SOLID WASTE LEACHING, HYDRAULIC CONDUCTIVITY TECHNICAL GUIDANCE AVAILABLE

Two technical guidance manuals, "Solid Waste Leaching Procedural Manual (SW-924)" and "Soil Properties, Classification, and Hydraulic Conductivity (SW-925)" are available from EPA to help hazardous waste handlers identify acceptable technologies to comply with the RCRA hazardous waste regulations.

EPA announced the availability of the two documents in the March 27 Federal Register and asked for comments by June 25. The leaching procedure manual analyzes a batch leaching procedure for laboratory use with various kinds of waste to predict the quality and composition of leachate from certain wastes under field conditions, EPA said. The hydraulic conductivity manual describes 16 different techniques for the measurement of hydraulic conductivity or permeability of saturated and unsaturated soils, EPA said, and provides information on soil classification, soil water, and soil compaction.

Copies of the manuals may be reviewed at EPA headquarters or regional office libraries, EPA said. Limited copies are available through the RCRA hotline, (800) 424-9346, toll-free, or in the D.C. area (202) 382-3000.

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COURT DENIES EPA PRE-CERCLA CLEAN-UP COSTS IN WADE CASE

The U.S. District Court for the Eastern District of Pennsylvania decided March 23 in the Wade case that EPA is not entitled to recoup clean-up costs incurred before the passage of Superfund. This is the second decision against EPA recovery of pre-Superfund costs, the first being the NEPACCO case (See Feb. 8, Page 13).

The court reaffirmed parties' liability for actions taken prior to Superfund passage but said reimbursement of clean-up costs prior to Superfund passage are not recoverable. An EPA attorney estimated pre-Superfund costs could exceed $100 million nationwide for actions taken by EPA under RCRA and the Clean Water Act and by the Federal Emergency Management Administration.

None of the court decisions, however, have ruled out non-Superfund options for recovery of these costs, he said. The Clean Water Act includes specific provisions for recovery and the general body of law provides for restitution as well, he said. EPA is already pursuing a common law cost recovery claim in the Love Canal suit, he added.

The court opinion in the Wade case said a broad interpretation of Superfund is clearly intended and recovery of pre-enactment response costs would further the intent of the statute, but concluded there is no statutory provision to support such a finding. The court rejected EPA's claim for the pre-Superfund costs but also rejected defendant's arguments to deny recovery prior to promulgation of the National Contingency Plan.

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RELATIVE SAFETY PROPOSED AS ZERO RISK ALTERNATIVE AT FOOD POLICY SESSION

A relative safety concept in place of the "zero risk" in the Delaney Clause was proposed this week by Dr. Charles M. Benbrook, Executive Director, Board on Agriculture, National Academy of Sciences, to the National Food Policy Conference meeting in Washington, D.C.

His proposal is an adaptation of the EPA's "bubble concept" used in Clean Air Act regulations.

Doubting the success of adopting an acceptable level of risk approach, Dr. Benbrook suggested: "Perhaps we could instead structure regulatory strategies based on the more narrow goal of reducing risks below the levels associated with current chemical use patterns. One such strategy might involve an exception to the Delaney clause whereby the use of a relatively less potent carcinogen would be permitted, but only contingent upon the elimination through regulatory action of another, more hazardous carcinogen. Such an approach could be structured and administered in a way to address head-on the regulatory catch-22. . . In light of all the scientific uncertainty in this area, such an interim approach might facilitate at least some progress toward a safer food supply until scientific advances allow us to develop a more definitive resolution of these critical issues."

The catch-22 in the Delaney clause was described by Dr. Benbrook as follows: "The EPA is authorized to suspend an old chemical like EDB if the risks associated with its continued use outweigh the benefits, taking into account the availability of other control alternatives. Yet, many promising new pesticides that are unequivocally safer and more efficacious than older products like EDB are denied tolerances, and hence registration, because of the Delaney clause. Accordingly, EPA finds itself unable to cancel some of the more nasty older products, even in the face of disturbing new data, because there are no available alternatives. As a result, our laws are actually prohibiting regulatory actions that would lead to unequivocal improvements in public health."

He told the Conference that "fashioning creative ways to undermine the Delaney clause has become a growth center within the legal profession. Ad hoc strategies adopted to resolve individual regulatory dilemmas have produced over the years a patchwork of policies. Food additives and pesticides are regulated differently according to when they were first introduced, as if, like wine, they improve with age. Different classes of compounds are subjected to varying degrees of scrutiny, and are regulated in accordance with different standards. Taken together, this body of law is itself a hazard to public health and is, moreover, inequitable and inefficient in its impact on the regulated community."

Dr. Benbrook predicted major FIFRA changes and revisions of the Federal Food, Drug and Cosmetic Act. He said the changes would happen "soon," but added, "I have yet to see, however, any really encouraging new approaches that offer a realistic hope for compromise and consensus." Later in his speech, "Food Safety: Some Policy Issues and Options for 1984," Dr. Benbrook predicted action on amendments to the two Acts perhaps as early as the first session of the next Congress.

"The key to breaking the legislative log-jam is for all the protagonists to recognize that the law simply is not working adequately," he said, and that "as a result, society is needlessly subjected to both excessive health risks and regulatory costs." Dr. Benbrook observed:

> "Any changes in the laws will be exploited to the full extent possible by concerned constituencies, exposing the FDA and EPA to major new administrative and judicial pressures. These pressures, in turn, can divert considerable amounts of resources from the basic mission of the agencies. If the changes are poorly defined and purposefully somewhat open-ended, I predict that there will be a series of extremely contentious, protracted regulatory battles that could substantially alter our current food safety policies."

He labeled pesticide contamination of ground water as an emerging issue, and asserted that the central question in dealing with it is "whether the EPA will, as a matter of policy, sanction the presence of pesticides in groundwater by establishing tolerances for pesticides in potable water."

Dr. Benbrook noted a past observation of EPA Administrator Ruckelshaus that "the agency may some day have to adopt generic pesticide cancellations in cases where EPA determines no currently available product can be used without posing an unreasonable risk of groundwater contamination." He predicted that groundwater contamination policy decisions would not be made until after the election.

EPA Scored by Dr. Benbrook For Not Getting Data Gaps Filled Faster

There will be other ethylene dibromide (EDB)-like cases, Dr. Benbrook said, because EPA has not yet "required pesticide registrants to fill the gaps in the toxicological data base on dozens of older chemicals. Since a chronic feeding study takes some four years to design, conduct, and evaluate, there will be several years' delay in completing the review of these older products. Indeed, the leisurely pace at which EPA has approached the tasks of filling data gaps has been one of the most significant, recurrent topics of criticism heard in congressional hearings on the pesticide program. You can not re-evaluate, or reregister, or regulate an older pesticide without data. Hence, the pace of the data call-in program determines how quickly the EPA can complete its review of older pesticides."

His speech, delivered March 26, frequently referenced EDB, once in the following "lesson:"

> "It takes a great deal of public concern, inevitably brought about in part because of considerable media coverage, to create the political pressure needed to compel the EPA to take controversial regulatory actions. The pressure is needed not because the EPA is bashful or unconcerned about the environment, but because the EPA operates within a highly political arena with a rather limited capability to overcome entrenched institutional and political opposition.
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> "Let the record clearly show that political pressures outside of EPA's pesticide office were the primary cause of six plus years' delay in suspending EDB. Throughout the last decade, involuntary pesticide suspensions and cancellations have been stubbornly resisted by chemical manufacturers and some user groups. Furthermore, Congress has periodically punished the EPA for unpopular actions by building into the regulatory process new hurdles for EPA to pass through or over. These procedural changes have strengthened the hand of those within the Congress and U.S. Department of Agriculture trying to defend pesticides against regulation" (See March 21, Pages 2, and 13).

He used EDB (See separate stories) to document the "fallacy" that "the eagerness of the press to pursue stories on pesticides and environmental health hazards will assure that any important health threat is thoroughly investigated and acted upon." Dr. Benbrook continued:

> "Wrong. The hazards of EDB were widely known and well documented for years before regulatory action was finally taken. There are simply too many chemicals in the environment, and too many unsuspected ways they behave in food, the air, or water to place too much faith in a diligent press corps. They can be counted on to occasionally, but not routinely, expose the failings of indecisive regulatory bureaucracies. Furthermore, the press and public simply cannot handle more than one 'chemical of the month.' Depending on your point of view, there are too many chemicals or not enough months."

His speech, which noted that the views were his own, not the Board's, indicated the possibility that the risks of methyl bromide and the effects of agriculture of doing without it might be more significant than EDB (See March 14, Page 33).

Seeming to see methyl bromide as April's chemical, Dr. Benbrook warned, "Less is known about the presence of methyl bromide in the food supply because it has not yet been subjected to the sort of intensive monitoring carried out recently on EDB. If serious doubts are raised about methyl bromide, the impact on the agricultural industry and public health could be much greater than we have just experienced with EDB. . . To further complicate matters, other registered alternatives for EDB and methyl bromide are also thought to pose substantial, but in most cases, poorly characterized health hazards" (See separate story).

He said that current pesticide regulation does not provide the theoretical incentive for the development of safer control techniques as the more hazardous ones are removed from the market.

"As long as the EPA takes seven years to regulate an EDB, only to restart the clock again for methyl bromide, and so on, the incentive to innovate through investments in product development is hollow and not very compelling," Dr. Benbrook declared, continuing:

> "It is almost impossible to attend a meeting of some aspect of agricultural policy without hearing that the ingenuity and productivity of U.S. agriculture is the envy of the world. Still, nearly every major pesticide regulatory action taken during the last decade has been resisted through warnings of crop failure and massive economic losses. Fortunately, I know of no case where these warnings came to pass."

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EPA ESTABLISHES "DELETION CATEGORY" FOR SUPERFUND NATIONAL PRIORITY LIST

Lee Thomas, EPA's Assistant Administrator for Solid Waste and Emergency Response, March 27 signed guidance for deleting sites from the Superfund National Priority List (NPL). The guidance establishes a deletion category for the NPL so that sites where problems occur after the site has been marked for deletion can still be corrected with Superfund monies.

EPA is prevented from spending Superfund dollars on any clean-up action other than emergencies on sites not on the NPL. EPA's guidance explained, "The deletion category mechanism, because it denotes deletions without actually removing the site completely from the NPL, will allow EPA to return to a site and expend Fund monies as warranted for operation and maintenance costs, continued monitoring, or correction of any failure of the remedy even though the site has been 'deleted.'"

The first group of deletions will be issued for comment this summer along with the additions in the coming update, the Thomas memo said. The guidance includes three criteria for deletion which it will also ask for public comment on in the summer update. The memo describes the criteria as follows:

"The decision to delete a site will be based on whether the site meets one of the three general deletion criteria reflecting either cleanup of the site or the fact that the site does not present a significant risk. In order to determine whether one of the criteria have been met, EPA will determine if the designed remedy has been implemented and is performing properly, including whether monitoring results, if any, confirm the adequacy of the remedy. Alternatively, if the site has been determined not to present a health risk even though cleanup has not been prescribed or performed, the deletion decision will be based on the study by which that determination was reached."

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