John Craddock-Moore

KIRKLAND & ELLIS

Chicago Office
200 East Randolph Drive
Chicago, Illinois 60601
Telex 25-4361
312 861-2000

Washington Office
1776 K Street, N.W.
Washington, D.C. 20006

202 857-5000

Denver Office
1625 Broadway
Denver, Colorado 80202
303 628-3000

To Call Writer Direct
202 857-5018

August 30, 1982

Robert J. Fensterheim
Administrator
PCB Program
Chemical Manufacturers Association
2501 M Street, N.W.
Washington, D. C. 20037

Dear Bob:

Per your request, this letter should assist you in preparing a revised PCB budget for the remainder of the 1982-83 fiscal year.

As summarized below, we have accomplished a great deal since June but the amount of effort required has been quite substantial mostly because of the manner in which EPA handled the "non-quantifiable" issue. Before this project can be brought to a successful completion, I anticipate that our firm (and I personally) will be required to devote substantial additional time. Accordingly, this letter suggests a realistic schedule and budget for tasks to be completed during the remainder of the fiscal year. Because the interests at stake extend well beyond those of PCB panel member companies, I am sending a copy of this letter to David Zoll for his review when he returns to Washington.

1. Work Completed and Progress to Date

Since the beginning of the new fiscal year on June 1, we have worked extensively on all phases of both the electrical equipment and inadvertent generation PCB rules.

In May, when initial PCB budget estimates were prepared, you and I anticipated that most, if not all, of the work on the electrical equipment rule would be completed before June 1, and hence would be paid for out of the general CMA budget rather than

0755934

PCB panel assessments. In fact, although initial comments were filed prior to June 1, much of the work on the electrical equipment rule, including preparation of hearing testimony, the hearing itself, and CMA's Reply Comments were done during June. Even though these efforts produced an unexpected depletion in the funds available for the inadvertent generation proceedings, EPA's final electrical equipment rule, which adopts most of CMA's arguments, demonstrates that these efforts were worthwhile.

Most of our efforts since June 1, however, have been in connection with EPA's "second" PCB rule -- the "non-quantifiable" proposal published on June 8, 1982. In addition to the extensive Comments filed July 8, we prepared written direct testimony for CMA witnesses, represented CMA at the hearings on July 26, prepared Reply Comments filed August 10, worked with CMA consultants Pittaway and James, filed procedural motions and a "disputed issues" hearing request, met often with Panel members and EPA officials, and carried out legal research relevant to both the "second" and the "third" PCB rulemakings. These efforts appear to have convinced the EPA staff that its "non-quantifiable" approach will provide little or no relief, and that the Agency inevitably must set a numerical cutoff for inadvertently generated PCBs, either by withdrawing and revising the current proposal or by addressing the issue anew in the "third" PCB rulemaking.

No doubt, the efforts required to reach this point have been greater than anticipated when initial budgets were prepared in May. In large part, this is due to the slipshod manner in which EPA prepared and issued its proposal. Thus, rather than issuing a full-blown proposal in June, EPA dribbled out its analytical "guidelines", causing CMA (1) to file various procedural motions, (2) to focus far more attention on analytical chemistry issues than originally anticipated, and (3) to prepare more extensive testimony and reply comments than might otherwise have been necessary. In some measure, however, we all simply underestimated how difficult it would be to overcome EPA's mistaken impression that CMA itself had initially favored or even proposed the "non-quantifiable" approach.

2. Schedule and Budget for Additional Work During the Remainder of the Fiscal Year

Although the work described above has yielded substantial dividends, additional effort will be required in order to bring the PCB project to successful completion. Because the panel's budget is nearly exhausted, it is essential that we spell out precisely what is likely to be required in both the electrical equipment and inadvertent generation proceedings.

Having read the recently-issued electrical equipment rule carefully, I believe we have achieved most of our objectives. Thus, EPA has (1) decided against phase-out of PCB transformers, (2) effectively exempted most chemical industry capacitors from phase-out because they are located in contained settings; and (3) deleted the initial proposal to require clean-up of PCB spills to background levels. EPA's treatment of the health evidence is still not satisfactory but the damage here is minimized by a largely unobjectionable general discussion which defers further consideration of the health evidence until the inadvertent generation proceedings.

Notwithstanding having achieved most of our objectives, I recommend that CMA participate as an intervenor in subsequent court proceedings assuming NRDC files a petition for review challenging the electrical equipment rule. CMA (and other industry groups) have been criticized by the current EPA for not supporting favorable EPA decisions. Support seems especially warranted here since many of the distinctions drawn in EPA's final rule appear to have been taken from CMA's comments. Moreover, participation in the court proceedings should allow CMA to preserve its position on the health issues and indeed to argue more strongly than EPA that the final rule presents no significant health risks.

Assuming that NRDC files a petition for review in September or October, this approach would require CMA to file a short petition for intervention within 30 days, a brief on the merits when EPA files its brief (probably in January or February 1983) and then perhaps to participate in oral argument before the Court. I would estimate that participation as an intervenor would cost from $35-50,000, depending upon how extensive a brief is required, what sorts of procedural motions are filed, and whether or not CMA argues orally.

Whatever CMA decides to do regarding the electrical equipment rule (where it has more at stake than PCB panel member companies), there is undoubtedly additional work to be done in the inadvertent generation rulemakings. First, between now and October, we will undoubtedly devote additional efforts to persuading EPA to abandon its present course and to publish a new proposal with satisfactory regulatory cutoffs. Second, comments of some sort will almost certainly be required on the lengthy "Baumel" health document released last week by EPA. And finally, once EPA issues a new proposal (regardless of whether that proposal is a revised "second" rule or a new "third" rule) it will again be necessary to prepare comments, hearing testimony and reply comments.

Much of the "spade work" for completing the inadvertent PCB rulemakings has already been done in the extensive comments and other documents prepared in response to EPA's "non-quantifiable" proposal. Nonetheless, much of the material will have to be recast and a better justification for CMA's numerical cutoff developed. This task, as well as critiquing the "Baumel" document, may require the assistance of outside scientific consultants. Moreover, experience to date in this proceeding cautions against underestimating how much work for CMA can be caused by EPA's vague and poorly thought-out proposals.

For all of these reasons, additional legal work on the inadvertent PCB generation issue could range from $60-90,000 for the remainder of this fiscal year, depending upon a variety of circumstances including whether the issues are resolved quickly in the "second" rule or delayed until a "third" rule as EPA presently plans. In addition, I recommend that some amount, perhaps $20-30,000, be set aside for scientific consultants who may be required to critique the "Baumel" document or otherwise to develop further support for a regulatory cutoff recommended by CMA.

With respect to the foregoing estimates, two caveats are in order. First, I have assumed that both the electrical equipment and inadvertent generation proceedings go forward as planned and that the "alternative rulemaking" is essentially a "dead-end". If this turns out not to be the case, then the estimates above might theoretically be reduced -- although my experience is that the resources required to reach agreement and to settle on something all sides are willing to see published in the Federal

Register are often as great as going forward with the proceedings. Finally, I have assumed that any court proceedings regarding the inadvertent generation issue would occur largely or exclusively in the next fiscal year (1983-84) -- an assumption that is reasonable assuming a proposal with quantitative cutoffs is not issued until November or later.

Before closing, I think it is worth noting that, like the electrical equipment rule, the inadvertent generation issue tends to affect institutional CMA interests as well as those of individual panel member companies. My original case outline identified significant precedential issues affecting EPA's overall administration of TSCA at stake in this proceeding. Moreover, now that we have nearly succeeded in correcting EPA's misimpression about CMA's role regarding the "non-quantifiable" approach, it is critical that CMA carry forward its commitment to provide the factual information and legal justification necessary to support a reasonable numerical cutoff.

I hope the above discussion will be helpful in preparing budget estimates and stand ready to respond to any questions you or David may have.

Sincerely,

Ed Warren

Edward W. Warren, P.C.

cc: David F. Zoll, Esquire

0755938