Air Products

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INTEROFFICE MEMORANDUM

Date 25 October 1978

Subject TSCA Legality

To C. E. Blades — Chemical Technical Administration (Location, Organization, or Department)

From E. I. Handwerk — Chemical Technical Administration (Location, Organization, or Department)

cc: R. H. Schenck

The Hi-lited section on the attachment resolves your concern as to whether a converter of raw materials not on the Existing Chemicals Inventory is in violation of TSCA. Yes, as a "user" of these materials he violates the act. However, the violation does not exist until after publication of the revised inventory.

E. I. Handwerk

EIH/sp
Attachment

(320)

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port chemical substances as a part of a mixture or article may report during the special reporting period. EPA expects to publish a revised inventory based on these additional reports sometime in fall 1979.

SMALL MANUFACTURER

As provided in TSCA section 8(a) and discussed in the preamble to the August 2 proposal, EPA may require "small manufacturers" to submit only information necessary for compilation of the inventory or concerning a chemical substance which is subject to a proposed rule or order under TSCA section 4, 5 or 6 or court action under section 5 or 7. At this time, any person who is required to report and who is a small manufacturer is only required to submit information required for compilation of the inventory. Accordingly, any "small manufacturer" need only identify chemical substances and report certain limited information required for purposes of the inventory. Small manufacturers are exempt from reporting production volumes and, if a small manufacturer has more than one plant site, he need not separately report for each site. Since these regulations define "manufacture" to include "import," the provision applies equally to "small importers."

The definition of "small manufacturer or importer" proposed in August has been revised to exempt from these additional reporting requirements those manufacturers and importers with total sales of less than $5 million. This exemption, however, does not apply with respect to any chemical substance produced by a manufacturer at one site or imported in quantities equal to or greater than 100,000 pounds during calendar year 1977. Accordingly, no manufacturer will be considered a "small manufacturer or importer" with respect to any chemical substance manufactured at one site or imported in quantities over 100,000 pounds.

In deciding how to define "small manufacturer or importer," EPA considered both the relative burden to manufacturers and importers to submit additional information and the value of that information to EPA and other federal agencies. Under this definition, the total cost of reporting for the inventory for the marginal small firm, in most cases, will be about 1 percent of profits. While the firms exempted under this definition represent nearly 80 percent of chemical firms, they account for only 4 percent of sales of chemical substances and only 6 percent of employment in SIC groups 28 and 2911.

In the interest of creating a data base that is at least complete with respect to the volumes of those chemical substances produced in substantial quantities, this definition does not exempt any manufacturer or importer from reporting the volumes of individual substances produced in quantities of over 100,000 pounds during calendar year 1977. Reporting production volume will involve simply providing the digit that is associated with a broad range (e.g., "4" is for production between 1 million and 10 million pounds), as provided in the table at § 710.5(d)(4). Since the manufacturer or importer will already be reporting the names of substances, the additional burden of supplying production information in terms of large ranges should be minimal, especially for substances produced in significant quantities.

REPORTING SCHEDULE AND ENFORCEMENT

These regulations provide for publication of an initial inventory based on reporting by manufacturers and importers of chemical substances, followed by publication of a revised inventory based on reporting by processors of chemical substances and importers of chemical substances as part of mixtures and articles. Reporting for the initial inventory will begin on January 1, 1978, and end May 1, 1978. Manufacturers and importers of chemical substances must report, as provided in § 710.3(a), during this first reporting period. Processors are only subject to the second reporting period which will begin after publication of the initial inventory and end 210 days later.

Thirty days after publication of the initial inventory, premanufacture notification will begin. After that date, any person who intends to manufacture or import (in bulk) a chemical substance not included on the inventory must submit premanufacture notice under section 5(a)(1)(A). Processors and users of a chemical substance for a commercial purpose, and importers of a chemical substance as a part of a mixture or article will be able to supplement the initial inventory during the second reporting period, as provided in § 710.3(b).

TSCA section 15(1) makes it unlawful for any person to fail or refuse to comply with the premanufacture notification requirements of section 5. TSCA section 15(2) makes it unlawful for a person to use for a commercial purpose any substance which he had reason to know was manufactured in violation of section 5. Sections 15(1) and 15(2) as they relate to section 5(a)(1)(A) will not be applied to persons who process or use for a commercial purpose chemical substances not on the inventory or who import chemical substances as a part of a mixture until after publication of the revised inventory. By reporting any chemical substance, not included on the initial inventory during the second reporting period, these persons will be able to protect themselves from prosecution under section 15(2) with respect to the requirements of section 5(a)(1)(A) of TSCA. Importers of a chemical substance as part of a mixture or article will not be subject to premanufacture notification requirements for "new" chemical substances until 30 days after publication of the *revised* inventory. Under these reporting requirements, persons who import chemical substances as part of articles do not have to report concerning those chemical substances for the initial inventory. EPA is still considering whether importers of certain chemical substances as part of articles will be subject to premanufacture notification requirements under section 5(a)(1)(A). EPA will address this issue prior to publication of the initial inventory. Refer to comments 18 to 23 for further clarification of these issues concerning importers of chemical substances.

Finally, EPA recognizes that it is inevitable, considering the large volume of information to be compiled and transmitted, that there may be some unintentional clerical errors in reporting. Accordingly, the note in § 710.1(b) of these regulations provides that EPA does not intend to focus its enforcement efforts on reporting violations that are clerical in nature. Instead, EPA will give priority to bringing actions against persons who (1) report false information, (2) report for inclusion on the inventory chemical substances which are excluded under section 710.4(c) of these regulations, (3) fail to report, or (4) fail to maintain records documenting reported information.

CONFIDENTIALITY

As discussed in the preamble to the August proposal, there is an apparent conflict between section 14 and sections 8(b) and 5(a) of TSCA with respect to the inclusion of the identities of certain chemical substances on the inventory. Section 8(b) requires EPA to publish a list of "*each* chemical substance which is manufactured or processed in the United States. Such list shall include *each* chemical substance which *any* person reports, under section 5 or subsection (a) of this section, is manufactured or processed in the United States." (emphasis added) The list has two purposes, to inform the public concerning which chemical substances are manufactured or processed for a commercial purpose and to which the public may be exposed, and to define what constitutes a "new chemical substances" for purposes of premanufacture notification requirements under section 5(a). However, section 14 states that any information reported to EPA under TSCA that is exempt from disclosure under the Freedom of Information Act fourth exemption (5 U.S.C. 552(b)(4)) may not be disclosed except in specific circumstances set out in section 14 (a) and (b).

In the absence of the requirements of section 8(b) and 5(a), EPA would publish an inventory that would not include the identities of specific chemical substances for which the fact that the particular substance is manufactured or processed for commercial purposes is confidential. In the absence of the requirements of section 14, EPA would publish a list of *all* chemical substances manufactured or processed for commercial purposes. Since the term manufacture includes "to import", this discussion and the regulations apply equally to imported chemical substances.

Having no explicit statutory guidance about how to resolve this conflict, EPA has attempted to balance the concerns of section 14 with those of sections 8(b) and 5(a). EPA believes that Congress did not intend manufacturers to be required to furnish EPA premanufacture notification on existing chemical substances whose identities for purposes of the in-

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