

THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

April 10, 1981

Charles Schwartz, Esq.
Schwartz & Gordet
Post Office Box 270
896 Main Street
Walpole, Massachusetts 02031

Re: Tetrachloroethylene

Dear Mr. Schwartz:

We have read and carefully reviewed your letter of March 4, 1981, in which you request information in four categories: 1) specific facts concerning each instance of TCE leaching from Johns-Mansville pipes into water supplies in the Commonwealth; 2) facts or events constituting notice to Johns-Mansville of the TCE problem; 3) the basis for the Attorney General's conclusion that TCE concentrations in Massachusetts water supplies constitute a breach of warranty through unreasonable risk of injury; and 4) proposals or remedies for the TCE problem. This letter will address each of these points in turn.

First, as discussed in our recent telephone conversation, the enclosed binder contains copies of the following documents, which set forth much of the documentary information requested by you:

- 1) A list of cities and towns which have installed vinyl-lined asbestos cement pipe, the mileage of pipe installed in each city or town, and the number of dead-ends.
- 2) TCE test summaries categorized by region and town. The tests were conducted in the spring and summer of 1980, and formed the basis of the September, 1980 report by DEQE, a copy of which was provided to you at our meeting on March 3, 1980. While these documents are relatively complete, there may be some test results which are not reflected therein.

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- 3) A list of cities and towns which have a) replaced their vinyl-lined pipes to remedy the TCE problem or b) are currently utilizing flushing or bleeding to maintain concentrations below 40 ppb.
- 4) Miscellaneous reports or other documents which may be of interest to you.

Second, in response to your questions regarding dates and the form of notice to Johns-Manville that warranties had been breached, our position is that Johns-Manville has been on notice of the problem of TCE leaching into water supplies of cities and towns which use the AC pipes for over a year. Letters from Johns-Manville to Rhode Island officials during investigation of TCE problems in Rhode Island in 1978-79 indicate an awareness of the TCE leaching problem. Discussion between Johns-Manville representatives and officials of the Massachusetts Department of the Attorney General and the Department of Environmental Quality Engineering, in the spring of 1980, soon after the presence of TCE in Massachusetts water supplies had been identified, constituted further notice to Johns-Manville of this defect in the safety and performance of the pipes. Additionally, our letter of February 11, 1981, sent pursuant to G.L. c. 93A, §4 to provide an opportunity for negotiations between the parties, served as notice for purposes of our breach of warranty claim. We feel that these circumstances indicate that sufficient notice was provided to Johns-Manville of defects in the pipes within a reasonable time. See generally, Coldstein v. G.D. Searle & Co., 62 Ill.App.3d 344, 378 N.E.2d 1083 (1978).

Third, we do not feel it is useful to set forth in any detail at this time our theory of liability in this case. In summary, however, we believe that Johns-Manville knew or should have known at various points during the production history of vinyl-lined pipe that the use of TCE posed a risk of injury. Further, we believe that the risk of injury was thoroughly unreasonable in light of the known facts concerning its adverse health effects, the context of the TCE use in connection with public water supply equipment, and the complete failure by Johns-Manville to disclose the risk of injury.

Finally, as to possible remedies for the numerous cities and towns with unacceptable levels of TCE, several alternatives exist. First, we would propose that Johns-Manville compensate those cities and towns for the costs of testing and for the costs of bleeding, flushing, or other remedial methods which can effectively lower the level of TCE to acceptable standards. Second, the combination of health, economic and environmental factors involved will most likely make it

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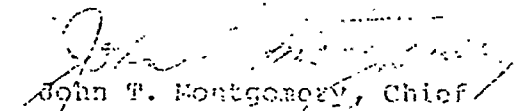
necessary to replace the vinyl-lined AC pipes in some sites. Our current belief is that when test data is analyzed fully, the need for pipe replacement can be limited to a minority of the locations with extreme concentration of the chemical.

While we are, of course, willing to negotiate the specific terms of a settlement agreement in this case, we need a commitment from Johns-Mansville that the basic remedial proposal outlined above is acceptable in principle. Because the risk to citizens of the Commonwealth is so serious, we are unable to agree to any settlement which does not contain the dichotomy of relief described above. Accordingly, we require a commitment by you by April 27, 1981 to enter into negotiations which contemplate such a dual remedy. Without such a commitment, negotiations would be fruitless.

We are certainly in agreement with the belief expressed in your letter that it would be in the interests of all parties to resolve this matter without litigation. However, as we discussed with you in our March 3, 1981, meeting, we are constrained in carrying out settlement negotiations by the need to protect our claims from possible statute of limitations defenses. Accordingly, we will need to file a complaint by April 27, 1981 unless Johns-Mansville agrees to waive the statute of limitations for a period of four months in order to allow for further settlement discussions between the parties, as outlined.

Please call me if you have any questions. I hope to hear from you by April 27 regarding the statute of limitations waiver and the basic settlement proposal.

Sincerely yours,


John T. Montgomery, Chief
Consumer Protection Division
Public Protection Bureau
727-4473

JTH/cf

Enclosure

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