

KIRKLAND & ELLIS

MEMORANDUM

TO: CMA PCB Panel

PRIVILEGED AND CONFIDENTIAL

FROM: Tim Hardy

DATE: June 29, 1984

RE: Legal Backdrop for the Spill Cleanup Issue

In recent discussions with representatives of EPA's TSCA Compliance Office, their proposed spill cleanup policy, No. 6-PCB-9, has been defended as nothing more than an expression of enforcement discretion. The premise of the Office is that any spill is an unauthorized disposal of PCBs that could form the basis for an enforcement action. The proposed policy is therefore considered merely a means of telling the regulated community that properly cleaned up spills will not result in enforcement actions. The CMA Panel has previously taken the position that spills and leaks from authorized PCB uses are not disposal, but rather a consequence of use that should be considered illegal only if unreasonable risk is presented.^{1/} It therefore seems useful -- prior to the July 24 meeting with EPA -- to review the regulatory history of EPA's spill/disposal regulations.

^{1/} CMA PCB Panel, "Comments in Response to Proposed Rule on Use of PCBs in Electrical Equipment" (May 24, 1982) at 21-26 (Attachment I).

SUMMARY

A case can be made, on the basis of TSCA Section 6(e) and its legislative history, as well as EPA's pre-1982 regulations, that spills and leaks from authorized PCB uses should not be considered disposal. Questions arise, however, as to whether the 1982 electrical equipment amendment setting forth clearly for the first time the Agency's view that all spills and leaks are disposal is still ripe for review. Further research on both issues might prove fruitful to be able to address these issues at the July 24 meeting.

THE STATUTE:

Section 6(e) of TSCA, 15 U.S.C. § 2605(e), directed EPA to "prescribe methods for the disposal of polychlorinated biphenyls" within six months. Section 6(e) (1)(A). The statute further provided that use of PCBs "in a manner other than a totally enclosed manner" should be banned within one year except that EPA could authorize non-totally enclosed uses if they were found not to "present an unreasonable risk of injury to health or the environment." Sections 6(e)(2) (A)&(B).

EPA'S REGULATIONS:

Following the statutory scheme, EPA's first PCB regulations dealt with disposal (and marking) of PCBs in concentrations above 500 ppm. 43 Fed. Reg. 7150 (Feb. 17, 1978).

Those regulations defined disposal (40 C.F.R. § 761.2(g)) and included a reference to spills (but not leaks) in the operative disposal provisions (§ 761.10(e)(1)&(2)).

Original 1978 40 C.F.R. § 761.2(g)

"Disposal" means to intentionally or accidentally discard, throw away or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes actions related to containing, transporting, destroying, degrading, decontaminating, or confining those substances that are being disposed.

Original 1978 40 C.F.R. § 761.10(e)(1)&(2)

(1) Spills and other uncontrolled discharges of PCB chemical substances or PCB mixtures constitute the disposal of PCB chemical substances or PCB mixtures.

(2) PCB chemical substances and PCB mixtures resulting from spill incidents shall be stored and disposed of in accordance with paragraphs (a) and (b) respectively of this section. In order to determine if a spill of PCBs has produced, at any point in a suspected zone of soil, gravel, sludge, fill, rubble, or other land based substances, a contamination level that exceeds 500 parts per million of PCBs, the person who spills PCBs should consult with the appropriate EPA Regional Administrator to obtain information on sampling methods and analytical procedures for determining the contamination levels associated with the spill.

EPA's 1979 regulations lowered the cutoff below which PCB disposal was unregulated to 50 ppm. They did not change the definition of disposal, but did alter the language in the spills disposal provision slightly. 44 Fed. Reg. 31514 (May 31, 1979).

New 1979 40 C.F.R. § 761.10(d)(1)&(2)

(1) Spills and other uncontrolled discharges of PCBs constitute the disposal of PCBs.

(2) PCBs resulting from spill cleanup and removal operations shall be stored and disposed of in accordance with paragraph (a) of this section. In order to determine if a spill of PCBs has resulted in a contamination level that is 50 ppm of PCBs or greater in soil, gravel, sludge, fill, rubble, or other land based substances, the person who spills PCBs should consult with the appropriate EPA Administrator to obtain information on sampling methods and analytical procedures for determining the PCB contamination level associated with the spill.

As part of its electrical equipment rulemaking, following remand from the U.S. Court of Appeals of the 50 ppm rule, EPA proposed changes in 1982 of both the definition of disposal and the operative disposal provision on spills:

The Agency proposes to clarify the definition of disposal by specifically including leaks, spills, and other uncontrolled discharges of PCBs. This change should alleviate the confusion the Agency has encountered in enforcing the existing rule over whether spills, leaks and other uncontrolled discharges constitute disposal.

47 Fed. Reg. at 17441 (April 22, 1982).

The Agency further indicated it was proposing a requirement of cleanup to background in all cases posing a threat of contamination to "water, food, feed and humans," and cleanup to 50 ppm in other cases. In justifying the cleanup to background proposal, the Agency stated: "As dilution is

an unacceptable form of disposal," such cleanup requirements could be justified as long as "the source of contamination contained 50 ppm or greater PCBs." 47 Fed. Reg. at 17441.

EPA's final 1982 electrical equipment rule dropped the specified cleanup levels. The Agency indicated the level of cleanup "will not be dealt with at this time." 47 Fed. Reg. at 37343 (Aug. 25, 1982). EPA, however, did include a new definition and operative provision for spills and leaks:

New 1982 40 C.F.R. § 761.3(h)

"Disposal" means intentionally or accidentally to discard, throw away, or otherwise complete or terminate the useful life of PCBs and PCB Items. Disposal includes spills, leaks and other uncontrolled discharges of PCBs as well as actions related to containing, transporting, destroying, decontaminating, or confining PCBs and PCB Items.

New 1982 40 C.F.R. § 761.60(d)(1) & (2)

(1) Spills, leaks and other uncontrolled discharges of PCBs constitute the disposal of PCBs.

(2) PCBs resulting from the cleanup and removal of spills, leaks, or other uncontrolled discharges, must be stored and disposed of in accordance with paragraph (a) of this section.

The Agency stated that it deleted from (d)(2) the reference to 50 ppm contamination levels because it "was sometimes construed as setting a required level of cleanup." Id. at 37354. EPA nonetheless explained that it did not intend to charge users of authorized electrical equipment that leaked with unauthorized disposal when they showed that "adequate" cleanup measures were initiated within 48 hours. Id.

The electrical equipment rule was challenged by several parties; CMA intervened in the various petitions. The parties have not yet, however, raised their claims on appeal because the major petitioners have agreed to stay the appeal: (1) NRDC and EDF pending the outcome of the transformer fire rulemaking; and (2) NEMA and EEI pending the outcome of the "any exposure is significant" rulemaking.

LEGAL ISSUES

Two major legal issues arise in considering the status of EPA's conclusion that any spill or leak constitutes illegal disposal: (1) the substantive legal question of whether spills and leaks from authorized use activities can be considered disposal under Section 6(e); and (2) the procedural question of whether this issue is still ripe for judicial review.

A. The Substantive Legal Issue

EPA's attempt to define disposal to include all releases of PCBs can be questioned on legal grounds. As CMA's comments to EPA argued in 1982 (Att. I at 22), all "disposal" references in the legislative history were to activities whose purpose was disposal. Should PCBs in authorized use leak or be spilled, such activities do not have a disposal purpose. Once the leak or spill is cleaned up, further movement of the PCBs can be considered disposal, as EPA

recognized in promulgating its original 1978 rules by noting that "[u]nder this regulation, proper disposal of material contaminated as a result of a spill must be performed." 43 Fed. Reg. at 7150 (Feb. 17, 1978). The leak or spill itself, however, should arguably not be considered disposal.

Although noting that disposal "is defined very broadly," EPA announced in promulgating the 1978 regulations that the term's scope was the "ultimate disposition of a PCB substance, article, or mixture." Thus, the original 1978 and 1979 disposal definitions focused on acts whose purpose (whether it be "intentional[]" or "accidental[]") was to "discard, throw away or otherwise complete or terminate the useful life" of PCBs. These terms arguably do not encompass leaks or spills resulting other than as part of a disposal activity.^{2/}

The operative "spill" provision of the 1978 and 1979 regulations seems to have been included to assure that persons could not dispose of PCBs through spills (that they might claim were accidental). On the other hand, EPA might argue this provision was intended to enlarge the definition of disposal to extend beyond disposal activities. However, by talking about the need to determine if the area where the spill occurred is above 500 or 50 ppm PCBs, the Agency seems

^{2/} Perhaps a simple analogy is enlightening. If you have numerous papers that you are using on your desk and you put one in the waste basket (even if you did not mean to put that particular paper in the waste basket), that is disposal ("intentional or accidental.") If, however, the wind blows the piece of paper out the window, that is not disposal.

to have been conceding that the intention of the operative spill provision was to assure that any materials containing 50 or 500 ppm PCBs that result from spills be properly disposed -- not to deem spills during activities whose purpose was not disposal to be disposal.

EPA purported in its 1982 electrical equipment amendments merely to be clarifying its past regulations. However, the regulatory language of the 1978 and 1979 regulations can arguably be read not to include leaks or spills that were not part of a disposal activity. Were the 1982 electrical equipment rule challenged, it could be argued EPA is attempting to promulgate a regulation contrary to the statute (as well as its past regulations) and that spills and leaks should properly be regulated as a consequence of authorized use.

B. The Procedural Issue

Challenging the amended disposal definition in the 1982 electrical equipment rule at this time raises the procedural issue of whether the rule is still ripe for review. Petitioners NRDC, EDF, EEI and NEMA have all agreed to drop their review petitions assuming EPA proceeds satisfactorily with subsequent, related rulemakings. CMA has consented to these agreements to stay judicial review.

CMA is, however, an intervenor in the challenges to the electrical equipment rule, and preliminary research indicates

an intervenor is normally granted the rights of a petitioner. Thus, CMA should be able to argue that review of the electrical equipment rule must continue if it has remaining issues to litigate -- even if the original petitioners have settled all their differences with EPA. However, the unique procedural status of this appeal -- with all petitioners having stayed review for an extended period -- creates an unusual situation in which to interpret the rights of an intervenor.

The equities of allowing continued challenges by CMA are strong given the implicit promise by EPA at the time the electrical equipment rule was issued to return in a subsequent rulemaking to the issue of the appropriate level for spill cleanup. As the proposed cleanup policy indicates EPA has changed its plans and intends no such rulemaking, CMA has new justification to request review of the 1982 rule.

COMMENTS IN RESPONSE TO
PROPOSED RULE ON USE OF
POLYCHLORINATED BIPHENYLS
IN ELECTRICAL EQUIPMENT
(47 Fed. Reg. 17426)

Submitted to the
Environmental Protection Agency
by the
Chemical Manufacturers Association
Special Program Panel on PCBs

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during the past year. As noted in Section IV of these comments, more than ample evidence of the minimal exposure and toxicity potential of continued use is already in the EPA record. That evidence fully supports a finding that such use will lead to insignificant exposures. When the de minimis health and environmental effects are balanced against the social and economic costs, there can be no doubt that the EPA proposals are more than sufficient to prevent any unreasonable risk.

VI. EPA IS NOT AUTHORIZED TO ESTABLISH CLEAN-UP LEVELS FOR ELECTRICAL EQUIPMENT LEAKS UNDER TSCA SECTION 6(e).

EPA has proposed for the first time a clean-up level for leaks, spills and other uncontrolled discharges from electrical equipment on the grounds that such discharges constitute "disposal" which EPA is authorized to regulate under Section 6(e)(1)(A) (47 Fed. Reg. at 17441). This proposal -- that "spills, leaks and other uncontrolled discharges be cleaned up to preexisting background levels if the source of contamination contained 50 ppm or greater PCBs prior to dilution" -- is not supported by any reasoned analysis of the facts or an unreasonable risk determination. It is, therefore, contrary to the Agency's authority to regulate use under TSCA Section 6(e), and should be deleted.

Moreover, this requirement conflicts with the cost-effectiveness standards for clean-up levels established by

Superfund and the recently-proposed National Contingency Plan. Pursuant to TSCA Section 9, EPA should, therefore, delete this new clean-up requirement and, instead, rely on its authority under Superfund to establish appropriate cost-effective PCB clean-up levels.

Leaks, spills or other uncontrolled discharges do not constitute disposal under Section 6(e) and thus may not be regulated without reference to unreasonable risk under Section 6(e)(2)(E). CMA agrees that PCB leaks, spills or other uncontrolled discharges from electrical equipment must be properly disposed of in accordance with appropriately promulgated regulations. Nevertheless, uncontrolled discharges are not disposal. They are incidental to, and included in the concept of, "use" under Section 6(e). No intention of disposing of PCBs lies behind discharges from electrical equipment; rather, the equipment is designed to prevent and minimize leakage or spills.

The legislative intent, as well as common sense, confirms that "disposal" in TSCA Section 6(e)(1) refers only to intentional acts terminating the useful life of PCBs. When discussed in the legislative history, PCB "disposal" was referred to as an intentional act, not including unintentional discharges from electrical equipment.^{10/} EPA's original

^{10/} See, e.g., 122 Cong. Rec. 33,038 (1976) (Representative Broyhill explaining exemption of PCBs "transported for purposes of disposal"); H.R. Rept. No. 1679, 94th Cong., 2d Sess. 77 (1976) (explaining provisions under which PCBs may be "reused rather than disposed of").

disposal regulations, upon which the current proposals are based, recognized this fact that unintentional leaks alone were not to be regulated as "disposal." In discussing the original definition of disposal, which was said to include spills, EPA explained that "[u]nder this regulation, proper disposal of material contaminated as a result of a spill must be performed." 43 Fed. Reg. 7150 (1978). Accordingly, EPA can establish uncontrolled discharge clean-up levels as an element of use only in the context of an unreasonable risk determination under Section 6(e)(2).

Moreover, and perhaps more importantly, TSCA does not permit EPA to specify a separate level of clean up under Section 6(e), since the clean up of any PCB release is already governed under recently enacted Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund), 42 U.S.C. §§ 9601 et seq. Under Section 105 of Superfund, the degree of clean up and clean-up methods must be practical and cost-effective, and must be determined in accordance with a revised National Contingency Plan to be promulgated by EPA pursuant to Section 105. The clean-up standards of Superfund 105, combined with EPA's clean-up and enforcement authorities under sections 104 and 106 are clearly and adequately designed to "eliminate" or sufficiently "reduce" risks from PCB releases. Indeed, Subpart F of EPA's proposed Revisions to the National Contingency Plan deals extensively and specifically with how to choose the appropriate level and methods of clean up.

As discussed in Section III above, where EPA administers laws permitting the elimination or sufficient reduction of a particular health or environmental risk, EPA must utilize such laws, rather than TSCA, absent a specific finding that it is in the public interest to protect against such risk under TSCA. The legislative history makes it amply clear that Congress intended EPA to scrutinize applicable, non-TSCA regulatory authorities, and utilize them where they eliminate or sufficiently reduce risks. See e.g., H.R. Rept. No. 1679, 94th Cong., 2d Sess. 85 (1976).^{11/}

Consistent with these requirements and the criteria for the "public interest" determination in Section 6(c), the Administrator must rely here on the more specific and cost-effective provisions of Superfund Section 105, including the

^{11/} Indeed, this duty is particularly clear with respect to potential disposal rules under TSCA. When the conference bill was presented to the House for final passage, Congressman Skubitz of Kansas expressed concern that, in giving EPA authority to regulate chemical disposal, TSCA § 6 duplicates RCRA provisions which had been passed the previous day, and which also gave EPA authority to regulate chemical disposal. In response to this concern, two House managers from the Conference Committee pointed to Section 9 as requiring EPA to use RCRA or similar authorities in regulating disposal, rather than TSCA. See e.g., 122 Cong. Rec. 33035:

If those authorities [RCRA] can be used to regulate the potential problem, then we would expect those authorities would be used, rather than immediately going to the provisions of the Toxic Substances Act. . . . [I]t was the intent of the conferees that the Toxic Substances Act not be used, when another act is sufficient to regulate a particular risk.

(Statement of Congressman Broyhill).

National Contingency Plan, to establish clean-up requirements. No "public interest" or other basis for not relying on this other statutory and regulatory framework is advanced in EPA's proposal. The cost-effective, practical clean-up levels under Superfund will more than adequately provide for elimination of unreasonable risks.

Finally, the clean-up requirements proposed in EPA's amended § 761.10(d) go farther than any unreasonable risk determination could support, even if one were made. EPA would require that spills, leaks and other uncontrolled discharges be "cleaned up to preexisting background levels where there is a risk of exposure of water, human food or animal feed" and at least to a level of 50 ppm "in all cases." However, most leaks and spills do not pose any unreasonable risk to health or the environment. As already discussed in Sections IV and V of these comments, the minimal releases from such occurrences, and the limited toxicity of PCBs, assures that risk will be slight.

EPA's proposal to clean-up-to-background, moreover, is inherently impractical. To require users to determine background levels in all areas where leaks and spills might occur would require extraordinarily expensive, if not impossible, procedures, especially in areas where background levels would be near to, if not, zero. Similarly, where the 50 ppm criterion applies, very expensive analyses would be required to assure compliance. Any cost-effectiveness

assessment of such requirements would find them unnecessary. No regulatory impact analysis of the new "disposal" requirements has been made by EPA despite the need for such rigorous analysis before the costly consequences of such a requirement can be justified.

EPA should therefore delete from its electrical equipment proposal the amended definition of disposal and the related clean-up requirements for leaks, spills and other uncontrolled discharges. Such requirements cannot be imposed under TSCA Section 6(e) without an unreasonable risk determination, are contrary to the TSCA Section 9 preference for reliance on other federal statutes, and are unnecessary and impractical. The Agency and the public can be fully assured of proper clean up of such discharges under the comprehensive rules and regulations of Superfund.

VII. THE EPA LARGE CAPACITOR PHASE OUT PROPOSAL
GOES BEYOND WHAT IS REQUIRED TO ELIMINATE
UNREASONABLE RISKS.

Although CMA generally supports EPA's efforts regarding continued electrical equipment use^{12/} -- albeit based on an assessment that finds them more than sufficient to eliminate unreasonable risks -- CMA finds EPA has gone farther than can be supported by substantial evidence in requiring a

^{12/} CMA has, however, determined a few other areas where the proposed regulations require clarification or amendment. An extended discussion of those issues is included in Appendix I.