

AGENDA
JOINT MEETING OF
MCA EXECUTIVE AND FINANCE COMMITTEES
Tuesday, March 13, 1979 -- 9:00 - 11:45 a. m.
Washington, D. C.

		TAB
9:00 a. m.	1. Call to Order -- Chairman Henske	
9:00-9:05	2. Minutes of Last Meeting -- B. M. Barackman	1
9:05-9:10	3. Financial Report -- G. C. Herrman	2
9:10-9:15	4. Appointment of Committee Members -- B. M. Barackman	3
9:15-10:15	5. Report of Finance Committee on Preliminary 1979/80 Budget -- J. E. Burrell / R. A. Roland / G. C. Herrman	
0:15-10:30	----- B R E A K -----	
10:30-10:40	6. Report on Economic Impact of TSCA Study -- W. C. Krumrei	
10:40-10:50	7. Report of Inter-Industry Task Force on Rail Trans- portation of Hazardous Materials -- W. G. Simeral	
10:50-11:40	8. Association Activities	
	a. Chronic Hazard Labeling -- R. A. Roland	4
	b. Research into Options for Waste Disposal -- C. A. Gosline	
	c. Response to Media on Disposal Site Problem -- R. A. Roland	
	d. Report of General Counsel -- E. B. Frost	5
	e. Report of Special Committee on Chemical Incidents -- W. M. Stover	
11:40-11:45	9. New Business	
11:45	10. Adjournment	

CMA 062284

MINUTES OF JOINT MEETING
MCA EXECUTIVE AND FINANCE COMMITTEES

MCA Conference Room

Washington, D. C.

March 13, 1979

1. The meeting was called to order at 9:00 a.m. by Mr. Donley, Chairman of the Board, who presided in Mr. Henske's absence. There were present:

Edward Donley, Acting Chairman

Executive Committee

J. Earl Burrell, Chairman

Finance Committee

William J. Ferracone

Richard J. Hughes

W. C. Krumrei

Paul F. Oreffice

Robert A. Roland

William G. Simeral

Charles W. Smith

Alexander B. Trowbridge

Bruce M. Barackman, Secretary

Edmund B. Frost, General Counsel

Gary C. Herrman, Treasurer

By Invitation:

*E. W. Callahan, Allied Chemical Corporation

*Donald M. Clarke, MCA

Geraldine V. Cox, MCA

*J. T. Estes, Allied Chemical Corporation

S. L. Goldstein, Olin Corporation

*C. A. Gosline, MCA

*J. J. Kenney, Jr., Union Carbide Corporation

V. H. Peterson, MCA

E. R. Pollak (SOCMA), Olin Corporation

*C. L. Sercu, The Dow Chemical Company

John E. Slavick, MCA

William M. Stover, MCA

*part time

2. Minutes of the February 13, 1979, Meeting The minutes of the February 13 Executive Committee meeting, as distributed, were approved.

3. Financial Report Mr. Herrman stated that the most recent financial report would be transmitted along with the minutes of the meeting. This report will show that for nine months of this year, MCA has received

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revenue of \$4,431,400 and disbursed \$3,608,800 resulting in an excess of revenue over expense of \$822,600. On February 28, 1979, MCA had total assets of \$7,750,800 of which \$4,624,600 was restricted.

It was pointed out that although the budget documents as distributed at the meeting indicated a projected deficit for the current year of \$905,300 -- the final cash basis deficit may be less, due to time lags in receiving, processing and paying expenses incurred under the various research and consulting agreements. This problem will be resolved in the forthcoming year when MCA shifts to an accrual basis for financial reporting.

4. Committee Appointments Dr. Julianne H. Prager, Minnesota Mining and Manufacturing Company, was appointed to the Patents and Information Retrieval Committee to fill the unexpired term of Mr. John Erickson, who has withdrawn.

5. Report of Finance Committee on Preliminary 1979/80 Budget
Mr. Roland referred to Book I, Preliminary Budget Request for the Fiscal Year Ending May 31, 1980, and Book II, Documentation of Internal Program and Priority Review -- both previously mailed to the Executive and Finance Committees. These constitute a financial management plan for the Association and form the basis for the final proposed budget to be presented to the Executive Committee and the Board at the April meetings.

Mr. Herrman reviewed the preliminary budget request for fiscal year 1979/80 with particular reference to the revenue and expense summary by line item, Exhibit A; described projections through fiscal year 1983/84; and discussed alternates considered in the level of dues required to fund the budget which led up to the recommendation for an 85% dues increase to meet present commitments, restore depleted reserves to the 50% level over five years, and provide a measure of flexibility in future programming.

Mr. Burrell discussed the Finance Committee review, with staff, of the budget proposal, with emphasis on the background for formulation of Book II. In performing the detail review of Book II, several areas for future improvement in MCA financial management were noted and discussed by the committee. Examples of these areas included the costing and funding of subscribed special projects, the costing and pricing of publications, the level of meeting registration fees, capitalization of assets, and the cost of present and future office space. It was left that these and other areas would be examined further by the MCA Finance Committee.

A significant conclusion that came of this review in looking at Book II and Book I is that the primary request for funds is coming from standing committees of MCA. To the best of the Finance Committee's ability to judge, it appears that these Committees are responding to the charter that was laid

down for them by the Executive Committee and Board. In fulfilling this charter, the committees are exercising their judgements as to the level of spending required by the nature of the problems in their respective areas. This in turn generates requests for MCA manpower and funds required to support the level of committee activity.

The Finance Committee felt that Book II reasonably defines the scope of work of the various committees, but that the overall judgement as to the merits of the program should be left to the Executive Committee.

The Finance Committee concluded that a \$7.5 million level of expenditure is reasonable if the programs presented are approved; the projections through fiscal year 1983/84 are also reasonable, based on a \$7.5 million level of expenditure; and that this level of spending for fiscal year 1979/80 would require a dues increase of 85%.

Mr. Donley urged Executive Committee members to study the documents presented and contact staff during this next month for answers to any questions that may arise. The proposed budget will be presented for approval at the April meeting; staff was asked to consider a stepped increase as an alternate dues schedule for presentation at that time.

Mr. Burrell suggested two things for consideration during the budget review -- the appropriateness of the level of expenses generated by the standing committees' activities; and the desirability of offering member companies an opportunity, for the first year only, to elect to pay dues in two installments in order to ease possible company budget problems. It was also suggested that another source of revenue which may be considered in the future is to fund Chemtrec by assessment based on member company shipments rather than out of dues as is the present practice.

6. EPA/AIHC Meeting February 12, 1979 Mr. Krumrei, Chairman of the Ad Hoc Committee of the Steering Committee, AIHC, reported on the results of a meeting with Mr. Costle, Chairman, Regulatory Council and Administrator, EPA. Representatives of AIHC and EPA participated.

Mr. Costle expressed concern about the cost of testing, particularly of low volume chemicals, its impact on the economy and its effect on innovation. He invited recommendations for testing which would lower costs and still provide a reasonable degree of safety. In the national cancer area he said they didn't want to stipulate zero risk and welcomed a dialogue with industry on points of difference.

Mr. Jellinek referred to MCA's economic impact analysis study of TSCA, saying it is the only one they're aware of and that they would like to use it if MCA would improve its credibility by using outside auditors and by adding people from outside the chemical industry to the group planning

and controlling the study. He also noted an increasing adversarial role on MCA's part and suggested meeting with MCA to develop ways to work better together in resolving issues.

During Executive Committee discussion it was agreed that meetings between MCA and EPA would be desirable. Mr. Roland was requested to work up a program and propose timing and participants for such meetings.

Mr. Roland reported on the TSCA economic impact study placed within NERA. He expressed concern with resistance being met from some company representatives in CRAC who have said they probably won't participate in the study. An attempt will be made at upcoming CRAC meetings to obtain a renewed participation commitment. Market testing of final questionnaire is expected by May 15. Without adequate member company sampling, the report would lack credibility. To ensure participation in the survey, Mr. Roland recommended sending a letter to Executive Contacts communicating the Executive Committee's unqualified endorsement of support of the study. He also recommended, in order to secure EPA's participation as a partner, that a toxic substances economic impact study task group meet with Mr. Jellinek in connection with the study to work out an auditing function and outside participation in management of the project, subject to Executive Committee approval. Following discussion, both recommendations were approved.

7. Report of Inter-Industry Task Force on Rail Transportation of Hazardous Materials Mr. Simeral reviewed briefly his letter to the Executive Committee dated March 6, 1979, Exhibit B. The recommendations at the bottom of page three and the top of page four were approved.

8. Association Activities

o MCA Wins P/R Award Mr. Roland announced that MCA has won the First Prize in the category of External/Internal Association Public Relations in the American Society of Association Executives 1979 Idea Fair. This was based on Peggy Walton's consumer information program which provides opportunities for audio and videotaping of chemical industry experts at MCA-arranged facilities at conventions of American Women in Radio and Television and National Association of Farm Broadcasters; and offers special taped interviews to extension home economists.

o Association Name Change The Executive Committee, and subsequently the Board at its January meeting, approved the name "Chemical Manufacturers Association" (CMA) subject to a vote of the membership. Mr. Roland advised that to date 73% of the members

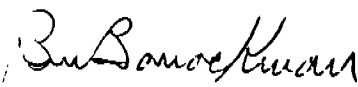
have voted. 68% of the members have voted in favor of the name change. 10 members have voted against. In the absence of a strong objection, the implementation of the name change and logo will proceed at a deliberate pace. Announcement of results of the vote will be made at the Annual Meeting.

- o Chronic Hazard Labeling Mr. Roland's report is attached as Exhibit C. The matter is expected to come before the Executive Committee and Board in detail at the April meeting. We have received from one member company strong opposition to the idea of chronic hazard labeling information. Their views have been considered. Anyone having comments again was urged to submit them.
- o Solid Waste Disposal Distributed to those present was a draft of a study by a task group of the Environmental Management Committee (EMC) which will form the basis of a report following review by that committee. This was in response to a request of the Executive Committee to the EMC to look into waste disposal options. The remarks of Mr. Callahan, Chairman of the EMC, relating to that report are attached as Exhibit D. He concluded with a request for comments on direction EMC plans to take.
- o Response to Media on Disposal Site Problem Mr. Roland stated that we have no P/R effort we can put together at this time because there is very little positive that we can say. First we must have a positive program to support. This will arise from such recommendations as contained in Mr. Callahan's report and Mr. Stover's report, to follow, on the Special Committee on Chemical Incidents (SCCI). After policy decisions are made, based on the work of the EMC and the SCCI we can go forward with a communications program.
- o Report of Special Committee on Chemical Incidents Mr. Stover's report is attached as Exhibit E. He reviewed the type of legislative proposal being readied, as well as the various congressional hearings underway or planned concerning problems relating to public exposure to hazardous materials. He requested the Executive Committee to review this week the outline and documentation supporting it (Exhibit E) and advise Mr. Roland by phone or wire no later than the end of Friday, March 16, whether they support or don't support the conclusions of the outline. MCA plans to contact the Senate Environment and Public Works Committee to secure a position at joint hearings on waste disposal scheduled for March 28-29. In preparation for these hearings, a meeting of the SCCI will be held Monday, March 19, hence the short deadline to receive the views of the Executive Committee.

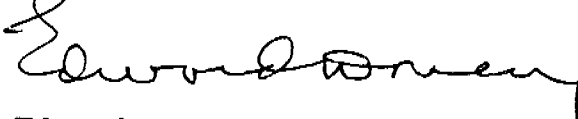
If response to the EMC proposals can be made at the same time, that would be welcome.

- o Report of General Counsel Mr. Frost's report is attached as Exhibit F. He updated item 8 of his report, saying that MCA's comments on work practice standards being developed by EPA to control general hydrocarbon emissions has been coordinated with AIHC whose counsel worked with us in preparing the comments which will probably go out today.

In regard to item 10 of his report concerning TSCA Section 5 pre-manufacturing notification rules, he noted that some small companies are not in agreement with the short form reporting proposal MCA is preparing to offer in place of the proposed EPA regulations. A difference of opinion exists concerning the point at which the volume of production of a chemical will trigger additional reporting. During discussion of this matter it was recognized that the MCA CRAC Committee is the appropriate forum in which to effect an accommodation of the differing views. At the same time the Executive Committee expressed its concern for a proper resolution of this matter.


Bruce M. Barackman
Secretary

Certified correct:



Edward Donley
Acting Chairman
Executive Committee

CMA 062290

EXHIBIT A

MANUFACTURING CHEMISTS ASSOCIATION
REVENUE AND EXPENSES SUMMARY BY LINE ITEM
PRELIMINARY BUDGET FY 79/80

REVENUE:	Amended FY 78/79 Budget	Projected FY 78/79 Actual Results	Preliminary FY 79/80 Budget	PROJECTED FUTURE REQUIREMENTS			
				FY 80/81 Projected	FY 81/82 Projected	FY 82/83 Projected	FY 83/84 Projected
Membership Fees	\$3,615,000	\$3,615,000	\$3,945,300	\$4,228,000	\$4,530,100	\$4,813,200	\$5,119,000
Investments - General Operations	250,000	326,400	305,000	300,000	300,000	300,000	300,000
Investments - Subscribed Research	250,000	348,600	250,500	250,000	250,000	250,000	250,000
Publication Sales	100,000	103,500	153,700	179,000	229,300	244,600	265,000
Meetings (net of expense)	130,000	132,000	129,000	102,700	106,100	91,400	97,300
Overhead Reimbursement - Subscribed Projects	180,000	200,000	250,000	250,000	250,000	250,000	250,000
TOTAL REVENUES	\$4,525,000	\$4,725,500	\$5,033,500	\$5,309,700	\$5,665,500	\$5,949,200	\$6,281,300
GENERAL EXPENSES:							
Salaries	\$2,131,300	\$2,206,100	\$2,696,700	\$3,018,900	\$3,262,300	\$3,523,500	\$3,805,200
Employee Benefits	425,700	419,400	523,200	624,900	674,900	728,900	787,100
Travel & Entertainment	113,200	124,000	160,900	178,700	193,000	208,400	225,000
Dues, Subscriptions & Publications	32,500	34,000	45,100	49,900	54,000	58,200	63,100
Meetings & Workshops	23,100	23,100	60,000	54,800	59,400	64,300	69,500
Printing & Publication	272,100	257,700	377,400	401,800	434,100	469,000	506,600
Postage	112,500	131,500	149,300	163,100	177,500	193,400	208,000
Public Relations	76,000	66,000	96,500	94,600	102,100	110,400	119,100
Rent & Premises Expenses	144,600	159,000	218,000	243,700	263,200	284,200	306,900
Furniture & Equipment Purchases	24,900	40,800	56,400	48,300	52,100	56,400	61,100
Computer, Audit & Investment Services	13,500	13,500	22,500	24,300	26,200	28,300	30,600
Telephone & Telegraph	84,400	96,100	128,000	139,900	151,000	163,200	176,100
Supplies & General Office Expense	89,500	107,100	129,300	141,900	153,200	165,500	178,700
Taxes & Insurance	478,600	328,900	373,900	409,700	442,600	477,900	516,100
Miscellaneous	5,000	2,400	4,000	4,900	5,800	5,600	7,700
Building Relocation (incremental costs)	-0-	-0-	-0-	185,500	171,800	185,600	200,500
TOTAL GENERAL EXPENSES	\$4,026,900	\$4,009,600	\$5,041,200	\$5,784,900	\$6,223,200	\$6,722,800	\$7,261,300
RESEARCH & LEGAL EXPENSES:							
Legal Fees & Expenses	\$ 915,000	\$ 943,000	\$1,368,000	\$1,545,000	\$1,565,000	\$1,545,000	\$1,535,000
Research & Consulting	560,000	678,200	1,102,000	1,121,000	1,125,000	1,110,500	1,111,500
TOTAL LEGAL & RESEARCH	\$1,475,000	\$1,621,200	\$2,470,000	\$2,666,000	\$2,690,000	\$2,655,500	\$2,646,500
TOTAL EXPENSES	\$5,501,900	\$5,630,800	\$7,511,200	\$8,450,900	\$8,913,200	\$9,378,300	\$9,907,800
Excess of Expenses over Revenue	\$ (976,900)	\$ (905,300)	\$ (2,477,700)	\$ (3,141,200)	\$ (3,247,700)	\$ (3,429,100)	\$ (3,626,500)
PERSONNEL COMPLEMENT	93	99	109	116	116	116	116

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ESTABLISHED 1802

E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED

WILMINGTON, DELAWARE 19898

Exhibit E

SENIOR VICE PRESIDENT

March 6, 1979

TO: MCA EXECUTIVE COMMITTEE MEMBERS

John M. Henske, Chairman
William H. Bricker
J. Earl Burrell
Edward Donley
Richard J. Hughes
William C. Krumrei

Duncan J. MacLennan
Paul F. Oreffice
Robert A. Roland
Tom K. Smith, Jr.
Jack B. St. Clair
Alexander B. Trowbridge

FROM: MCA REPRESENTATIVES TO INTER-INDUSTRY TASK FORCE
ON RAIL TRANSPORTATION OF HAZARDOUS MATERIALS

I plan to recommend for action at our meeting on March 13 those items listed at the bottom of page 3 and the top of page 4.

The Task Force plans to terminate its work in June, 1979. A final report will be issued at that time. There are several matters that should receive continuing attention from the MCA. These matters are discussed briefly below and are followed by a recommended procedure to deal with them.

(1) Training of Emergency Response Crews - The Task Force has developed an introductory training course for use with small emergency groups such as volunteer fire companies. It has been thoroughly tested and receives good marks from the people trained as indicated by a post-evaluation questionnaire. The DOT has also reviewed the program and agrees that it has merit. The dissemination of the program has been planned as a joint effort of shippers and the railroads. The direct cost of the program will be \$200,000 over a two-year period. We anticipate that AAR will pay one-half. We will solicit shippers for the other \$100,000. Program direction and coordination will be done jointly by a designated person from AAR and another from MCA. Shipper companies and railroads will be asked to provide people to help in distributing the program. No MCA budget funds should be required.

(2) Accident Response System - AT&T has made preliminary recommendations for upgrading the communications system of which CHEMTREC is the central point. On the afternoon of March 13, their proposal will be presented in detail, together with cost estimates.

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March 6, 1979 .

It now appears that in the first phase of upgrading, the principal additional expense to MCA will be to provide CHEMTREC with a hard-copy capability so that accident information can be relayed to shippers and others via a hardcopy transmittal over telephone lines. CHEMTREC will probably implement this first step in the next several months. Subsequent steps will involve cooperation with railroads and the DOT and the addition of further hardware. The planning and coordination of this work should be with MCA.

(3) Safety System Analysis - The Task Force has made some progress in analyzing accident data to identify areas for improvement. Continued effort is needed. The DOT has an active program. It has been proposed that an ad hoc group follow up. The group would have representatives of AAR, MCA, and the Railway Progress Institute (Car Manufacturers Group).

(4) Railcar Maintenance Procedures - One of the groups formed under the Task Force is an ad hoc group of shippers, railroad maintenance officers, and railcar manufacturers who have dealt with the problem of car maintenance. This group may choose to continue its meetings since much useful exchange of information has occurred. MCA should foster this activity so long as the results merit continuation.

(5) Mutual Aid/Mutual Assistance - Many shippers are reluctant to provide expert assistance at the scene of an accident, especially if none of the materials involved came from the shipper. Their principal concern is legal liability. Efforts are in progress to develop an appropriate solution to this problem. The MCA should take the lead on this matter and maintain close contact with other industry associations, especially the Fertilizer Institute and NLPGA.

Once this problem has been dealt with, a more comprehensive set of Mutual Assistance agreements should be sponsored by MCA.

(6) Emergency Response Manuals - There are currently many different source books published by a variety of public and private groups. One very important publication is the so-called "Red Book" used by the railroads and published by AAR. We have arranged for MCA to be represented in the future when modifications of the "Red Book" are developed. Further, we are indicating to DOT our desire to participate in an advisory group to assist the DOT in developing a universal manual that would replace the multiplicity of material now in use.

(7) Marking of Tank Cars - The MCA Distribution Committee has already agreed to follow up on this matter relating to the use of names of products on selected tank cars.

Each of the above items deserves the continuing attention of MCA. In addition, CHEMTREC is universally acknowledged as a vital link in accident response and deserves the continued sponsorship of MCA. It is not yet clear just how rapidly or at what cost CHEMTREC should be upgraded in capability, but this matter will come into sharper focus in the next few weeks.

In any event, it is our recommendation that the responsibility for future efforts in each of these matters, including the overall operation and planning for CHEMTREC, should properly be placed with the MCA Distribution Committee. While it should be left to that Committee to decide how best to organize to assume these responsibilities, it seems clear that one permanent subgroup will be needed to deal with CHEMTREC and probably one or more task groups to deal with the other matters.

We will conclude our efforts with publication of a report in June. It is our recommendation that the President of MCA take steps to have regular meetings with the President of AAR in the future. Items for the agenda of such meetings should be developed from the various activities of the MCA Distribution Committee which involve mutual interests with the railroads. These items would include most of those listed above until they are complete, updating on the CHEMTREC operation including any problems in implementation of planned improvements, and activities of the AAR Tank Car Committee on which an MCA representative serves.

We propose for action by the Executive Committee the following:

The Executive Committee of MCA accepts the recommendations of the Inter-Industry Task Force on Rail Transportation of Hazardous Materials as follows:

(1) The Task Force is to be discontinued as of the publication of its final report expected about June, 1979.

(2) The various unfinished program items of the Task Force are referred to the MCA Distribution Committee for follow-up and completion.

(3) The CHEMTREC operation of the MCA is to be under the general jurisdiction of the Distribution Committee. That Committee is requested to assume responsibility for future planning and overview of the CHEMTREC operations of MCA.

(4) The President of MCA is requested to establish and maintain frequent liaison with the President of AAR and to convene appropriate meetings of shipper and railroad executives in the future. Such meetings would be directed towards maintaining good communications with the railroad management group and reaching resolution of problems of mutual interest.



W. G. SIMERAL
Cochairman
Inter-Industry Task Force on
Rail Transportation of Hazardous Materials

WGS:kgk

CHRONIC HAZARD LABELING

As recommended by the Occupational Safety and Health Committee, tentative guidelines for the incorporation of chronic hazard information on labels in safety data sheets, prepared by the Task Group on Chronic Hazard Labeling, were used in a trial procedure in drafts of three revised safety data sheets: SD-19 Dimethyl Sulfate, SD-43 Acetaldehyde and SD-44 Chromic Acid. Member company users, member company manufacturers and members of the Occupational Safety and Health Committee were asked both to review the drafts and to give particular attention to the tentative guidelines and their application in the construction of the labels.

None of the 65 responses received to date recommend that chronic hazard information given in the text of a safety data sheet be excluded from a label. Eight companies responded with suggestions for changes in the guidelines or in the safety data sheet description of chronic effects. Changes recommended for the guidelines concerned either the use of more detailed definitions of the criteria for chronic effects or changes in the phrases used in the guidelines or in the label statements. Comments on the safety data sheet material ranged from suggesting less literal reports of chronic effects taken from the literature to urging that "critical level exemption" statements be developed to describe exposures below which chronic effects would be absent.

All suggested changes and comments have been considered by the Task Group on Chronic Hazard Labeling. Recommendations have been prepared for review by the Occupational Safety and Health Committee. At its meeting on March 15 this committee is expected to develop final recommendations to be presented to the Board of Directors at its meeting on April 10.

Action required: None, for information only.

SOLID WASTE DISPOSAL

Purpose:

To provide an interim report on the technological alternative for hazardous waste disposal.

Overview:

- (1) As we investigated technological alternatives we found other factors had to be considered before we could reach rational conclusions. For example:
 - (a) If acceptable sites are not available to practice proven technology -- the fact that safe technology exists is not a viable solution to the waste disposal problems.
- (2) We must maintain the viability of all the various technologies so we may choose the best and safest disposal method for individual circumstances.
- (3) We must proceed carefully to avoid duplicating the nuclear energy experience. The government has failed to resolve the nuclear waste problem after 30 years of effort and has paralyzed the industry.
- (4) The report you will receive today is a first rough draft which we are working to tidy-up.

I. TECHNOLOGY:

- (1) Technology exists to dispose of hazardous wastes in an environmentally safe manner. Methods include:
 - (a) Process related -- to reduce or alter hazardous character at source.
 - (b) Dispersed -- landfarm, ocean, deep well, etc.
 - (c) Containment -- fixation, encapsulation, vaulting, landfill.
 - (d) Treatment -- incineration, biological, etc.
- (2) Applied research is desirable to maximize operating continuity, equipment life, monitoring storage and material handling.
- (3) Two technologies warrant additional industry support:
 - (a) Incineration of waste at sea
 - (b) Engineered storage (vaulting)

Recommendations:

- (1) MCA should not fund basic research for hazardous waste disposal at this time.
- (2) MCA should explore a joint program with EPA to further the use of incineration at sea and vaulting.

Action:

- (1) EMC will prepare a proposal for Executive Committee.

II. POLITICAL-LEGISLATIVE CONSIDERATIONS

- (1) We believe actual or potential threats from

- (a) Oil spills
- (b) Hazardous chemical spills (Section 311)
- (c) Solid waste sites

require different steps to avoid future problems and correct recently recognized problems and redress injury.

Recommendations:

- (1) MCA support legislation that treat oil spills and hazardous chemical spills separately -- and to establish separate "super funds"
- (2) Urge EPA to implement 18 month study of Section 311 type hazardous substance spills as required by the 1978 amendments
- (3) Support RCRA amendments for:
 - (a) EPA inventory of old sites
 - (b) Funding for reclamation to be assessed on waste disposer
 - (c) Provide federal assistance to States for new waste disposal sites
 - (d) Redress of private/public injury

Action:

- (1) EMC will meet with Thomas C. Jorling - EPA Deputy Administrator, Water - to urge industry knowledge be incorporated into the study.

II. SITING

- (1) Need new land disposal sites
- (2) Difficulty in obtaining new, or continuing to operate licensed existing, sites is based on local public/political opposition
- (3) After 30 years -- government has not yet resolved nuclear waste disposal problem
- (4) State of Minnesota had to return several million dollars in grant funds to set up a regional disposal site when local residents stopped the program

Recommendations:

- (1) MCA evaluate a joint industry/government program to site, build and operate a regional waste disposal facility to prove its safety and worth. Quasi-public or industry-government consortiums may be useful ideas

Action:

- (1) EMC develop a specific proposal for Executive Committee consideration
- (2) This proposal would serve as a vehicle for discussions with appropriate business leaders and government officials

IV. RECLAMATION OF FAILING SITES

- (1) We have the technology to identify failing sites
- (2) We have the technology to mitigate the damage
- (3) Reclamation can be costly and extend over long periods of time

Recommendations:

- (1) MCA consider formation of a consulting team that would be available to investigate failure sites and propose action programs for reclamation. Group could be similar in nature to Chemtrec.

Action:

- (1) EMC develop a specific proposal for Executive Committee consideration. Problems associated with liability and cost recovery would be addressed.

V. PUBLIC RELATIONS PROGRAM

- (1) We believe a strong program to educate the general public on the need for safe waste disposal facilities is needed.

Second Interim Report
Special Committee on Chemical Incidents

Committee Activities

The MCA Special Committee on Chemical Incidents continues to pursue development of recommendations for response to legislative proposals concerning problems created by public exposure to hazardous materials.

The Special Committee recommends MCA adopt a policy which advocates creation of a funding mechanism to clean up abandoned waste disposal sites under specific conditions and with safeguards outlined in the following series of principles, and more fully detailed in the referenced attachments.

1. Spills of hazardous substances and spills of oil are significantly different and merit different legislative treatment. In the past, legislative proposals have linked oil and chemical spills, recommending identical sanctions and response mechanisms and blurring important physical, scientific, commercial and financial distinctions. MCA should oppose such linkage. (See Attachment 1)
2. Problems resulting from spills of hazardous substances are significantly different from those which result from improper land disposal, and therefore merit different legislative treatment. "Superfund" bills which address both spills and disposal fail to properly recognize such critical distinctions as purity versus amalgamation, random location versus specific site, surface water contamination versus leaching, and drastically differing potentials for impact on the national economy. MCA should oppose such bills. (See Attachment 2)
3. The problem of spills of hazardous substances is adequately addressed by existing law (Section 311 of PL 95-217, as amended, and related sections) and new law to control spills is unnecessary. MCA had an active and constructive role in the evolution of this body of law, which now provides: a fund of \$35 million to clean up and restore damage from spills; penalties for violations; recovery of fund monies from wrongdoers; defenses which suggest certain societal responsibilities; incentives for safe handling, prompt reporting and immediate cleanup; governmental action when spiller is unknown or does not act; an emergency fund where public health is endangered. MCA should oppose unnecessary new law in this area. (See Attachment 3)

4. Public policy must carefully distinguish between its treatment of disposal practices and problems before enactment of RCRA, and those after enactment. Enactment of the Resource Conservation and Recovery Act, PL 94-580, in 1976, created for the first time a system of controls over waste disposal: EPA issues permits for sites and oversees their safety; a manifest system ensures cradle-to-grave control of hazardous wastes; identifies disposers and the character of wastes; mandates financial responsibility on the part of operators.

Throughout the years prior to enactment of RCRA, society as a whole engaged in a variety of land disposal practices -- sound and unsound -- the results of which are only now being fully realized. Consideration in development of public policies and remedies must therefore be given to the scope of the problem, the many elements of public responsibility which exist, the evolution in scientific capability and disposal state-of-the-art, and difficulties in affixing liability in a just fashion.

MCA should seek to maintain appropriate distinctions between "prospective" and "retrospective" disposal policies.

5. A funding mechanism should be created to eliminate harm from abandoned waste disposal sites which are hazardous. Carefully focused and appropriately limited new law is needed to address problems created by disposal practices of the past. (See Attachment 4)

The fund should:

A. be derived in some significant degree from public monies, as well as from the private sector, so as to reflect the breadth of societal responsibility for creating the problem. (See Attachment 5) (NOTE: the SCCI is continuing to study specific funding concepts and mechanisms with the intention of developing a recommended approach which the chemical industry can advocate.)

B. be limited in its application to eliminating harm caused by abandoned disposal sites and preventing additional harm. (NOTE: restoration of sites to a pristine state, or repair of broad-scale ecological damage is not an appropriate usage of the fund. The SCCI continues its study of this area with the intention of making further recommendations.)

C. have an upper limit, an annual payout limit and a statutory life-span.

D. pre-empt the application of conflicting or overlapping state laws. (See Attachment 6)

* * *

Should the Congress create a superfund with application beyond abandoned waste disposal sites, the following principles should be observed.

7. Limits and circumstances of liability must be carefully structured. New law should not operate to penalize disposers for incidents beyond their control, to make adequate insurance unavailable, or to otherwise impinge on their rights or options. (See Attachment 7)

8. New law must avoid the concept of strict liability. Such a departure would be unfair, unworkable, alter traditional Federal/state relationships and impede the evolutionary processes of our judicial system. (See Attachment 8)

9. Subrogation rights must not be included in a Federal compensation plan. Such intervention by government would proliferate claims, interfere with tort law recovery, inflate the Federal bureaucracy, unwisely inject new considerations into settlements and is, in fact, unnecessary. (See Attachment 9)

IN TERMS OF "SUPERFUND" LEGISLATION, OIL SPILLS SHOULD
BE TREATED INDEPENDENTLY FROM SPILLS OF HAZARDOUS MATERIALS

The term oil refers to a uniform group of products whose physical qualities are relatively constant. Oil when spilled will normally float on water, will be predictable in dispersion and will be physically containable. Oil is removable under normal circumstances. On the other hand, whether a chemical will be a cause for concern when spilled depends on a variety of unique circumstances -- the exact chemical spilled, the amount spilled, the unique physical characteristics of the chemical, the hazards associated with such chemical, the nature of the receiving water. Removal or mitigation may be unnecessary or impossible. There are also great differences in transportation patterns. Over eight million barrels of oil are imported to this country on a daily basis. Volumes transported are very large and carriers are often foreign -- flag vessels who may not have sufficient insurance or assets to cover potential liabilities resulting from a catastrophic accident. Foreign vessels may be difficult to hold liable because of diplomatic complications. These particular problems may dictate creation of a larger fund than Section 311 currently contains.

As a general rule, chemicals are shipped in far smaller quantities than oil and most movement and potential for spills occurs on land where dispersion and removal are not significant problems. Even with water carriage the accidental spiller is identifiable and liable for costs of any necessary cleanup and mitigation. Although Section 311 of the Clean Water Act controlling hazardous spills has not been operational in the past, that program will go into effect this Spring and we believe 311 will provide adequate incentives for safe operation. If spills do occur, the spiller has sufficient financial incentives to react quickly and the legal responsibility to report the spill promptly. In the event the spiller does not initiate cleanup the U. S. Government or a state can respond and recover costs of cleanup from the spiller.

The problem of intentional spills (i.e., midnight dumping, vandalism) is not a 311 spill but rather improper disposal and should be treated in the same fashion as abandoned sites or closed sites where liable parties are not identifiable.

In terms of "superfund" legislation, solid waste disposal incidents should be treated differently from chemical spills under Section 311 of the Clean Water Act

Chemical spills normally involve "pure" substances as products in commerce. As such, they are closely regulated by DOT and at least one other Federal agency (e.g. EPA, FDA, CPSC, FTC) in terms of purity (quality), packaging, manner of transport and labeling. As pure substances, they normally will have "pure", definable effects when spilled into a receiving water

In contrast, solid waste in many cases will be an amalgamation of a wide variety of waste products. The waste will not be pure by any means and will not have such easily defined environmental effects as with the spilling of a pure chemical product.

Solid waste is concentrated at individual sites where collected and generally found in large volumes. Spills occur at random sites in finite quantities, with relatively small volumes involved in each instance. Consequently the potential for environmental impact and the problems associated with containment or mitigation arising from a spill is considerably less than in the case of solid waste incidents.

From an environmental standpoint, the concern in most cases with solid waste will be with respect to leaching potential and underground water contamination. In contrast, chemical spills occur on surface waters. The mitigation techniques and remedies for each situation necessarily will be very different. Because of such differences, Congress chose at the outset to deal with solid waste and chemical spills in different statutes (RCRA and the FWPCA, respectively). There is no sound reason to treat these very different matters under one legislative scheme.

In addition, the scope of spill superfund legislation related to "hazardous" substances identified and designated by EPA under Section 311 of the Clean Water Act (as amended) will necessarily impact on fewer industries than such legislation concerning solid waste disposal. The generators of solid waste comprise a broad spectrum of United States industry, requiring a broader funding base.

NEW LAW TO CONTROL SPILLS AND PROVIDE FUNDS
FOR CLEANUP OF HAZARDOUS SUBSTANCES IS NOT NEEDED

In the Second Session of the 95th Congress the Senate attempted to establish a superfund mechanism for response to spills of hazardous materials. At that time, regulations implementing Section 311 of the Clean Water Act designed to implement the spill cleanup program were enjoined by a Federal district court. The court subsequently ruled that EPA had failed in its attempt to identify harmful quantities of hazardous substances in conformance with the Act. As a result, the procedures for assessing penalties and recovering costs of cleanup incurred by the U. S. Government were invalid. Only the spiller, on a voluntary basis, or the revolving fund under Section 311(k) could provide monies for mitigation and cleanup of spills. EPA had no recourse against liable parties for civil penalties or cleanup expenses undertaken by the government. As such, the Senate Committee report (95-370) accompanying S. 1952, "The Clean Water Act of 1977" stated that most of the \$35,000,000 appropriated for Section 311(k) in 1970 had been expended on both oil and hazardous substances spills.

The 1977 amendments to the Clean Water Act reauthorized the appropriation to Section 311(k) such sums as may be necessary to maintain the fund at a level of \$35,000,000. In addition, legislative repair of Section 311 during the closing days of the 95th Congress will permit the 311 spill program to operate for the first time by the Spring of 1979. EPA will be able for the first time to collect penalties for violations and recover expenses for cleanup and restoration except when the spill results from: an Act of God, an act of war, negligence on the part of the U. S. Government or a third party, or where full recovery cannot be made because of limitation of liability or exhaustion of spiller's financial resources, whichever comes first. Each of these defenses suggests a societal responsibility and Federal revenues for cleanup have been authorized under Section 311(k).

Section 311 provides incentives for safe handling of hazardous substances and prompt reporting of spills. It encourages spillers to clean up immediately, and allows the Government to act when the spiller does not or is unknown. Currently the Section 311 list contains designations of 299 hazardous substances. However, the Administrator is directed in Section 311(b)(2)(A) to develop, promulgate and revise the list of elements and compounds which present an imminent and substantial danger to public health or welfare.

Nothing in Section 311 of the Clean Water Act affects or modifies the right of a person to pursue any legal recourse for damages caused by spills of hazardous substances.

BACKUP AUTHORITY IN THE CLEAN WATER ACT

Should any substance including those listed under Section 311 present an imminent or substantial danger to public health or welfare caused by its release into the environment Section 504 of the Clean Water Act allows the Administrator to prevent, limit or mitigate the effects of that release. Section 504(b)(2) authorizes such sums as are necessary to maintain a fund for emergency assistance at \$10,000,000. If the emergency is caused by a discharge subject to Section 311, monies expended under Section 504 are recoverable under Section 311(g). Cost of cleanup for emergencies caused by violations of Sections 301, 306, 307, 402 or 403 of the Clean Water Act are recoverable under Section 309, Federal Enforcement.

TREATMENT OF ABANDONED HAZARDOUS WASTES LANDFILLS BY
CREATION OF A FUND FOR MITIGATION AND CLEANUP

There are many abandoned landfills in the United States which may contain hazardous materials. This unsatisfactory situation has been created by common practices which society has employed throughout the nation's history. In general, these conditions have arisen from ignorance of potential damage and not as the result of criminal neglect. Our society has only recently come to realize some of the problems resulting from the commonly accepted disposal technology of previous years. It would be inappropriate, therefore, to develop a system that unduly penalizes or singles out elements of society to bear the burdens of correcting disposal practices of the past. A broad-based tax supplemented by state and Federal revenues should be used to generate funds to aid in the cleanup of dangerous landfills when there is no clearly responsible party to do so. Coverage should include disposal sites where more than one contributor has been involved and it is impossible to determine actual contribution levels of each disposer. The fund should also cover illegal disposal or "midnight dumping" where the dumper escapes detection or if apprehended, has insufficient assets to pay for cleanup.

A. Uses of the Fund: Non-RCRA permitted sites only

1. Mitigation and cleanup to stabilize the site to eliminate imminent hazard to public health and the environment

Examples --

- leachate entry into waterways aquifers or populated areas
- toxic fumes impacting populated areas

2. Analytical work to determine the extent and nature of the imminent hazard and to assure continued containment after stabilization

Examples --

- on-site testing as necessary to determine the presence of hazardous materials
- testing of waterbodies and aquifers to detect migration of suspect materials
- annual gas monitoring survey from previously identified sites

B. Potential Uses of the Fund Which Are Not Appropriate

1. Ecological and environmental restoration
2. Personal injury and third party damages
3. Research grants to study this or other problem areas
4. Post-RCRA permitted landfills. Under RCRA, site operators will conform to high technology standards and be required to maintain financial responsibility

PUBLIC FUNDING OF EFFORTS TO CLEAN UP ABANDONED WASTE DISPOSAL
SITES IS NECESSARY, EQUITABLE AND SOUND PUBLIC POLICY

Public funding, from both the Federal and State Governments, for the mitigation of damages to public health and the environment and cleanup of abandoned hazardous waste disposal sites, is appropriate for reasons of equity and sound public policy

1. Some current problems are the result of inadequate municipal or other publicly-owned hazardous waste disposal sites, some of which contain sludge and other wastes from publicly-owned waste water treatment plants or collection systems

2. It is clearly not equitable to place the full economic burden on today's companies, stockholders, and customers for the practices, failures or shortcomings of yesterday's industrial producers. The generators of today's hazardous wastes, many of whom are handling their waste in successful, acceptable ways, should not bear the whole cost of past practices. The present products, wastes and hazards all may be vastly different from those of abandoned sites. Furthermore, many of the problems of today were not known and were, in fact, unknowable in terms of the state of knowledge and art at the time of the original disposal.

3. The general prosperity and economic health of the nation and the state were beneficiaries of the economic activities that produced the hazardous wastes in the first instance, and public revenues should properly share part of the burdens imposed today.

4. In some instances, the wastes were generated as a result of government activities, government procurement contracts and the like, including war production efforts associated with the nation's wars. A Federal responsibility is clear in such instances.

5. The contribution of Federal and State revenues will be of significant benefit in assuring fiscal and operational accountability and responsibility. In the absence of such a contribution, there would be a clear tendency to overspend -- wasting resources -- since only someone else's money would be involved. For this reason alone the interest of sound public policy and fiscal control dictates significant contributions of public revenues.

6. A requirement for Federal and State financial participation will also be of significant benefit in establishing priorities with respect to cleanup and mitigation efforts. While the task may not be as large as is indicated by some early estimates, the task will exceed the resources -- both financial and technical -- that may be available at any one time, and a requirement for Federal and State contributions will aid in establishing the program's priorities

7. Hazardous wastes are not solely the products of the chemical industry; rather, they are an integral ingredient of our industrial society. Problems associated with abandoned hazardous waste disposal sites reflect more than 100 years of industrial development in the nation. Hazardous wastes have been generated by a wide range of industries, business concerns, government agencies and defense installation, municipalities and scientific facilities. The problem is societal in scope and the costs of coping with it should reflect its societal nature, just as the benefits of resolving the problems will inure to all elements of the country. Only through significant participation by general revenue funds, at both the state and national level, can this general responsibility be adequately discharged.

The Need For Federal Preemption of State Hazardous
Waste Disposal Legislation

Important legislation with respect to environmental cleanup and mitigation costs for pre-RCRA incidents must be aimed at providing an orderly mechanism for response. Only a comprehensive national program can accomplish this purpose. Superimposing a Federal superfund on top of a potential patchwork of state and Federal laws would complicate the hazardous waste problem rather than solve it. For these reasons and others set forth below, support for Federal legislation must be conditioned on preemption of state laws and, as appropriate, coordination of relevant Federal laws and programs.

Preemption of state programs is essential because:

1. Separate state funds could result in multiple charges or taxes on the same product;
2. Separate state funds would result in duplicative and wasteful administrative expenses;
3. The impact of #1 and #2 above would create unnecessary and unwarranted inflationary pressures creating wasteful government spending which taxpayers resent;
4. Procedures for uniform administration, financial responsibility requirements and fee collection would provide the necessary stability which permits and encourages business planning and investment, whereas separate state laws would vary and serve as a disincentive to industrial investment in new and expanded facilities and job creation;
5. Separate state funds and laws would not increase the level of protection but would serve to create inequities;
6. Damages from hazardous waste disposal do not recognize state boundaries;
7. Separate state laws individually crafted to meet local considerations would encourage forum shopping;
8. Expensive and time-consuming litigation because of conflicting, overlapping and inconsistent state laws is undesirable. Industry should be encouraged to utilize its resources to solve the problem of waste disposal in cooperation with Federal authorities;
9. State interests would be fully protected by a uniform Federal program;

10. The test should not be whether state laws are strengthened or weakened by Federal preemption of such laws, but rather whether the environment is protected and interstate and foreign commerce is simultaneously encouraged to flourish under uniform guidelines resulting in a healthy and vigorous national economy.

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WASTE DISPOSAL SUPERFUND LIABILITY ISSUES

- I The disposer should be relieved from liability for incidents which were beyond his control Although all Federal legislation to date with regard to liability for oil pollution ^{1/} supposedly establishes "strict" liability, each act provides defenses which relieve a spiller of some if not all liability. Accordingly, this is not a new or innovative concept. Further, the most recent legislation (Outer Continental Shelf Lands Act Amendments of 1978) provides for considerably more defense than those provided for in earlier acts ^{2/} (i.e., Clean Water Act - 1972 and Trans-Alaska Pipeline Act - 1973). The recent trend to permit traditional defenses to liability probably results from the realization that the liability will be uninsurable without them, thereby precluding any owner or operator incapable of self-insuring from engaging in the covered activities. There should be no liability to the extent the incident is caused by (1) an act of war, (2) an act of God, or (3) an act or omission of a third party. This language would provide for a comparative negligence standard and reflects the majority rule in this country (in most cases by statute). It avoids the harsh and inequitable results of a contributory negligence defense where one party is slightly negligent as compared to a catastrophe such as war or an earthquake or to the gross negligence of the other party. With regard to a particular claimant, the defense should apply both to the incident and the economic loss -- i.e., if the claimant's negligence caused the incident or the environmental damage, a comparative negligence standard would apply; if the claimant's gross negligence or willful misconduct caused the incident or the environmental damage, the discharger would have no liability. Therefore, if a particular claimant did not cause the incident but did contribute to his loss, he should be barred from recovery. For example, an individual who ignores the warning signs at a hazardous waste disposal site and deliberately excavates or alters the dumpsite should not recover for resulting damages to his adjoining property

^{1/} Clean Water Act, Trans-Alaska Pipeline Authorization Act, Deepwater Port Act, Outer Continental Shelf Lands Act.

^{2/} There is no liability where an incident is caused solely by (1) Act of War, (2) unanticipated grave natural disaster or other phenomenon of an exceptional inevitable and irresistible character the effect of which could not have been prevented or avoided by the exercise of due care or foresight. Similarly, there is no liability as to a particular claimant where the incident or economic loss is caused by the claimant's gross negligence or willful misconduct. As to ordinary negligence, the comparative negligence principle should apply.

- II The disposer's liability should be limited to a specified amount. As with all Federal liability legislation, an upper limit should be placed on the amount of damages to which a discharger must respond in the absence of his gross negligence or willful misconduct. The limit should reflect degree of risk posed and insurable limits. Again, if the amount is uninsurable, thereby making self-insurance the only alternative for the excess liability, many businesses will be precluded from engaging in the covered activity.
- III The disposer should have primary responsibility for cleanup. Following the precedent set by Federal Water Pollution Control Act in 1972 (Sec. 311), all Federal liability legislation imposes this responsibility. Since the discharger is liable for such costs, he should be able to exercise some controls over them. Of course, if the cleanup is not initiated promptly or is not conducted diligently according to standard cleanup procedures, a Federal coordinator should be able to contract for outside help after making appropriate findings about the inadequacy of cleanup by the discharger.
- IV The disposer should be entitled to recover his costs of cleanup where he is entitled to defense or his costs exceed his liability limit. The discharger should be treated no differently from any other claimant when he has a defense to liability or his liability limit is exceeded. Again, this follows a precedent set under Section 311 of the Clean Water Act 3/.
- V The claimant should present his claims directly to the Fund when the disposer denies liability or has paid damages up to his liability limit. The Federal Acts which provide for this party damage claim 4/ permit a claimant to present his claim directly to the Fund or to commence legal action against the discharger whenever the discharger denies liability for any reason. Such election on the part of the claimant is exclusive and irrevocable.

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- 3/ Owner/operator pays removal costs measured by the U.S. Government and then pursues by right of subrogation, recovery from third party. If an act of war or act of God, U. S. Government negligence defense or claim in excess of liability is involved, the owner/operator must clean up and then sue the Fund in the Court of Claims to recover its costs.
 - 4/ Liability under the Clean Water Act runs to the U. S. Government only.

THE FEDERAL GOVERNMENT SHOULD NOT ENACT A
STRICT LIABILITY TORT LAW SYSTEM AS A PART OF A COMPENSATION PROGRAM

A Strict Liability Standard Would Be Unfair And Unworkable: Traditional tort liability requires a finding of either negligence or a defective product. Both standards require a finding of a breach of social responsibility. Under both standards a company is liable only if the avoidance of the harm was reasonably within its control. A strict liability statute would omit this basic element of fairness found in the negligence and products liability area. To change the law now would create uncertainty with respect to past conduct, making the purchase of insurance difficult if not impossible, and would result in liability being imposed for past conduct which was proper at the time. In a strict liability context the party held liable might be one who could not have avoided the harm.

A Federal Tort Statute Would Impose Federal Regulation In An Area Traditionally Reserved To The States Under Our Federal System: With few exceptions (e.g. nuclear power plants, admiralty) tort law -- the responsibility of a member of society to avoid harm to others -- has been determined by the states. A Federal intrusion into this area of states rights would be a major modification of political responsibilities in our Federal system. This should not be undertaken lightly and should be avoided when unnecessary.

Tort Law Is Traditionally A Matter For The Judiciary, Not The Legislature: The evolution of tort law from intentional torts, through the law of negligence, to the present system has been accomplished by the judiciary of the several states. This has allowed trial and error and an application of justice to the factual issues before the courts. Legislation would limit the ability of the courts to continue the evolutionary process as the need arose. Federal, as opposed to state, legislation would make all jurisdictions uniform preventing the trial and error system which permits one state to adopt the best features of a sister state system while rejecting others.

NOTE -- This paper does not deal with the issue of negligence per se currently imposed under traditional tort law, where a party who breaches a statutory obligation which leads to another party's injury is held liable on the basis of causation without regard to a specific showing of negligence. In those circumstances, negligence is inferred by the statutory obligation or duty which has been breached. This is unlike strict liability, where neither actual nor inferred negligence is a factor in assessing liability, but merely a causative relationship to the injury alleged.

A FEDERAL COMPENSATION PROGRAM SHOULD NOT
INCLUDE SUBROGATION RIGHTS

Subrogation Could Lead To Multiple Claimants Asserting Different Legal Rights or To Mutiplicity of Lawsuits: The issue of subrogation only applies in the area of private injuries and not for measures involving the cost of clean-up or mitigation of environmental contamination. Simply stated, subrogation involves one party (e.g. the Federal government) standing in the shoes of another party (e.g. private individual) and asserting such party's rights. In the case of environmental cleanup and mitigation costs, the government is itself the party in interest on behalf of all citizens generally.

Unless a Federal program compensated for all private injuries including the more speculative types (e.g. loss of future profits and advantageous business opportunity, pain and suffering, loss of consortium, decreased earning capacity, damage to aesthetic or historic property value), two claimants with potentially diverse interests and legal rights would result -- namely, the government under subrogation rights and the injured party for claims not yet compensated. Additionally, if the subrogation claim was based on strict liability and the private claim on traditional negligence concepts, the jury would be confused by the different legal standards to be applied.

If the government were to consider compensation for all private injuries, it would become embroiled in a morass of issues and claims requiring enormous staff and huge fund from which to award claims.

Separate trials to avoid potential conflict would aggravate already crowded court problems and needlessly subject the alleged wrongdoer to duplicative defense costs and the injured party to duplicative time spent in connection with trial preparation and prosecution.

Subrogation By The Federal Government Would Interfere With The Victims' Recovery Under Tort Law: A plaintiff in a tort action must make numerous strategic and tactical decisions before and during litigation. For example, the plaintiff must determine the court in which to bring his action, the parties to be sued, the timing of the commencement of suit, the selection of witnesses, settlement and trial tactics. A Federal compensation program should not interfere with or inhibit a victim's prosecution of his tort claim. Yet we must assume that the government agency and the victim will not always concur on the proper trial strategy. It follows that an independent right of subrogation

st interfere with the victim's right to recover in a tort case.

Subrogation Rights Will Increase The Federal Bureaucracy: In order to prosecute a subrogation claim the government agency involved would require a claims staff similar to an insurance company's including investigators, claims evaluators, trial lawyers, a panel of expert witnesses (chemical, medical, and engineering). To be effective the trial lawyers would need a knowledge of local court rules and nature of the jury panel. All of this would be an unnecessary duplication of the victim's attorney's litigation skills.

Subrogation Invites Improper Political Or Policy Considerations: A victim will ordinarily pursue, settle, or withdraw a claim against a third party on the basis of economic considerations balancing the probability of success or failure in the suit. The government agency may be influenced by factors unrelated to tort liability such as political pressure from the press or citizens groups, a desire to punish the purported wrongdoer, or in some cases political or professional ambitions. A tort claim ought not to be pursued or resolved for any of these reasons. A tort claim should be limited to a consideration of the harm and the legal responsibility.

Subrogation is Unnecessary: The compensation program can satisfy the government's need to be reimbursed for its compensation when appropriate in another manner, not so disruptive as subrogation. The government agency could be given a lien on any recovery by the victim in a tort law action. If the victim recovered, the government would be reimbursed. The lien would not discourage suits by victims because the government program will probably not compensate for such non-monetary factors as pain and suffering. To further encourage suits by victims the lien recovery could be used to satisfy a pro-rata share of litigation expenses and the program could provide that the lien applied only to a percentage of the recovery (e.g. 80%), permitting the victim to recover something even if his settlement was less than the lien.

Status Report on Litigation and Administrative Proceedings

1. Resource Conservation and Recovery Act (RCRA) Rulemaking

On February 22, 1979, a draft of MCA's comments on EPA's proposed regulations to implement Sections 3001, 3002, and 3004 of the Resource Conservation and Recovery Act (RCRA) was mailed to all Solid Waste and Environmental Contacts. The draft comments should assist all member companies prepare appropriate comments for submittal to EPA by March 16, 1979.

On February 22 and 23, 1979, MCA made three statements at EPA's Washington, D.C. public hearings on the proposed RCRA implementing regulations. Dr. G. V. Cox, Vice President and Technical Department Director, presented a statement on the proposed regulations to implement Section 3001. R. Sobel of Allied Chemical Corporation and MCA's RCRA Task Group Leader presented a statement on the proposed regulations to implement Section 3002. G. J. Hanks of Union Carbide Corporation presented a statement on the proposed regulations to implement Section 3004.

2. Resource Conservation and Recovery Act Intervention. The

Citizens for a Better Environment have filed a petition with the United States Court of Appeals for the District of Columbia Circuit seeking review of Judge Gesell's January 3, 1979, order that approved EPA's proposed schedule for developing regulations to implement RCRA. Outside counsel advises that this challenge appears frivolous.

3. Prevention of Significant Deterioration Regulations PSD.

Although the United States Court of Appeals for the District of Columbia Circuit heard oral arguments on October 10, 1978, on the first phase of the litigation (i.e., effective date of the regulations), we are still awaiting a decision on this issue.

On the second phase of the litigation (i.e., substantive issues presented by the PSD regulations), MCA's outside counsel is preparing a brief responding to the positions raised in the environmentalists' brief. Outside counsel will also prepare a brief to be submitted to the court by April 1, 1979, that will reply to positions raised by EPA (i.e., EPA response brief is due March 1, 1979). As of this date, oral arguments are still scheduled for April 19 and 20, 1979.

4. Nonattainment/Emissions Offset Interpretative Ruling. On January 26, 1979, MCA outside counsel submitted a petition with the United States Court of Appeals for the District of Columbia Circuit challenging EPA's revision of its Emissions Offset Policy. We have offered all member companies an opportunity to be listed with MCA as party-petitioners. Companies interested in being listed should contact us by no later than March 9, 1979. It now appears that several other trade associations will be joining the subject litigation but they will rely on MCA to be the lead party in the litigation.

On February 15, 1979, MCA submitted written comments on the first three issues EPA opened for public comment. MCA will be submitting written comments on the remaining issues by March 19, 1979. The Agency has not committed to revise its Interpretative Ruling based on the public comments it receives. Nevertheless, we believe submitting comments is a necessary part of our litigation strategy.

5. Pretreatment Regulations. MCA and EPA, after a series of negotiating sessions, have been able to tentatively resolve most of the concerns we have identified in EPA's general pretreatment. The major areas that are still unresolved concern how the Agency will handle the question of "bypasses" and the question of variances for fundamentally different factors. The Agency and MCA have agreed to agree on developing a formula(s) to resolve this issue. All parties agree that the variance question may have to be litigated separate from the other general pretreatment issues. As a result, on February 23, 1979, outside counsel and EPA's counsel filed a petition with the United States Court of Appeals for the District of Columbia Circuit requesting that the briefing scheduled be deferred until September 1, 1979. In the petition, the court was advised that all parties hoped all resolvable issues could be finalized by March 30, 1979, and that EPA could propose the agreed-to revisions by July 1, 1979. If the final regulations are essentially the same as the agreed-to revisions the litigation would be limited to the variance question. At this time, we feel MCA will probably take a relatively low key role in this phase of the litigation to assure that the chemical industry's concerns are adequately represented. Primary litigants would be NRDC, the American Paper Institute, and EPA. It is our understanding that our member companies are not that dissatisfied with what EPA promulgated on the variance issue.

6. Photochemical Oxidants/Ozone Ambient Standard Revision.
See separate status report.

7. National Pollutant Discharge Elimination System (NPDES)
Revised Regulations. See separate status report.

8. EPA's National Emission Standards for Hazardous Air
Pollutants (NESHAPS) Proposed Work Practice Standards. On February 9,
1979, a draft of MCA comments and an alternative work practice
standard for NESHAPS pollutants was forwarded to Counsel for the
American Industry Health Council (AIHC) soliciting comments on our
most recent draft. As of this date, we have only heard that AIHC
believes that submittal of our comments and alternative proposal
should be further delayed pending EPA's imminent promulgation of
its generic air carcinogen policy and an advance notice of proposed
rulemaking (ANPR) on a work practice standard. In addition, AIHC
expressed a concern that Section 112 of the Clean Air Act does not
provide the Agency with the authority to issue regulations establishing
a general work practice standard for hazardous air pollutants under
Section 112. No substantive comments on the technical aspects of
MCA's alternative approach have been received from AIHC.

On February 23, 1979, we learned that EPA's Assistant
Administrator for Air Matters had returned the general carcinogen
policy document and the ANPR to the staff at Research Triangle Park
for extensive reworking. It is estimated that this rethinking of the
policy and the work practice standard will result in a two-to-three
month delay in publication of said documents.

It has been MCA's intent in submitting appropriate comments
on EPA's draft work practice standard and an alternative MCA program
to make very clear that MCA is not conceding that the Agency has
the legal authority to develop such a program under Section 112.
Nevertheless, we are convinced that the Agency management is
committed to developing such a program under Section 112 and for
the State Implementation Plans under Section 110 of the Act. As a
result, we believe that such MCA's alternative work practice standards
should be submitted to EPA, with appropriate caveats, in order to
assure that if EPA develops a work practice standard it is technically
and economically feasible.

9. Benzene Decision. The Supreme Court has granted the petition of OSHA and the unions for a writ of certiorari to the Fifth Circuit for review of the benzene decision which imposed a risk/benefit analysis requirement on OSHA. Thus the stage is set for a precedent-setting Supreme Court review of the risk/benefit concept. The unions are further requesting an expedited hearing schedule which will permit a Supreme Court decision by the end of this term which ends in July 1979. MCA will be represented before the Supreme Court by John H. Pickering and Andrew T. A. Macdonald of the Washington, D. C. law firm, Wilmer, Cutler & Pickering.

10. TSCA Section 5 Premanufacturing Notification Rules. The Section 5 Task Group of MCA's Chemical Regulations Advisory Committee (CRAC) continues to work with Peter Barton Hutt, Covington & Burling, to develop comprehensive comments on EPA's proposed Section 5 rules. In addition, there will be a news conference on March 6, and an MCA panel will testify at an EPA hearing in Washington on March 7. Outside counsel and the CRAC Committee continue to work on a short form proposal to offer in place of the proposed regulations.

11. Coal Conversion Regulations. See separate status report.

12. Department of Commerce Draft Uniform Product Liability Act. See separate status report.

Attachments

EC - 3/13/79

CMA 062322

EPA's Promulgation of Revised National Ambient
Air Quality Standards for Photochemical Oxidants
Ozone Under Section 109 of the Clean Air Act.

On February 8, 1979, EPA revised the National Ambient Air Quality Standards for Photochemical Oxidants pursuant to Section 109 of the Clean Air Act, as amended. The Agency relaxed the primary and secondary standards from 0.08 ppm to 0.12 ppm and changed the chemical designation of the standard from photochemical oxidants to ozone. Although the Administrator has provided some relief in the revised standards, the existing scientific data clearly supports a further relaxation of the standard. In addition, a proper evaluation of the data indicates that further relaxing the ambient standard would still provide an adequate margin of safety to protect the public health.

The Environmental Management Committee and its Air Pollution Effects Task Group have requested that MCA initiate a judicial challenge based on the failure of the Agency to adequately evaluate the existing scientific data and adopt a more lenient ambient ozone standard. This matter has been discussed with outside counsel (John H. Pickering and Andrew T.A. Macdonald of the Washington, D.C. law firm Wilmer, Cutler & Pickering) and they concur that there are valid issues ripe for appellate review. The General Counsel has reviewed the matter and concurs with the EMC and Task Group recommendation.

Accordingly, MCA will be represented by Lloyd N. Cutler and Andrew T.A. Macdonald of Wilmer, Cutler & Pickering. The legal cost for this litigation will be covered by MCA's 1979-1980 budget.

Outside counsel advises that MCA's petition should be filed with the United States Court of Appeals for the District of Columbia Circuit no later than mid-March to assure that we are involved early enough in the litigation to assume an active role among the industry petitioners. In this regard, the American Petroleum Institute has already filed its petition with the court and will assume the lead party role among the industry petitioners. In addition, a number of environmental groups (e.g., NRDC, EDF) may also file challenges. A number of member companies are expected to join MCA in this appellate litigation.

Action Required: None, Supplied for information only.

National Pollutant Discharge Elimination
System Revised Regulations

On November 20, 1978, MCA submitted to EPA extensive comments on the Agency's proposed revisions to its National Pollutant Discharge Elimination System (NPDES). A copy of MCA's comments was transmitted to all member companies. We were advised at the February 9, 1979, meeting of the Washington Environmental Coordinating Committee that EPA plans to promulgate final revised regulations sometime early in March.

In addition, we have been provided the most recent draft of the final revised NPDES regulations. As anticipated, the revised regulations contain a number of provisions that are objectionable to industry on both legal and technical grounds. Although there is a remote possibility that several of the more objectionable provisions will be modified before the NPDES regulations are ultimately promulgated, we expect the Agency to promulgate its revised NPDES regulations essentially as presented in the most recent draft version. As a result, the Environmental Management Committee and its NPDES Task Group have requested that MCA provide outside counsel to assist in the preparation of a contingency litigation strategy on the assumption that the final regulations will fail to adequately respond to the concerns raised in MCA's November 20, 1978, comments.

The General Counsel has reviewed this matter and concurs with the EMC and Task Group recommendation. The issues presented by the forthcoming revised NPDES regulations are complex and of great significance to the chemical industry. Accordingly, Theodore L. Garrett of Covington & Burling will be outside counsel on this matter. Project financing has been included in the budget for 1979-1980 for challenging the revised NPDES regulations.

PRIVILEGED MATERIAL REDACTED

PRIVILEGED MATERIAL REDACTED

Action required: None, supplied for information only.

Coal Conversion Regulations

John M. Henske, president, Olin Corporation, testified on March 2, 1979, on behalf of MCA regarding the Department of Energy's proposed regulations for new and existing facilities under the Powerplant and Industrial Fuel Use Act of 1978. At the same time, MCA filed a more detailed written statement on the new facilities regulations. In addition, written comments on the existing facilities regulations will be submitted by the March 26 deadline.

MCA remarks emphasized that in a number of key respects the regulations proposed by the Department of Energy exceed the authority granted by Congress under the Fuel Use Act. Following are some highlights:

1. New Facilities

Economic Exemption - Congress adopted an economic exemption to the Act's prohibitions on the use of oil and natural gas. This exemption is to apply if the cost of burning coal or another alternate fuel would "substantially exceed" the cost of using imported petroleum in the facility. The Department of Energy, however, has virtually eliminated this exemption. A facility would have to show that the use of coal would cost at least 50 percent more than the use of imported oil. This economically unrealistic standard is made even worse by the way the costs are to be computed (7 percent discount rate estimated as the cost of capital and a presumed 40 year venture life).

2. What is an MFBI?

Congress intended by the Fuel Use Act to regulate only large facilities (Major Fuel-Burning Installations). The DOE's proposed regulations go far beyond this. They cover for purposes of aggregation all facilities located at the same site regardless of their size. Moreover, the ridiculous presumption is made that "at the same site" means all units within 10 miles of each other.

3. Aggregation of New and Existing Facilities

New and existing facilities would be added together to determine whether the 250 million Btu aggregation threshold has been reached.

4. Fuels Decision Report and Filing Fees

A Fuels Decision Report must be filed when petitioning for an exemption. This report demands an immense amount of information, much of it only peripheral to the statutory criteria for an exemption. A filing fee of \$25,000 - \$85,000 must accompany an exemption petition.

5. Existing Facilities

Congress authorized DOE to order an existing unit to convert to coal or an alternate fuel only when it determined that the facility had the technical capability to do so, and that it is financially feasible. DOE says it is financially feasible to convert unless the cost of using another fuel is 50 percent higher than the cost of using imported petroleum. This effectively nullifies the statutory exemption. Meanwhile, the test of technical capability includes that a loss of 25 percent of a unit's rated capacity will not be considered substantial. Most companies would certainly view a one-fourth loss in rated capacity as substantial.

Department of Commerce
Draft Uniform Product Liability Act

On January 12, 1979, the U. S. Department of Commerce published a draft Uniform Product Liability Act. The final version, scheduled for completion by June of this year, will serve as a model law for use by the States.

MCA's Special Committee on Tort Law Reform submitted extensive comments on the Department of Commerce proposal. In general, the Committee felt that the Act offered certain improvements but, nevertheless, was deficient in numerous areas of importance to the chemical industry.

The following are a few highlights:

1. Relevance of the State of the Art

Under the draft statute, evidence that a product conformed with state of the art at the time of manufacture raises a rebuttable presumption that the product was not defective. MCA recommends that the state of the art defense should establish a conclusive presumption that the product was not defective.

2. Relevance of Compliance with Legislative or Administrative Standards

If the product seller has complied with a rigorous legislative or administrative safety standard, the proposed law creates a rebuttable presumption that the product was not defective. MCA urges that compliance establish a conclusive presumption.

3. Statute of Repose

The statute contains a presumption that the useful safe life of a product is 10 years, but that presumption is rebuttable weighing such factors as the effect of wear and tear on the product, the effect of climate and other local conditions on the product and the policy of users as to repair and maintenance. MCA recommends that the 10 year presumption be made conclusive unless the manufacturer warrants to the contrary.

4. Pharmaceutical Exception

The statute of repose contains a so-called "pharmaceutical exception" for products that cause harms that manifest themselves or cause perceptible harm only through prolonged exposure. MCA recommends further study of the issue with respect to the long-term effects of hazardous materials, and warns

that the proposed exception creates the problem of treating certain industries differently for purposes of determining liability when uniformity of treatment is more desirable.

5. Nonmanufacturing Product Sellers

Under the draft statute the nonmanufacturing product seller generally would be free from liability where he does not have an opportunity to inspect the product for defects. MCA believes this section is overly protective of the nonmanufacturing seller and urges its deletion.