulk ages, PCBs are volatilizing into the air or falling off into the building or into the soil around the building, creating health risks.

The presence of the chemical, which is regulated under TSCA, raised alarm among parents and activists. Controversy about the contamination grew as schools in Massachusetts and New York conducted tests, which showed PCB levels in caulk as high as 337,256 parts per million (ppm). TSCA regulations say products containing more than 50 ppm of PCBs are considered toxic and "present an unreasonable risk of injury to health."

Recently, lawmakers have joined parents and activists in calling for EPA to take a greater role in the cleanup of the schools. In May, Rep. Jarrold Nadler (D-NY), along with local government members such as Democratic state Sen. Thomas Duane, wrote to EPA Region II to urge the agency to take charge of the situation.

The lawmakers urged the agency to "immediately assume primary responsibility for ensuring the proper management of [PCBs] by ensuring comprehensive testing and all necessary remediation for PCB contamination at the schools . . .," according to the May 18 letter. Relevant documents are available on Inside EPA.com.

In a June 25 response letter to Nadler, EPA Region II says the agency is providing technical assistance to the schools and monitoring their work in cleaning up the contamination. The letter also refers to a separate letter the region wrote to the parent teacher association, which had requested an emergency and remedial response. An EPA response under Superfund law is not appropriate when there are other parties, such as the school district, that able to perform the clean up, the letter says.

While the letters do not refer to the upcoming rulemaking, the environmental attorney says EPA has been wrestling with how to deal with contamination of schools for the last year and a half. EPA is faced with levels of PCBs that are clearly a violation of TSCA, but also has to consider cleanup costs and fines that could potentially bankrupt the schools, the attorney says.

After discussing the issue this spring with EPA Region I, II and headquarters, the environmental attorney says EPA appears to be considering a temporary abatement measure, such as a sealant over the caulk, which would allow the schools to stay open and delay the cleanup until the summer months when school is out of session. This abatement could delay the liability of a daily fine, which the school could face for not cleaning up the contamination, the attorney says.

A May 16 letter from EPA Region II to the United Federation of Teachers also suggests that EPA is considering temporary abatement. "EPA is evaluating potential, practical, short-term options -- like taping, sealing, or repainting that could reduce potential exposure," the letter says.

The environmental attorney is supportive of the abatement approach, as long as it is temporary. It is not a suitable long-term solution because the PCBs can leach through sealants, the source says. In addition, more immediate action may also be necessary. Since the rulemaking process can be lengthy, EPA could possibly issue an administrative enforcement order under TSCA to require schools that were built before 1979 to test for PCBs.

In addition, a few congressional representatives have indicated they may introduce legislation that would require schools to test for PCBs, the environmental attorney says. Such legislation could be similar to the Asbestos School Hazard Abatement Act, passed in 1984, which required EPA to provide scientific, technical and financial assistance to help schools remove asbestos from their buildings, the attorney says.

Amid the ongoing controversy between schools, activists and EPA, a pending product liability lawsuit is also drawing attention to the issue of PCBs in schools, the environmental attorney says. While the lawsuit will likely have little impact on the pending rule, the attorney hopes the case will prove that Monsanto is liable for the cost of cleanup at all contaminated schools.

In January, the Yorktown Central School District in New York filed a product liability lawsuit against Monsanto, Pharmacia and Pecora, companies that manufactured PCBs and caulk containing PCBs. The school argues that Monsanto knew of the toxicity of PCBs for 40 years before production of the chemical was banned, and seeks damages to pay for the school's remediation costs and indemnification for claims regarding PCB exposure.

The defendants have filed a motion to dismiss the lawsuit. A source familiar with the defendant's case agrees that the lawsuit will not have much impact on EPA's rulemaking, but declined to comment further on EPA's efforts.

A source with the National Paint and Coatings Association says the group is monitoring the issue and will become more actively involved in the process once EPA starts crafting the regulation.

EPA did not respond to a request for comment by press time. -- Kate Winston

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