CHEMICAL MANUFACTURERS ASSOCIATION

November 2, 1982

TO: Occupational Safety and Health Committee
and Hazards Communications Task Group

FROM: Rita Comotto

Enclosed is a copy of CMA's Post-Hearing Comments on Hazard Communication. CMA submitted these comments to OSHA on November 1.

A final OSHA standard is expected in early 1983.

cc: Milton Freifeld
Jackie Simmons

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BEFORE THE
UNITED STATES DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION

Hazard Communication	)	Docket No. H-022

**Post-Hearing Comments of
the Chemical Manufacturers Association on
Notice of Proposed Rulemaking**

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These post-hearing Comments are submitted by the Chemical Manufacturers Association ("CMA") in the above-captioned proceeding.

CMA has participated fully in this rulemaking proceeding. It submitted written comments prior to the hearings, presented written and oral testimony of a panel of representatives of CMA member companies on many of the most important issues raised in this proceeding, and participated in the questioning of witnesses appearing on behalf of other interested parties.

The proposed standard represents a significant improvement over the January 1981 proposal -- primarily in the added reliance on performance-oriented requirements -- but still contains a number of unnecessary and costly provisions. CMA, in its comments, made suggestions directed at eliminating those elements that impose substantial burdens without providing additional protection to employees, and at permitting the continuation of effective programs now in use. The hearings before OSHA have supported those comments.

In the post-hearing comments that follow, we demonstrate, first, that the hearings have confirmed the need for a performance-oriented standard, and that there was widespread agreement on a number of important points. Second, we briefly restate CMA's position on the most important issues in this proceeding -- a position that we believe is fully supported in the record. Finally, we address the issues that were the subject of major controversy at the hearings: disclosure of chemical identity and trade secrets; chronic health hazard determinations; preemption of state and local regulations; and the exemption of research and other laboratories.

I. The Testimony Demonstrated the Need for an Effective Performance-Based Standard

The comments and the hearings have confirmed the need for an effective federal standard requiring employers to identify workplace hazards, communicate hazard information to employees, and train employees in recognizing and avoiding those hazards. The testimony of employers, employees, unions and public health officials has uniformly supported the appropriateness of a rule directed toward these ends. There has been no serious dispute of the proposition that well-structured programs for informing employees of the hazards of the workplace are beneficial and cost-effective.

In the remainder of this section, we discuss several of the general themes that have emerged in the course of this proceeding.

A. The Standard Should Be Performance-Oriented

The use of performance-oriented requirements is the key to achieving an effective standard without unnecessary costs and burdens. Performance-based rules require the employer to design and implement a program which will be adapted to the particular hazards presented by its workplace, and will at the same time permit the employer to avoid the expense of satisfying specifications that are of no value in the particular workplace.

Perhaps the best example of the importance of performance orientation is in the area of labeling. We believe that labeling would be the single most costly element of the proposed standard, and unnecessarily so. All parties agree that there must be warnings and reminders of hazardous chemicals in the workplace. However, flexibility in carrying out the labeling requirement is essential. Requiring employers to use a universal scheme which could be sensible in some plants but not in others would be unproductive and confusing, and extremely costly. The current proposal's approach to labeling, which includes specifications as to the content of labels, would be excessively burdensome and is not necessary for worker protection. Other techniques -- such as color-coding or even restricted access -- may be more effective and less expensive in a particular workplace. Labeling of reaction vessels or process equipment may be appropriate under some conditions, but not others. The use of a performance-oriented requirement -- such as that proposed by CMA in its earlier comments and its proposed standard -- is essential.1/ It is not necessary to place labels or markings on every container -- especially stationary containers and processing equipment -- so long as the worker is alerted to the hazards by

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1/ CMA included the following provision in the proposed standard it submitted to OSHA in July 1981:

> Each employer shall ensure, through labels, placards, signs, MSDSs, coding or marking systems, oral or written instructions, or other appropriate forms of communication, that employees are informed in the workplace itself as to the nature of hazards of substances and mixtures to which they are exposed.

signs, placards, operating procedures, coding systems or other means that effectively convey essential information. For example, in many cases, a simple identification of the hazard with cross-reference to a readily available MSDS will suffice.

A number of witnesses have criticized the use of performance-based rules as unenforceable. This criticism cannot withstand scrutiny. Under the proposed standard, each covered employer would be obligated to institute a hazard communication program, with components in the areas of hazard determination, training, labeling and material safety data sheets. OSHA can compel employers to show that these programs are in place and that they comply with the standard. OSHA can review MSDSs to ensure that they meet the terms of the standard. It can determine whether workplace labeling adequately informs workers of the hazards. It can ascertain whether MSDSs and labels are being sent downstream as required. There is therefore no basis for the notion that a performance-oriented standard would prove to be unenforceable. More importantly, the loss of effectiveness and the increased costs that would follow from a more specification-oriented standard would far outweigh any marginal gain in "enforceability."

B. Effective Programs Now in Use Should Be Permitted To Continue

There has been little disagreement with the principle that present effective programs should be permitted to continue without substantial disruption. It is obvious -- and unchallenged -- that so doing will minimize the additional costs imposed by the new federal standard. A number of employers have placed into the record descriptions of the programs they have adopted voluntarily to ensure the effective identification and communication of information regarding workplace hazards.2/ There has been no dispute of the proposition that there are many effective programs in existence today.

OSHA should tailor its standard to allow the continuation of these effective programs. Not only will this avoid imposing unnecessary and unproductive costs on employers who have already made the effort to implement sound programs, but it will also avoid the confusion and employee health risks that will inevitably accompany changes in programs already in use.

2/ *E.g.*, Written Testimony of Carl W. Umland, Chemical Manufacturers Ass'n, at 2-7 (June 1, 1982); Written Testimony of Ford Motor Co. (June 16, 1982).

The simplest and most effective way to implement this principle is to follow a performance orientation as much as possible. Good programs now in use will meet reasonable performance-oriented standards, while employers upgrading existing programs or devising new ones will be able to do so in the manner most efficient for their workplaces.

We believe the evidence before OSHA supports extension of the performance orientation of this standard. In its opening comments, CMA proposed a number of specific changes -- in the labeling area and elsewhere -- to make the standard more performance-oriented. The hearings have supported this approach.

C. The Specifics of an Effective Program Will Vary From Workplace to Workplace

A related principle on which there has been no real disagreement is that the specifics of an effective hazard communication program will differ from one workplace to another. This was the testimony of Dr. Daniel T. Teitelbaum, appearing on behalf of OSHA,3/ and it was confirmed by the examples of various effective programs described in the testimony of individual employers.4/ It should be evident that

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3/ Transcript of Hearings ("Tr.") at I-159 (June 15, 1982).

4/ *E.g.*, Written Testimony of Carl W. Umland, CMA, at 2-7 (June 1, 1982).

a program well-suited to a facility in which only two or three potentially hazardous chemicals are ever present might be inadequate in a facility in which a large number of hazardous chemicals are regularly used. Different methods of labeling and of training would be appropriate in such plants.

This undisputed principle gives added support to the increased use of performance orientation. OSHA's standard should require employers to provide effective hazard communication in the manner best suited to the particulars of their workplace.

D. Training Is an Essential Element of an Effective Program

All parties have agreed on the importance of training in any hazard communication program. Through training, workers can be made aware of the hazards of the workplace, and of ways to deal with them. An effective hazard communication program will have a proper balance of labeling, printed information (MSDSs) and training. The standard should permit appropriate flexibility in each of these areas.

E. Acute Hazards Can and Should Be Defined

The comments and testimony have supported the addition of more definitions of acute hazards to the proposed standard. The chemical industry and the unions have agreed that where specific definitions of hazards are available to guide employers in identifying workplace hazards, they should be used. From the employer's perspective, use of specific definitions decreases uncertainty and facilitates the decision of whether a substance constitutes a potential hazard.

In the case of acute hazards -- unlike chronic hazards (see pages 23-25, below) -- precise definitions are not only available but in widespread use. The American National Standards Institute ("ANSI") has published a voluntary chemical hazard communication standard, including definitions of acute hazards, which is widely used in the chemical industry. These definitions are fully described in CMA's comments in this proceeding, and a copy of the recently revised ANSI standard is attached to these comments as an appendix. OSHA should incorporate the ANSI list of acute hazards, along with ANSI's definitions of those hazards, into this proposed standard. To do so would be fully supported by the comments and testimony. We are aware of no party that has denied the appropriateness of using this approach.

II. General Position of CMA

While we will not repeat in these post-hearing comments each of the arguments made in our prior comments, we stand by each of the recommendations we have made in this proceeding. In our view, the hearings have provided added support for our position on the following points:

-- Employers should be permitted to evaluate the hazards of a mixture by any appropriate method, and where those hazards have been evaluated, only ingredients contributing substantially to the hazards of the mixture need be disclosed.

-- Research laboratories and other laboratories not engaged in commercial production should be fully exempted from coverage by this standard.

-- Acute hazards should be defined by the standard, and the definitions should be consistent with those put forth by the American National Standards Institute and widely used in the chemical manufacturing industry.

-- Materials that do not pose a significant risk to health or safety in customary or reasonably foreseeable use should not be considered hazardous for purposes of this standard.

-- The definition of "health hazard" should be refined to make explicit that it reaches only those chemicals which are generally recognized, on the basis of well-established scientific evidence, to lead to serious adverse health effects in employees.

-- Employers should not be required to prepare a list of all hazardous chemicals in a workplace, because such a list would inevitably be read to equate inclusion on the list with exposure, and would thus be misleading.

-- Employers should be permitted to satisfy the in-plant labeling requirement by using any form of communication that adequately informs employees of the hazards. In this respect, it would be particularly burdensome to require specified labeling of stationary process equipment.

-- The standard should be revised to permit continued utilization of current MSDSs to the greatest extent possible.

-- Chemical manufacturers should be required to provide MSDSs to their customers upon request, and not automatically with the first shipment.

-- The protection accorded by the proposed standard to trade secrets consisting of chemical identity must be preserved.

-- In order to eliminate the disruptive effect and inefficiency of differing and inconsistent state standards, OSHA should expressly provide that state standards differing in any material respect from the federal standard will be presumed to place a burden on interstate commerce.

III. Discussion of Issues Raised at the Hearings

In the course of the hearings, four important issues emerged as major topics of discussion: preservation of trade secrets consisting of chemical identity, assessment of chronic health hazards, preemption by OSHA of state and local hazard communication regulations, and the need to exempt research and other non-commercial laboratories. In this section, we will address these issues in some detail. In addition, we will respond to the question posed by OSHA at the hearings in Washington, as to how downstream users might best be provided with information regarding engineering controls.

A. Preservation of Trade Secrets Consisting of Chemical Identity

One of the most frequently discussed issues at the hearings was the manner in which the standard should reconcile employee interests in obtaining information regarding the identity of chemicals present in the workplace with employer interests in preserving the secrecy of confidential proprietary information that provides an employer an advantage over its competitors.

At the outset, we must emphasize that this issue does not concern the need of employees for hazard information. Information adequately describing and warning of workplace hazards is essential to employees, and we support communication of that information. During the hearings, union witnesses repeatedly addressed the trade secret issue by citing examples in which inadequate hazard information was made available.5/ Those examples are simply not germane to the question of when chemical identity may be withheld. It is the issue of chemical identity disclosure in cases involving trade secrets that we are addressing here.

Responsible witnesses, regardless of their ultimate position as to how a balance should be struck, have acknowledged that legitimate interests are present on both sides of the issue.6/ Employees have testified as to their need to be able to tell their treating physician the name of a chemical which is suspected to be the cause of a health problem, and no one disputes the reasonableness of this expressed concern. Employers have testified as to the critical role of trade secrets in enabling a company to maintain its position in the market -- thereby creating jobs for its employees -- and in fostering the research that is required for the development of new chemicals. The legitimacy of this concern has long been recognized in the law.

5/ *E.g.*, Written Testimony of Mike Wright, United Steelworkers of America, at 5-6 (June 17, 1982).

6/ *E.g.*, Oral Testimony of ACTWU, Tr. 4120-21 (July 30, 1982).

It is CMA's view that the approach of the proposed standard in harmonizing these interests is fundamentally sound, but that it errs on the side of over-disclosure in its treatment of the so-called "high chronic hazards." However, in addressing this issue, it is useful first to put the scope of the problem in perspective. Only in this way can a rational reconciliation of the interests be effected.

1. The Proposed Standard Would Make Chemical Identity Available in the Vast Majority of Situations

The general rule under the proposed standard is that the employer must disclose the precise chemical name of each hazardous chemical in the workplace (subsection (e)(2)(i)). The exception to this rule for trade secrets is a limited one, available only where six listed conditions are met. Among these conditions are: the employer must be able to substantiate its trade secret claim; a generic chemical classification that will provide useful information to a health professional must be provided in place of the chemical identity; and the precise identity must be provided to the attending physician where the identity is needed for treatment of a patient. Moreover, full information as to the hazards of the material must be provided regardless of trade secret status.

There is nothing on the record to suggest that this limited trade secret protection will lead to the withholding of a significant amount of information. CMA has proposed a judicially accepted definition of "trade secret," drawn from the Restatement of Torts:

> any formula, pattern, process, device, information or compilation of information (including chemical name) that is used in an employer's business and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it.

OSHA noted the wide acceptance of the Restatement definition in its January 1981 proposal, 45 Fed. Reg. 35248 (1980). This is a relatively narrow definition. Chemical identity could be withheld under this definition only where it is not known to others in the industry.

A considerable portion of the testimony opposing the standard's trade secret provision has consisted of anecdotal evidence of assertedly unjustified claims of trade secrecy.7/ Even if these examples are assumed to be accurate in their characterization, however, they are entirely irrelevant to the issue at hand. There is currently no federal labeling law

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7/ *See*, *e.g.*, Oral Testimony of ACTWU, Tr. 4115-16, 4121 (July 30, 1982).

requiring employers to disclose chemical identity, and there is no law defining a trade secret in connection with any disclosure obligation. Reliance on present conduct -- where there is no applicable law -- as a guide to what will happen when there is an applicable law makes no sense. It is like asserting that because motorists do not stop at an intersection where there is no stop light, they may be expected to run the light once it is put in. Employers will not lightly claim trade secret status when an unfounded claim would constitute a violation of an OSHA standard.

Protection of chemical identity in cases of trade secrets is of great importance to employers. While employers may be expected to protect their trade secrets to the extent necessary to their business and permitted by law, there is no basis in the record for a conclusion that trade secret claims will be asserted where they are not well-justified, nor is there a basis for the conclusion that these claims will be asserted over-frequently in cases of hazardous chemicals.

While a great deal of time has been spent in the various comments and testimony on this issue, a sense of perspective must be maintained. Trade secret information constitutes only a small percentage of the information to be disclosed. There is no reason to believe this limited exception to the disclosure requirement will be abused.

2. The Interests To Be Balanced Are Those of the Employer in Protection of Trade Secrets and Those of Employees in Hazard Warning and Medical Treatment

The testimony at the hearings has extensively described the precise interests to be balanced in the trade secret provisions of the standard. On the side of the employer, the interest is in the protection of confidential chemical identity information that enables it to maintain its position in the market. On the side of the employees, there is a need for access to information that will enable them to avoid hazardous exposure and to obtain medical treatment in case of exposure.

Numerous chemical manufacturers, as well as other companies and trade groups within the coverage of this proposed standard, have testified to the importance of trade secret protection to them. While it is difficult to attach a reliable monetary figure to this protection, there can be little doubt that the protection of proprietary information is of paramount importance. Indeed, the very existence of the extensive legal protection afforded under the patent system and trade secret law attests to the importance of encouraging research by permitting those who develop a new product to obtain financial rewards from the sale of that product.

There has been considerable testimony as well on the side of the employee interests. First and foremost, of course, is the interest of the employee in hazard information. It is this information that enables the employee to know of the hazards of the workplace, and the means of avoiding harm from those hazards. The primary objective of this standard is to assure that hazard information is supplied. Chemical identity, however, is of little use to the employee in this respect. Indeed, one employee testifying on behalf of the Amalgamated Clothing and Textile Workers Union (ACTWU) stated that chemical identity was not useful to her, but was confusing; she felt that hazard information -- identifying the hazard and stating means of avoiding it -- was needed instead.8/ It should be obvious that an employee can be warned effectively of the hazards of a material without being given the precise chemical identity. Experts from industry, government and academia have stated that they have been able to obtain the information they need, and that in many cases exact chemical identity was not needed.

Second is the interest of the employee in providing a physician with the name of the chemical where that information is needed for purposes of treatment. The desirability of

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8/ Tr. 4095 (July 30, 1982).

requiring disclosure to treating physicians -- under terms of confidentiality -- is undisputed. The proposed standard clearly meets this employee interest by requiring this disclosure. Two employee witnesses on behalf of the ACTWU testified that disclosure to a treating physician would fully satisfy their interest in chemical identity information.9/

A third interest, in access to chemical identity to permit the union to perform its own evaluation of the material, has been asserted by some union witnesses (although the testimony of the employee witnesses just described suggests that this interest may be of more concern to union officials than to the workers). Provision of trade secret information to a union is a matter of concern to many companies, in part because the union may well represent employees from competitive companies, thereby adding to the risk of disclosure and the harm in case of disclosure.

To the extent the unions are arguing that they should be placed in a position to obtain all chemical identity information, they are arguing an issue that has already been resolved before a different agency. The National Labor Relations Board, in three recent decisions, has granted unions

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9/ Tr. 4111, 4113 (July 30, 1982).

some rights of access to information regarding the identity of chemicals in the workplace.10/ These decisions examine the reasonableness of the request under the particular circumstances of the workplace, acknowledge the need for preservation of confidentiality, and call for bargaining over allocation of the costs of providing this information. To the extent the unions have an interest in obtaining this sort of information, the NLRB has acted on behalf of that interest. There is no justification for OSHA to upset the balance struck by those NLRB rulings. It is thus inappropriate for OSHA to weigh into its balance this asserted union interest, which has been satisfied already by the agency charged with supervising matters relating to union representation -- the NLRB.

As the next sections show, the interests legitimately to be balanced can be reconciled under the general approach adopted by OSHA's proposed standard.

10/ Minnesota Mining & Mfg. Co., 1981-82 NLRB Dec. (CCH) ¶ 18,892 (1982); Colgate-Palmolive Co., 1981-82 NLRB Dec. (CCH) ¶ 18,893 (1982); Borden Chemical, 1981-82 NLRB Dec. (CCH) ¶ 18,894 (1982).

3. <u>The Current Proposed Standard, Revised To Eliminate Special Treatment of "High Chronic Hazards," Reasonably Balances Trade Secret and Disclosure Interests</u>

The basic approach of the current proposed standard effectively balances the various interests involved, preserving trade secrets while ensuring worker protection. The employer may withhold chemical identity where that information constitutes a trade secret, but employees must have access to full hazard information and enough generic information regarding the material to provide useful information to a health professional. Moreover, a treating physician would have access to the precise chemical identity where that information is needed for treatment of an employee. This approach satisfies the interests of the employer as well as those of the employee, as described in the preceding section.

The hearings have not, however, provided sufficient reason to maintain the proposed standard's special treatment of the so-called "high chronic hazards." It has not been established that trade secret information that might be revealed under this provision (subsection (g)(1)(ii)) would add to employee protection. Epidemiological studies based on this information remain a rarity. There has been little evidence that trade secret claims have posed a barrier to such studies that would otherwise have been undertaken, much less that the limited category of trade secrets under the proposed standard would interfere with studies of this type.

Rather, the same principles that govern the release of trade secret information for other hazards should logically be applied to the chronic hazards. As the foregoing comments have demonstrated, the proposed standard reasonably reconciles disclosure interests and trade secret interests. There is no basis in the record for the special treatment of the "high chronic hazards."

4. If the "High Chronic Hazards" Are To Be Treated Specially, the "Need to Know" Standard Is a Reasonable Balance

We do not agree that the trade secret exception should be limited in the case of the "high chronic hazards." However, if OSHA concludes that such special treatment is necessary, the approach of the current proposed standard is reasonable. There is no reason to require the release of the chemical identity where it constitutes a trade secret unless there is a "need to know" that information.

Disclosure of chemical identity, in cases involving trade secrets, entails the risk that those secrets will be lost. This clearly encroaches on the interests of the employer, as these hearings have demonstrated. Such an encroachment should be permitted only where the legitimate interests of the employee require it. Unless there is a demonstrated need to know that identity, there is no justification for requiring the disclosure of trade secret information.

The reasonableness of the "need to know" standard as a means of balancing the interests of the parties was acknowledged from the perspective of employees in the course of testimony before OSHA. Indeed, an industrial hygienist for the ACTWU agreed to this proposition at the hearings.11/

The hearings thus provide support from both labor and industry for the view that if the high chronic hazards are to receive special treatment, proprietary information concerning the chemical identity of materials posing those hazards should be required to be disclosed only where there is a need to know the precise chemical name.

B. Assessment of Chronic Health Hazards

The fundamental approach of this proposed standard to the identification of chronic health hazards is sound and is fully supported by the record now before OSHA. The evidence

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11/ Oral Testimony of Matthew Gillen, ACTWU, Tr. 4122-23 (July 30, 1982).

demonstrates that the determination of whether a chemical poses a chronic health hazard is extremely difficult and requires the professional judgment of trained individuals. No simple procedure exists by which this decision can be made mechanically. No standard can disregard this plain fact, and the institution of a required rote procedure for making this determination would not lead to scientifically sound or reasonable results.

The fact that health hazard determinations are extremely complex and are the subject of dispute even among trained scientists and doctors is amply supported by the record in this proceeding. Dr. John Dougherty testified on behalf of CMA "that such determinations are complex. The difficulties of interpreting both human epidemiological and animal toxicity studies are well known" (Tr. 1035). Other witnesses have testified to the difficulty of making these determinations, and the need for expert judgment.12/

As testimony at the hearings demonstrated, it would be inappropriate for OSHA to require employers either to make their hazard determination on the basis of certain specified

12/ *See*, *e.g.*, Written Testimony of Daniel T. Teitelbaum, M.D., on behalf of OSHA, at 6-8 (June 15, 1982); Written Testimony of Franklin E. Mirer, Ph.D., UAW at 16 (June 21, 1982).

published lists or to mandate review of particular literature sources. These lists are constantly out of date as science overtakes them, and it is difficult to develop agreement on which chemicals should be included. CMA's panel noted, in response to questioning, that new materials would not appear on these lists, and instead an industrial hygienist would need to exercise judgment as to analogues (Tr. 1055). Some materials that appear on lists such as RTECS are frequently harmless as such or as used in a particular workplace. Moreover, a search of the literature is frequently unnecessary because new materials often are only slight variations of materials with which the employer is already familiar (Tr. 1056). In such cases a full literature search would be wasteful and unnecessarily burdensome.

It is both reasonable and necessary to impose on employers the requirement of making a good faith assessment of whether the material is generally recognized, on the basis of well-established scientific evidence, to cause serious chronic health effects in employees upon exposure. A standard that attempted to set out a mechanical formula instead would produce determinations less suited to the workplace, while imposing unnecessarily high costs.

C. Preemption of State and Local Hazard Communication Standards

1. The Need for Preemption

During the course of the hearings, there has been considerable evidence of the unnecessary expense imposed or threatened by differing or inconsistent state and local regulations.13/ Robert Vogel, of Rohm & Haas Company, testified to the widely varying state and local rules now in effect (Tr. 1043-45). As he noted:

> "Manufacturers in interstate commerce are already faced with more than a dozen state and local laws and the potential of fifty-plus different chemical standards. The inevitable threat of conflict, overlap and needless costly duplication looms" (Tr. 1040).

This imposes costs not only in complying with these many standards, but also in monitoring the new rules that are being created or considered in every jurisdiction, so that the company doing business in several locations can ensure its compliance. In addition, variations from area to area in trade secret protection mean that the standard offering the least protection of trade secrets will prevail, because loss of a trade secret in one place means loss everywhere (Tr. 1045-46).

13/ See, e.g., Written Testimony of Elizabeth Treanor, American Petroleum Institute, at 4 (June 22, 1982).

While several individuals have spoken on behalf of their state or local right-to-know laws, none has given a coherent justification for nonuniformity. We know of no examples of peculiarly local problems that would satisfy the OSH Act's requirement that state plans affecting interstate commerce "are required by compelling local conditions," 29 U.S.C. § 667(c)(2) (1976). In view of the confusion and unnecessary expense caused by differing or inconsistent state and local standards, and the absence of any convincing evidence in support of the need for such standards, OSHA should do everything within its power to preempt those standards.

2. The Legal Authority of OSHA To <u>Preempt State and Local Standards</u>

In our prior comments, we recommended that OSHA act to preclude this patchwork of differing state and local regulations. We argued that OSHA should state expressly that any state plan that imposes different hazard communication requirements than the federal standard will be presumed to burden interstate commerce unduly, and will therefore not be approved under section 18 of the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 667 (1976), absent a compelling demonstration to the contrary.

In comments and testimony, at least two parties (the Environmental Defense Fund and the AFL-CIO) have taken issue with the legal authority of OSHA to act with respect to preemption.14/ These parties have argued that a state need not obtain federal approval in order to regulate in an area occupied by OSHA, except if it wishes to supplant -- and not merely complement -- the OSHA regulation. Their position is both irrelevant and wrong.

Their position is irrelevant because it in no way challenges the authority of OSHA to consider the burden on interstate commerce in deciding whether to approve a state plan. Indeed, section 18 of the OSH Act requires OSHA to consider this issue. As one court recently held, in the context of a state plan setting an ethylene dibromide (EDB) standard more stringent than the federal standard:

> "This court holds that Fed-OSHA, the agency charged with the review of the new California standard under § 667(c), and not the United States District Court, should decide whether the EDB standard change falls within the 'product standard' clause and, if so, whether that change is justified by compelling local conditions not unduly burdensome on commerce."15/

14/ Additional Comments of the Environmental Defense Fund on the Proposed OSHA Hazard Communication Standard (June 23, 1982); Written Testimony of the AFL-CIO at the Detroit Hearings (July 30, 1982).

15/ Florida Citrus Packers v. State of California, No. C-81-4218 EFL (Oct. 4, 1982).

The AFL-CIO and EDF are addressing the question of when a state has to ask for approval, not what OSHA should do when it receives such a request. OSHA need not resolve or even take a position on the issue of when a state must obtain approval. That issue will arise only if a state attempts to enforce a hazard communication standard without having obtained OSHA's approval.

In addition to being irrelevant, the position taken by EDF and the AFL-CIO is wrong. While the OSH Act does not expressly differentiate between the situation where a state intends its standard to be exclusive and the situation where a state intends merely to supplement a federal standard, the legislative history plainly demonstrates that Congress meant to preclude the situation in which companies are compelled to deal with multiple state standards. Since chemicals (with labels) and MSDSs will be shipped in interstate commerce, multiple standards will clearly impose a burden. This situation arises whether the state means for its regulation to be exclusive or merely in addition to a federal standard.

The OSH Act states that the Secretary of Labor may approve state plans only if those plans, "when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce," 29 U.S.C. § 667(c)(2) (1976). This provision was sponsored in the Senate by Senator (later Attorney General) Saxbe, who explained the need for the rule using the example of machinery products:

> "If . . . each of the States were permitted to set differing safety standards for dirt movers, it would place a tremendous burden on interstate commerce. This amendment provides that they may do so because there may be circumstances that would so require, but the words are put in, 'compelling local condition,' and second, that they 'do not unduly burden interstate commerce.'
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> "This amendment is offered so that we do not have differing safety regulations on equipment moving from State to State in interstate commerce . . . ."16/

This same concern was expressed on several occasions in the House of Representatives, which agreed to the amendment:

> "In other words, why should we have a diversity of State requirements for something that is sold in interstate commerce if this is a variation, not in degree of protection, but only in kind?"17/

16/ 116 Cong. Rec. 37,622 (1970), reprinted in Senate Committee on Labor and Public Welfare, Legislative History of the Occupational Safety and Health Act of 1970 ("Leg. Hist."), at 500-01 (1971).

17/ 116 Cong. Rec. 38,381 (1970) (remarks of Cong. Erlenborn), reprinted in Leg. Hist. at 1018. See also 116 Cong. Rec. 38,390 (1970) (remarks of Cong. Railsback), Leg. Hist. 1041; 116 Cong. Rec. 38,703 (1970) (remarks of Cong. Railsback), Leg. Hist. 1060.

This clear purpose of Congress to preclude burdensome differing state regulations makes it implausible to contend that Congress intended to distinguish between exclusive state plans and state plans intended only to supplement the federal standard. Whether the state regulation is intended to be exclusive or to go along with the federal regulation, the effect on manufacturers doing business in several states is identical. Such a distinction would be contrary to the expressed intent of Congress -- the elimination of inconsistent and differing state regulations in an area in which OSHA has acted.

D. Exemption of Research and Other Non-Commercial Laboratories

It is of great importance to our members and other employers that this standard exempt research laboratories and other laboratories not engaged in production of materials for sale. As several witnesses have testified, these laboratories use large numbers of chemicals, most of which are present in the laboratory in limited amounts and for very short periods of time. Application of the standard to these laboratories is unnecessary, due to the high level of training and supervision commonly found in the laboratory.18/ Moreover, the labeling

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18/ See, e.g., Written Testimony of Elizabeth Treanor, American Petroleum Institute, at 6 (June 22, 1982);

[Footnote continued next page]

required by the standard would impose enormous burdens without commensurate benefits.

- The proper approach to laboratory hazards is to deal with the practices used in the laboratory, emphasizing training rather than detailed labeling and other requirements for each chemical. Laboratory personnel must be trained to use caution in dealing with each chemical; they have different responsibilities and expectations than non-laboratory workers.

These unique characteristics of laboratories make it inappropriate to include them in the same regulatory framework with commercial manufacturing operations.19/ OSHA, recognizing this fact, has initiated proceedings to create a separate standard covering laboratories. See 46 Fed. Reg. 21785 (1981).

Separate treatment of laboratories is essential to the development of effective regulation. The application of the proposed hazard communication standard to these laboratories would be excessively burdensome and expensive, and

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[Footnote continued from preceding page]

Written Testimony of Ralph Engel, Chemical Specialties Manufacturers Ass'n, at 5 (June 24, 1982); Written Testimony of Sigma Chemical Co. at 1-2 (May 14, 1982); Oral Testimony of Matthew Tarker, Tr. I-212-215 (June 15, 1982).

19/ It should also be noted that only a small fraction of the nation's laboratories are in SIC Codes 20-39.

would provide much less benefit than a different standard more narrowly directed at the special characteristics of the laboratory. The proposed standard should therefore be revised to exempt research laboratories and other laboratories not involved in production of materials for sale.

E. Communication of Information Regarding Recommended Engineering Controls to Downstream Users and Other Requirements Relating to MSDSs

CMA has emphasized in its comments and testimony the importance of avoiding MSDS requirements that will require the costly revision of MSDSs now in use, without providing important additional information to employees. Among the changes CMA has urged are:

-- Elimination of the requirement in subparagraph (e)(2)(iv) that the MSDS include a listing of "medical conditions which may be aggravated by exposure to the chemical," since this could impose on employers the virtually impossible obligation of considering every possible medical condition to determine whether each of its chemicals could have aggravating effects.

-- Elimination of the requirement that both chemical name and CAS number appear on the MSDS.

-- Where a mixture has been evaluated, only those ingredients that contribute substantially to the hazards of the mixture should be required to be disclosed; hazardous ingredients should be required to be disclosed down to the one percent level only where the hazards of the mixture have not been evaluated.

-- Employers should be permitted to use blank spaces or appropriate entries to indicate that information was sought but not found.

At the Washington hearings, OSHA asked CMA to suggest alternative language for the standard governing the information on engineering controls that should be provided to downstream users (Tr. 1277). This request was made in response to CMA's testimony that the current proposed standard (subsections (e) (vi) and (vii)) could be interpreted to require of manufacturers the impossible task of guessing the uses to which the downstream user may put the product. See CMA Comments at 44.

We would resolve this problem by eliminating subsections (e)(2)(vi) - (ix) and replacing them with the following language:

"(vi) General protection information for safe handling and use, such as eye, skin and respiratory protection, and ventilation requirements, and special precautions to be taken in handling and storage."

This would be consistent with the current requirements of OSHA's Form 20 (Sections VIII and IX), and would not require special knowledge of a customer's anticipated use of the product.

IV. <u>Conclusion</u>

The proceedings in this rulemaking have provided strong support for OSHA's approach to establishing an effective, performance-oriented standard for the communication of information regarding hazards in the workplace. CMA believes that the hearings have substantiated its position as described in its comments and its testimony. On the basis of the record now before OSHA, the agency should now make the needed changes we have described above and in our prior comments, and adopt a uniform federal standard. Such a standard will ensure that all regulated employers meet their responsibility to inform employees of the potential hazards presented by chemicals in the workplace, and will accomplish this goal without unnecessary costs and burdens.

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