MINUTES OF MEETING
CMA EXECUTIVE COMMITTEE
Innisbrook Hotel, Tarpon Springs, Florida
January 7, 1980

1. The meeting was called to order at 1:00 p.m. by the chairman. There were present:

H. Barclay Morley, Chairman
J. Earl Burrell
Louis Fernandez
John M. Henske
Richard J. Hughes
William C. Krumrei
Duncan J. MacLennan
L. John Polite, Jr.
Robert A. Roland
William G. Simeral
Raymond C. Tower

Bruce M. Barackman, Secretary
Gary C. Herrman, Treasurer
Edmund B. Frost, General Counsel

By Invitation:
Timothy F. Burns, CMA
Geraldine V. Cox, CMA
H. A. Ericson, Monsanto Company
John T. Estes, Allied Chemical Corporation
Richard F. Gold, Stauffer Chemical Company
Stephen L. Goldstein, Olin Corporation
Keith R. McKennon, The Dow Chemical Company
K. James O'Connor, Jr., CMA
Victor H. Peterson, CMA
Edward B. Pollak (SOCMA), Olin Corporation
James N. Sites, CMA
William M. Stover, CMA
David F. Zoll, CMA

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After excusing invitees and staff, except for Messrs. Barackman and Frost, the committee convened in executive session during which the apparent difficulties resulting within CSMA because of the CMA name change were discussed. Following this, the committee then proceeded with the agenda items in regular session.

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CMA 062630

2. Minutes of the Last Meeting The minutes of the November 19, 1979, meeting of the Executive Committee, as distributed, were approved.

3. Treasurer's Report Mr. Herrman's report is attached as Exhibit A. He announced that the request for 1979 chemical sales data, upon which fiscal 1980-81 dues will be based, is in the mail. The budget process is under way. It is planned to mail a preliminary budget on February 25 for consideration at the March meeting.

4. Review of Committee Reports to the Board Mr. Morley noted that:

- The Energy Conservation Committee recommended that its name be changed to Energy Affairs Committee which more accurately reflects the current broadened scope of activities.

  Following discussion, a change of name to Energy Affairs Committee or simply Energy Committee, as preferred by the committee, was approved.

- The Patents and Information Retrieval Committee recommended it be restructured to eliminate information retrieval activities.

  During discussion, matters involving other committees were included as well. The importance of evolving a priority system to discreetly pick those issues about which CMA should be most concerned and which would merit policy discussion at the Board level was recognized. It was decided to take no further action until the Audit Committee reports had been received. Meanwhile, staff was requested to come back to the Executive Committee with recommendations regarding committee structures and the mechanics to provide an overview of emerging issues in areas where there are no committees.

5. Superfund Mr. Stover reviewed briefly developments in the Congress, noting that little had changed since his last report. During his report, attached as Exhibit B, he invited attention particularly to the release into the environment concept as it relates to the funding issue, pages 8 and 9. Mr. O'Connor proceeded to make an economic analysis of various bills pending.

Following discussion the Executive Committee:

- Endorsed Superfund analysis in Exhibit B.

- Reaffirmed CMA position on Superfund and reemphasized the importance of maintaining a unified posture on that position, namely: The Association opposes the imposition of fees of any kind on industry; the problem of orphan disposal sites should be addressed through a fund financed by Federal and state money; and state tort law is adequate to address the personal injury problem. The priorities should be scope, liability, and funding in that order.

- Directed Superfund Steering Committee to develop alternatives for Executive Committee consideration for use in the event that our present position should require modification.

- Designated Mr. Fernandez of Monsanto as Executive Committee liaison to Superfund Steering Task Group.

6. <u>Chemical Industry Communications/Public Support Program</u>
Mr. Roland introduced the subject by reading excerpts of letters from several companies predominantly in support of the program while noting some concern had been expressed about advertising.

Mr. Sites, during his report attached as Exhibit C, emphasized that the ad part of the program is essential to its effectiveness. He discussed the importance of member company involvement to a successful program. To aid such participation he announced that a Speakers Manual will be available soon and a special workshop will be held in Washington, D. C., Wednesday, February 13, for industry communication's personnel. Distributed to those present was a printed copy of "Transporting Chemicals Safely: What We're Doing About It" and a photo copy of a similar booklet being printed on the subject of "Protecting the Environment." These are the first two in a series of four booklets being prepared for mailing to Executive Contacts. The others will concern worker safety and product safety.

Mr. Sites then discussed the need for additional structuring within CMA:

(a) To assure the Board/Executive Committee and member company executives of top-level policy and budget review and guidance, and

(b) To provide the maximum involvement in implementing this nationwide program by top member company communications professionals.

Mr. Herrman presented various alternatives for billing member companies in support of the program.

Following discussion, the Executive Committee:

- Endorsed the communications program summarized in Exhibit C.

- Approved establishment of a Communications Committee of 15 members to take the place of the present task group and oversee the communication's program and related association public relations activities.

- Recommended Board approval for the establishment of a group of 7 members to be called the Communications Policy Review Group to assure top-level budget and policy guidance for the program and suggested the following Board members as members:

  J. Earl Burrell, President, PPG Industries, Inc., and Chairman, CMA Finance Committee
  Vincent L. Gregory, Jr., Chairman of the Board and Chief Executive Officer, Rohm and Haas Company
  James B. Henderson, President and Chief Executive Officer, Shell Chemical Company
  William C. Krumrei, Senior Director, Research and Development, The Procter & Gamble Company
  L. John Polite, Jr., Chairman of the Board and Chief Executive Officer, Essex Chemical Corporation
  William G. Simeral, Senior Vice President, E. I. du Pont de Nemours & Company

  The group will also include Dr. Etcyl Blair, Vice President, Health and Environmental Sciences, The Dow Chemical Company, and Chairman of the Communications Program's Science Advisory Group.

- Recommended for Board approval that the funds for the program be raised by special assessments to be made in January 1980 of $2.555 million and January 1981 of $3.6 million, based on calendar year 1978 and 1979 sales, respectively.

7. Association Activities

(a) CMA Meeting Sites Various Semiannual meeting sites for 1980-84, with dates prior to Thanksgiving week, were presented by staff and discussed. Locations for the regional Board meetings in September and January were also considered. The September 1980 meeting at

Pebble Beach, California, September 8-9, having previously been confirmed, it was agreed that the January 1981 meeting would be at the Ocean Reef Club, Key Largo, Florida, January 5-6. With the benefit of views expressed during discussion, staff will proceed to obtain suitable accommodations through 1984 from among those available.

(b) Clean Air Act Revision - Retention of Consultants Action on this item was deferred for Board consideration.

(c) Labeling Mr. Zoll's report is attached as Exhibit D. He emphasized that labeling will be among the most important issues facing the chemical industry in 1980.

(d) Resignation of Mr. A. B. Trowbridge On the occasion of Mr. Trowbridge's resignation as Chairman of the Executive Committee and as a member of the Board of CMA effective January 1, 1980, the Executive Committee requested Mr. Roland to arrange for the presentation of a suitable commemorative which would convey the Association's appreciation for his valuable contributions to its activities.

8. New Business

(a) Name Liaison to the Office of Chemical Industry Trade Advisor This item was tabled.

(b) Committee Apointment The appointment of Mr. Thomas F. Evans, Monsanto Company, to replace Dr. W. J. McCarville on the Occupational Safety and Health Committee for the term ending May 31, 1982, was approved.

Bruce M. Barackman

Bruce M. Barackman
Secretary

Certified correct:

H. B. Morley

H. Barclay Morley, Chairman
CMA Executive Committee

Exhibit A

TREASURER'S REPORT

Seven Months Ending December 31, 1979

This report will be prepared and distributed following the end of the month.

For your reference, the following is provided:

- The approved 1979-80 budget.
- Year-to-date budget amendments in Special Projects, the Hazardous Waste Technical Center and the Environmental Management Committee's Air Program.
- The revised total Budget for fiscal 1979-80 after amendments.

CMA
EC-1/7/80
BD-1/8/80

CHEMICAL MANUFACTURERS ASSOCIATION

Budget For Fiscal Year 1979-1980

(As amended through December 31, 1979)

REVENUES:	Original 1979-80 Budget	Approved Amendments	Budget as Amended
Membership Dues & Entrance Fees	$ 7,298,800	$ -	$ 7,298,800
Investment Income	555,500	-	555,500
General Meeting Income	129,000	-	129,000
Publication Sales	153,700	-	153,700
Overhead Reimbursement- Subscribed Projects	250,000	104,800	354,800
TOTAL REVENUE	$ 8,387,000	$ 104,800	$ 8,491,800
GENERAL OPERATING EXPENSES:			
Salaries	$ 2,696,700	$ 186,500	$ 2,883,200
Employee Benefits	523,200	34,000	557,200
Travel & Entertainment	160,900	53,100	214,000
Printing & Reproduction	377,400	15,500	392,900
Public Relations	96,500	-	96,500
Furniture & Equipment	185,700	27,200	212,900
Telephone & Telegraph	128,000	5,300	133,300
Postage	149,300	2,800	152,100
Taxes & Insurance	373,900	27,100	401,000
Rent & Premises	218,000	13,200	231,200
All Other	131,600	13,600	145,200
TOTAL	$ 5,041,200	$ 378,300	$ 5,419,500
LEGAL & RESEARCH:			
Legal Fees & Expenses	$ 1,368,000	$ -	$ 1,368,000
Research & Consulting	1,102,000	-	1,102,000
TOTAL	$ 2,470,000	$ -	$ 2,470,000
TOTAL OPERATING EXPENSES	$ 7,511,200	$ 378,300	$ 7,889,500
EXCESS OF REVENUE OVER EXPENSES BEFORE COMMUNICATIONS PROGRAM	$ 875,800	$ (273,500)	$ 602,300
COMMUNICATIONS PROGRAM EXPENSES	$ (250,000)	-	$ (250,000)
CHANGE IN ASSOCIATION RESERVES	$ 625,800	$ (273,500)	$ 352,300
Projected Year-end Reserves	$ 2,202,500	$ (273,500)	$ 1,929,000
Projected Reserves as a Percentage of General Operations	43.7%	-	35.5%

CMA 062636

Exhibit B

SUPERFUND: LEGISLATIVE STATUS UPDATE

Congressional hearings on Superfund and related bills are largely behind us and the next step in the legislative process is subcommittee markup.

In the House, the first formal markup began in Representative James Florio's (D-NJ) Subcommittee on Transportation and Commerce on December 13, 1979. The session produced a flurry of activity and maneuvering, but no major decisions were reached. The vehicle for markup was Mr. Florio's H.R. 5790 which provides for emergency response to abandoned and inactive waste disposal sites, zero releases of hazardous wastes and substances into the environment, creates a fund financed primarily from taxes against the chemical and oil industries with contributions from Federal and state general revenues, defines a new scheme for RCRA interim permitted sites that become inactive, and establishes joint, several and strict liability to enable persons and governmental agencies to recover from responsible parties.

The Subcommittee staff developed technical changes to the original proposal which were offered as a substitute, and Representative Barbara Mikulski (D-MD) proposed two amendments which were adopted.

Representative Robert Madigan (R-IL) failed in an effort to substitute a much more limited bill for the Florio bill. The Madigan substitute would have applied only to abandoned and inactive disposal sites, provided full funding from tax dollars earmarked from the tax royalties of the Outer Continental Shelf Act, established an emergency response and containment mechanism, ordered a state-by-state inventory of all sites be conducted and established strict liability for clean-up and containment. The Madigan substitute was defeated on a party line vote of 3 to 5.

The House Public Works and Transportation Subcommittee on Water Resources has taken no further action to date on H.R. 85, the oil spill Superfund Bill. Key questions before that subcommittee will be the creation of a Superfund for hazardous substances spills, and whether or not to meld such a fund with the ocean oil spills bill.

The Merchant Marine and Fisheries Committee, which originated H.R. 85, is thought to prefer enactment of a separate oil spill Superfund.

The Senate Environment and Public Works' Subcommittees on Environmental Pollution and Resource Protection have not proceeded with formal markup of S. 1480 (Culver/Muskie). The Committee staff continues to hold in-depth discussions with various groups, including CMA, on the Superfund issues. CMA has thus far participated in six discussion sessions, bringing in technical, legal and legislative specialists to take part. These sessions will continue into January.

It is possible that when the Subcommittees begin markup early in 1980, a new staff re-drafted version of S. 1480 could be presented.

The Administration and the Environmental Protection Agency (EPA) continue to pursue a Superfund that would include coverage of oil spills, hazardous substances spills and abandoned and inactive waste disposal sites. EPA continues to come under attack for its failure to provide concrete figures to justify its complex and massive approach. EPA still views Superfund as a top priority issue.

CMA has recently entered into discussions with members of the Sierra Club, the Environmental Defense Fund, Congress Watch, and Environmental Action. These talks are aimed at exploring areas of Superfund where common ground might be found.

SUPERFUND: ECONOMIC ANALYSIS

Thursday, December 6, 1979, Mr. Roland wired members of the CMA Executive Committee requesting they designate a qualified representative to participate in an ad hoc working group to further explore the economic implications of Superfund legislation. The group was asked to focus on the degree to which common methodologies, conclusions or alternatives could be developed in measuring the possible impact of Superfund concepts.

In a December 13 meeting the group reached several broad conclusions and agreed on the outline of a report to be presented at the January 6, 1980 meeting of the CMA Executive Committee.

Outline of the report follows:

I. A comparison of the fees likely to be required under:

A. The Administration Bill (S. 1341)

B. The Florio Bill (H.R. 5790)

C. Two hypothetical waste disposal fee mechanisms:

(1) Disposal fee charged against hazardous wastes identified under RCRA;

(2) Disposal fee charged against hazardous wastes and special wastes identified under RCRA.

II. A comparison of the economic burden imposed on ten CMA member companies for each of the four scenarios listed above. Data are indexed against the cost of S. 1341 to protect individual company confidentiality. Agreement was reached on several common assumptions to be used in calculating the data.

III. Advantages and disadvantages of various fee/funding concepts: attention will be devoted to the feedstock fee approach, the waste disposal fee approach, and other possible fee mechanisms, such as chemical sales tax, transportation tax, etc.

Action Required:

Information only.

SUPERFUND: ISSUES AND POLICY CONSIDERATIONS

Although many important questions have been raised during the course of the superfund debate, nearly all can be encompassed within three general issue areas: the scope of coverage, the standards of liability and the method of funding.

The scope issue involves two major considerations. First is subject matter coverage of the superfund program. Should it address only old dumpsite problems or should it also include future dumpsite problems, spills of hazardous substances of oil spills? Second is scope of relief. Should the program be limited to emergency assistance and cleanup or should it go on to cover third party damages and a host of other items?

The standards of liability issue area raises several vital questions. Should there be joint and several liability or should there be a system with apportioned liability? Should there be strict liability with few defenses being allowed or should more defenses be provided? What standards of causation will be used to determine whether a party is liable?

The third issue area is funding. Should the fund be financed out of Federal dollars? Should industry be required to foot the bill? Or should there be some combination of Federal and industry money? If there is an industry fee, how should it be structured and imposed?

Following is a review of the key questions in each of these major issue areas.

I. SCOPE ISSUES

A. "Ultrafund"

Some Superfund bills adopt an extremely broad approach -- what has been referred to as "ultrafund" approach. They would combine oil spills, hazardous substance spills and hazardous waste disposal site problems into a single compensation and liability fund. The usual justification is that administrative efficiency and public health would be enhanced by one comprehensive system; one program answers the need for immediate notification and response, emergency response actions; engineering techniques required for containment and remedy are substantially similar for spills of hazardous substances and oil; there are also substantial similarities between problems caused by hazardous wastes and waste oils at disposal sites.

B. The CMA Approach

CMA, on the other hand, has argued for separation of "ultrafund" into its constituent parts.

- oil spills should be handled separately from chemical spills;
- chemical spills should be separated from waste disposal incidents;
- in addressing hazardous waste disposal sites, pre-RCRA problems should be separated from post-RCRA problems.

The rationale is that these subjects are each different in nature, and are addressed in differing degrees by societal and legal mechanisms already in place. Therefore, they sould receive separate and distinct consideration.

Once Superfund is split into its component parts, each part must be analyzed on its own merits. Does each part address a genuine need which requires enactment of new legislation?

With regard to spills of hazardous substances, there does not seem to be a demonstrated need for the sweeping superfund approach. Section 311 of the Clean Water Act and related sections of the law already provide an adequate mechanism for dealing with such spills.

Section 311 authorizes a $35 million fund to clean up and repair spill damage; penalties for violations; recovery of fund money from wrong-doers; and incentives for safe handling, prompt reporting and immediate cleanup. Furthermore, there is backup authority in Section 504 of the Clean Water Act. This section, which has never been funded, authorizes $10 million for the Administrator to prevent, limit or mitigate imminent or substantial danger to public health or welfare caused by the release into the environment of any pollutant.

Where new legislation is clearly needed, however, is in the area of old "orphan" dumpsites. These old sites create problems which are not being adequately addressed by existing law. Congress should establish a Federal fund to provide for emergency assistance and containment in cases where orphan dumpsites are causing an imminent threat to public health and where no other party is taking responsible action.

C. Damages Covered

A further consideration is the specific types of damages a superfund should cover. One approach is to limit damages to cleanup and containment. Others would provide for restoration of natural resources, third party economic damages, personal injury, lost tax revenues and additional items.

CMA has testified that the fund should be limited to emergency response and containment. This is based of the view that an extensive relief program could quickly exhaust the fund, especially if it covered third party claims without discrimination. Unless the fund focuses on emergency cleanup and strict attention is given to prioritizing the use of fund monies, the fund could quickly mushroom out of control.

D. Toxics Tort Law And "The Conrad Kent Proposal"

A key question is whether to create a new Federal toxic tort law to compensate persons injured by toxics. CMA has strongly opposed this proposal on the grounds that tort liability is an area traditionally regulated by the states under our system of government. The Federal government should not usurp this responsibility by developing its own personal injury compensation system for hazardous substance spills and waste sites.

In lieu of a Federal toxic tort law, CMA supports creation of a Federal relief program to assist injured parties who might otherwise suffer economic hardship. This program would establish a $50 million fund which would promptly compensate those harmed by involuntary exposure to hazardous substances.

The intent is not to provide a make-whole remedy and give dollar-for-dollar reimbursement for all damages. Instead it is meant to provide injured parties with immediate short-term relief so that they can make it through the injury without suffering economic hardship as a consequence. To achieve this goal compensation is limited to calculable out-of-pocket losses for certain types of damages, not necessarily in their full amount. Such compensable losses would include out-of-pocket medical expenses, lost wages and the loss of repairing or restoring damaged property.

A claimant who receives compensation from the fund may still elect to sue the alleged wrongdoer under existing law. To cover the benefits paid on the private damage claim, the fund would have a lien on 80 percent of any amount recovered, net of costs and reasonable attorney's fees. The remaining 20 percent would not be subject to the lien and would be retained by the claimant as an incentive to bring the suit.

The effect of the proposal is to avoid creation of a new Federal cause of action, not impose strict liability and to preserve the existing state tort law system. This proposal has previously been approved by CMA's Executive Committee, and is frequently referred to as "the Conrad Kent proposal". Mr. Kent is the Vice President - Law of Stauffer Chemical Company and drafted the original language.

E. The "Release-Into-The-Environment" Concept

Another type of scope issue is the disturbing concept embodied in S. 1480 which, in effect, prohibits any release into the environment. This concept, is a fundamental departure from current environmental law. S. 1480 sets aside the technology and health effects bases of the Clean Air Act, Clean Water Act and RCRA. Under this bill any discharge or emission -- even one carefully and specifically permitted under existing law -- would be subject to wide ranging and open-ended liability.

CMA has strenuously opposed this far-reaching concept. Following is an excerpt from testimony by Frank Friedman (ARCO) speaking on behalf of the Association.

"The bill (S. 1480) unjustifiably prohibits the release of any hazardous substance into the environment, thereby replacing the present and well-established system of regulating these substances on the bases of technology and danger to public health and the environment. It will conflict with, confuse, and duplicate much of the environmental legislation now on the books.

The all-encompassing prohibition on the release or disposal of any hazardous substance would have the inevitable effect of overturning the entire basis of existing environmental legislation and regulations. This prohibition cuts across the gamut of environmental, health and safety statutes, including the Clean Air Act, the Clean Water Act, RCRA, MPRSA, FIFRA, FDA, OSHA, and TSCA. These laws presently place specific limits upon releases into the environment based upon a careful assessment of the danger to public health and welfare, the availability of control technology, and other factors. The bill would repeal limits on emissions and discharges that EPA has found to be adequate to protect public health and welfare, and would mean that billions of dollars invested by industry to comply with existing requirements will have been wasted.

It also would render unlawful that conduct which is now expressly permitted under Federal and state programs. The blanket prohibition on any release provides no safe harbor for existing statutory systems. For example, releases in compliance with valid Federal and state water and air permits would subject the discharger to unlimited liability."

II. LIABILITY ISSUES

It is difficult to address the liability issue in the abstract. Without focusing on precise language of a given bill it is hard to assess the overall impact of a proposed liability scheme. For example, strict liability may be acceptable in some limited curcumstances. In combination with strict liability, however, other factors may pose such serious problems -- factors such as loose causation principles, broadly defined categories of damages, and inadequate defenses. Despite these uncertainties, following are some general observations on liability issues in Superfund.

A. Joint and Several Liability

It is unfair and unwarranted to impose joint and several lianility for all consequences of a hazardous waste disposal incident. Imposition of such liability would mean that a person with a peripheral or even virtually nonexistent relationship to damages could be held responsible for all costs. Thus, a company with extensive assets responsible for disposing of one barrel of hazardous waste in a leaking site could be liable for all damages from 10,000 barrels in the same site. Making one party pay for the wrongs of all other persons is unjust and punitive. The modern concept of comparative responsibility -- which apportions liability based on the extent of responsibility -- should be substituted in its place. This concept has gained wide support in the state tort law reform movement.

B. Retroactive Liability And Proximate Cause

The retroactive change in liability principles is of major concern. Imposition of strict liability without allowing traditional defenses based on proper and reasonable conduct would require a person to unfairly bear liability. Proximate causation should also be required. Proximate cause limits recovery to those injuries which in fact resulted from the negligent act. The conduct in question must be a substantial factor in bringing about the harm. Where it is not shown with reasonable certainty that the harm or loss resulted from the act complained of, there can be no recovery or compensatory damages.

C. Strict Liability For Cleanup Costs

Nevertheless, strict liability for only cleanup costs may be acceptable under certain circumstances. Provision of appropriate defenses is essential. Without safeguards, strict liability could become a heavy burden for even the largest companies.

Strict liability for other types of damages, however, is generally not acceptable. This is especially true in the case of private injuries. Personal injury liability is best left to the states, which historically have had jurisdiction over tort law.

D. Limits On Liability

If a strict liability regime is established, there should be a limit on liability. Otherwise a company could be financially crippled by a single incident even when it is not at fault. A mechanism which sets a maximum liability limit but allows establishment of a lower limit for certain classes or categories would seem appropriate.

E. Tort Law Vs. Welfare Relief Concept

There is a substantial difference between a welfare system and a tort law system. Welfare is the relief which society provides to parties who are in need or who have been injured and have no other source of relief. Tort law, however, is a system which provides relief to injured parties by means of assigning responsibility and accountability to some other individual or institution in society. Society itself does not pay for the relief provided by the tort law system. Instead, relief flows from party to party on the basis of a determination of legal responsibility.

The distinction between a welfare system and a tort law system should be maintained rather than blurred by loose tort law concepts. Private entities should not be called upon to fund a welfare system. Welfare is a societal responsibility, or at least a responsibility discharged by private entities on a voluntary basis. CMA is willing to support responsible and well-tailored welfare legislation for persons harmed by exposure to hazardous substances, such as the previously discussed "Conrad Kent proposal."

F. Liability Guidelines

To summarize the discussion on liability issues, a wise policy would seem to be as follows:

- oppose joint and several liability, support a system of comparative responsiblity;

- consider accepting strict liability for cleanup costs only but maintain adequate defenses;

- leave personal injury and third party liability issues to state tort law;

- insist upon tight causation principles; and

- establish liability limits.

III. FUNDING ISSUES

Who should be responsible for providing funds for any superfund? Three approached are now under consideration: public funding, industry fees or some combination of the two.

A. Public Funding

CMA has argued strongly in favor of public funding for the following reasons.

First, the hazardous waste problem is societal in nature and only through the use of public monies can this societal responsiblity be fairly discharged. Hazardous wastes are an integral by-product of our industrial society. They have been and will continue to be generated by a wide range of industries, business concerns, government agencies and defense installations, municipalities and scientific facilities.

Second, it is unfair to single out the chemical industry for punishment through a fee system. The EPA has itself identified 17 major industries which generate large amounts of hazardous waste.

Third, today's companies should not have to pay for practices of yesterday's industrial producers.

Fourth, imposition of a fee to pay for orphan dumpsites raises serious constitutional questions under the due process clause of the Fifth Amendment.

Fifth, off-budget financing through a fee on industry is an irresponsible way to launch a new Federal program that otherwise would not make the grade. Such financing hides appropriation of societal funds from the public and shields the program from the normal scrutiny of the budget process. The off-budget financing precedent is a most important argument against an industry fee, as indicated in the attached excerpts from a recent speech by Edmund B. Frost, CMA Vice President and General Counsel, before the API/NFPA Environmental Forum VIII.

"The real reasons for placing the fee on industry emerges when we turn to budget considerations. Some staffers on the Hill have been quite candid in admitting that they want an industry fee simply because the normal and orderly budgetary processes will not rank Superfund sufficiently high to allow it to be funded. Their alternative is a fee system or "off-budget financing." This hides appropriation of societal funds from the public and from the normal scrutiny of the budget process.

At first blush, this is an attractive way to fund a new program which cannot otherwise cut the mustard. But while off-budget financing may be a good way to launch a new program without full public scrutiny, it is not a good way in the long run for the Federal government to control its use of our society's resources. In terms of fiscal policy and inflation, a fee levied on the chemical industry would have essentially the same effect as a tax. And, in addition, the use of that fee in a superfund would be the same as a Congressional appropriation. But regular fiscal and budgetary controls would lapse. Control of inflation, however, depends on the ability to control and balance the governmental sector. From an inflation point of view and as a precedent for financing new programs, the industry fee concept is terrible, if not irresponsible."

Sixth, with regard to spills of hazardous substances, existing legal mechanisms such as the Clean Water Act and state tort law satisfactorily provide for recovery of damages.

B. Industry Fees

Nevertheless, serious consideration is being given on Capitol Hill to the imposition of an industry fee. A major reason is budgetary -- many proponents of Superfund want an industy fee because they believe that fiscal and budgetary priorities and constraints would not permit the massive and immediate amounts of monies they envision.

The two fee mechanisms most frequently discussed are a front-end feedstock fee and a back-end disposal fee.

1. THE FRONT-END APPROACH derives money from producers of hazardous materials by assessing a per unit fee on oil, petro-chemical feedstock and certain other inorganic chemicals and heavy metals. The major advantage cited by its proponents is that this type of fee is easy to administer. There are numerous disadvantages, however.

First, it penalizes companies that have over the years adequately managed their waste disposal problems.

Second, the hazardous waste disposal site problem is not the result of the production of hazardous substances. The real problem is unproper disposal of hazardous wastes.

Third, a feedstocks fee places a burden on products that do not ultimately generate hazardous waste. Some products that do not generate hazardous waste would nevertheless be taxed heavily.

Fourth, the fee is not so easily passed down the chain as some would argue. The chemical industry is highly competitive.

2. THE BACK-END APPROACH derives money through a tax or fee on the disposal of hazardous waste. An advantage is that the charge is more closely related to the problem of hazardous waste disposal. Moreover, it is consistent with RCRA in that it encourages recycling and recovery of hazardous waste. Also it encourages the reduction of the amount of hazardous waste disposed. It could also be structured to place the highest burden on the most dangerous wastes.

However, there are some major disadvantages.

First, a disposal fee system would be difficult to administer because of the high number of fee collection points.

Second, there is a danger that generators of high volume/low toxicity wastes could be required to pay an undue share of any fee.

Third, a related problem is that a large volume of waste is water-based. It would distort the fee if water is included.

Fourth, the disposal fee would raise costs of legal disposal and might thereby encourage midnight dumping.

Fifth, this fee mechanism likewise penalizes companies that have over the years adequately managed their wastes.

C. Fees And The Release Concept Of S. 1480

Under the Culver-Muskie bill, S. 1480, companies would be subject to very substantial environmental fees even though they are complying with existing laws and even though their releases cannot be shown to result in injury or damage.

The bill imposes substantial fees on the production of hazardous substances and on the generation and release of hazardous substances from any factory, vessel of motor vehicle even if the person manufacturing or releasing the substance was in full compliance with the requirements of other federal environmental laws. Under the extremely broad coverage of the bill, a hazardous substance is one which would adversely affect any organism, and a release is any accidental or intentional emission, discharge, or other release of such a substance into the environment. Thus, a facility discharging any amount of a hazardous substance in accordance with an NPDES permit, emitting any amount of a hazardous substance in compliance with the Clean Air Act, disposing a hazardous waste im compliance with RCRA, or otherwise releasing into the environment any amount of a substance which might adversely affect any living organism would be liable for the payment of fees on the basis of each such release.

The proponents of the bill expressly intend that the fees be universally applicable to all releases and set at such amounts as to encourage the use and development of technology to eliminate all releases or at least to reduce such releases substantially below the levels permitted under existing law.

CHEMICAL INDUSTRY COMMUNICATIONS/PUBLIC SUPPORT PLAN

The CMA Executive Committee and Board of Directors, meeting in New York City on November 19, approved in principle the chemical industry's Communications/Public Support Plan subject to a final decision on January 7. At the same time, the Board recommended that all member companies be thoroughly informed once again as to the objectives, scope and content of the program. Accordingly, CMA on December 3 distributed a complete packet of information on the plan, the industry's public attitude problems and the role of the new Science Advisory Group. Therefore, since all Executive Contacts have already received this documentation, we include here only an Executive Summary of the plan, plus the particular pages that deal with budget and funding.

Action Requested: Approval of the Plan

CMA
EC-1/7/80
BD-1/8/80

COMMUNICATIONS/PUBLIC SUPPORT PLAN

EXECUTIVE SUMMARY

1. It is evident that public concern is growing about the dangers of chemicals in products, the environment and the workplace and a perceived failure of industry to do enough to manage these risks.

   Surveys show that the chemical industry rates very low in public favorability. Other surveys rate the industry as doing the "poorest job" in complying with air and water pollution laws, and as not doing enough to reduce risks.

   These negative attitudes are bolstered by increased news media coverage of environmental attitudes and by the activities of environmentalists. These attitudes appear to be even more negative among government officials, with irrational and poorly conceived legislation and regulation often the result.

2. The implications to the industry of such attitudes are massive in terms of compliance costs and impaired business. Innovation and product development suffer, plant construction lags because of community resistance and the investment community puts its funds elsewhere.

3. A major, long-term effort is needed to communicate industry's efforts and to build a more balanced perspective in the public's mind about chemicals and the chemical industry. The most logical means of mounting such an extensive, lengthy program is through a joint effort by all CMA members that would lessen the burden on any one company.

4. Primary message objective: To increase recognition that the chemical industry is committed to doing a responsible job to protect the public from the health and safety risks of chemicals -- specifically in the major concern areas of air and water pollution, product safety, transportation safety, worker safety and hazardous waste disposal. The story of industry essentiality and benefits would be incorporated as a basic part of this objective.

   The audience objective: The first stage includes political actives, government officials, communicators, academics and the public in areas of major plant concentrations. The second stage would expand the audience to include more of the general public, assuming that testing and research determines such an expansion to be desirable.

5. All appropriate communications tools will be used, including a full range of news media activity and establishment of an Information Monitoring and Response System to spot and refute inaccurate statements. A Science Advisory Group will provide authoritative voices where appropriate, and a speakers program will extend impact on both the national and community levels. Publications and films will be used, while advertising will be used to provide control over content and timing of the program's message and to target this through key publications.

6. A key aspect of the program will be encouragement of individual company use of materials at the local and company level. Such grassroots activity is essential to effecting changes in public opinion or in public policy.

   Companies will be kept fully informed on the progress of the program by timely reports that will include results of continual research on effectiveness.

7. Funding of the program will be by a special assessment based on the traditional formula followed to establish member's dues.

8. Timing of the program: This includes an expanded public relations effort that has already begun, with production of booklets and Speakers Kit, News Media Tours and other projects accelerating in January. The advertising program is scheduled to begin in early 1980.

BUDGET

The following estimates have been developed by the Task Force as a general guide to financial requirements. It should be underscored that the advertising budget figure for the June 1, 1980 - May 31, 1981, period does not include funds for expansion of the advertising program to a major share of the general public during this time frame. Such a program and budget will be determined upon completion of expenditure level tests for the general public which are scheduled to be undertaken in the first half of 1980.

June 1, 1979 - May 31, 1980	($'000s)
Advertising	1,500
Expenditure Level Test	400
P.R. Agency Fee, out-of-pocket	225
Publications/Films	150
Tracking Research	110
Internal Staff Addition	70
Reserve	100
	2,555

June 1, 1980 - May 1981	
Advertising	3,000
P.R. Agency Fee, out-of-pocket	225
Tracking Research	100
Internal Staff Addition	100
Publications/Films	75
Reserve	100
	3,600

FUNDING

It is the Task Force's recommendation that funding for the program be generated by a special assessment to all member companies, at least during the first two years of the program (June 1, 1979 - May 31, 1980).

The special assessment would be based on the same formula as member dues: i.e., per cent of applicable sales.

Shown below are estimated assessment figures for member companies for the first and second years of the program.

For Companies with Chemical Sales of:	First Year Assessment	Second Year
$10 million	$1,539	$2,137
50 million	4,626	6,425
100 million	7,704	10,700
400 million	27,648	38,400
Over 400 million	Up to maximum of 86,580	Up to maximum of 120,250

Exhibit D

LABELING ISSUES

Federal mandatory hazard warnings and chemical ingredient disclosure will be among the first and most important issues to confront industry in 1980. Labeling is already the subject of litigation and, early in 1980, is scheduled to be the subject of complimentary rulemaking proposals by both EPA and OSHA.

These federal labeling initiatives will involve sensitive and complicated issues. As merely three examples, industry will be faced with such questions as:

(a) how and when should the federal government require that substances which are or may be carcinogenic to animals be labeled in the workplace; in commerce in general?

(b) when do health and safety considerations justify disclosure of the identity of the confidential ingredients of chemical products?

(c) should the federal government require that every chemical be labeled as to its full ingredient composition and as to its actual or potential adverse effects regardless of the severity of those effects?

Federal labeling rules are a concern which is rapidly maturing at this time for several reasons. In general, labor unions and environmentalists have begun pushing EPA and OSHA to expedite publication of labeling proposals which would violate or conflict with the agencies' respective statutes. Furthermore, Congressional interest has begun to focus upon the issue of workers' "right to know" of the health consequences of materials with which they are working. However, as is so often the case in health and safety matters, the Congressional rhetoric is developing in a fashion which promises to emphasize emotion of purpose over precision of thought.

Labor unions and environmentalists have been strongly urging EPA and OSHA, verbally and in writing, to propose coordinated labeling rules before the end of 1979 which would mandate labeling of large generic categories of substances suspected of posing any of a wide range of actual or potential effects, and to mandate full disclosure of all of the ingredients of all chemical products. In September the Public Citizen Health Research Group, the Philadelphia Area Project on Occupational Safety and Health, and U.S. Congressman Andrew Maguire (D-NJ) filed suit in the District Court for the District of Columbia seeking to compel OSHA to promulgate a rule requiring employers to "apprise employees and employee representatives of the identity of all potentially toxic materials and harmful physical agents to which they may be or may have been exposed in the workplace."

CMA has intervened in that litigation against the plaintiffs arguing that Congress gave OSHA labeling authority in connection with substances for which the agency had promulgated a standard, not omnibus authority for generic labeling and disclosure requirements.*

When CMA learned that EPA's staff efforts to develop a labeling rule promised to take that Agency outside its statutory authority as well, it directed outside counsel to submit a letter to Administrator Costle (and EPA staffers, with copies to Eula Bingham and interested OSHA staffers) carefully detailing CMA's view of EPA's statutory labeling authority.**

At the present time, CMA is continuing to communicate with both agencies. However, it appears to be very likely that the labor and environmentalist constituencies which are pushing the agencies into labeling rules will succeed in convincing the agencies to propose rules which in significant part will be unnecessary, counterproductive, burdensome and beyond their respective mandates. Nevertheless, the regulatory and litigation battles will be difficult and laden with the current red flag issues of our industry -- cancer, confidentiality, the workers' "right to know," generic rulemaking versus case by case rulemaking, and the issues of the cost burdens imposed by health and safety regulations.

In Congress these same red flag issues will be surfacing not just in regard to labeling but in the broader context of industry responsibility in the health and safety area.

For instance, Congressman Edward P. Beard (D-RI) as chairman of the House Subcommittee on Labor Standards held hearings last spring concerning compensation for occupational disease issues. He has indicated that as a result of those hearings one of the things he has become convinced of is that there does not exist adequate labeling on substances in the workplace.

Expanded criminal penalties are being proposed in two very active pieces of legislation which will serve to focus on industry's health and safety activities. The so-called Miller Bill (H.R. 4973) would impose criminal penalties on corporate officials who knowingly fail to inform their employees and the government after discovering a serious danger of death or serious bodily injury associated with a product or business practice. In addition, the latest draft of revisions of the federal criminal code provides criminal penalties for persons who knowingly engage in conduct which places another in imminent danger. Both of these bills reflect Congress' expanding interest in corporate criminal responsibility and the certainty that health and safety issues will receive more rather than less attention.

This report is for information only. No action required.

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* Memorandum of Points and Authorities In Support of Motion of Chemical Manufacturers Association for Leave to Intervene as Defendant attached.

** October 26, 1979 letter to Douglas Costle re Labeling Regulations for Industrial Chemicals Under TSCA attached.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN HEALTH RESEARCH GROUP 2000 P Street, N.W. Washington, D.C. 20036 PHILADELPHIA AREA PROJECT ON OCCUPATIONAL SAFETY AND HEALTH 1321 Arch Street Room 201 Philadelphia, Pa. 19107 and UNITED STATES CONGRESSMAN ANDREW MAGUIRE 1314 Longworth House Office Building Washington, D.C. 20515 Plaintiffs, v. RAY MARSHALL, Secretary United States Department of Labor Third Street & Constitution Avenue, N.W. Washington, D.C. 20210 Defendant, CHEMICAL MANUFACTURERS ASSOCIATION 1825 Connecticut Avenue, N.W. Washington, D.C. 20009 Applicant for Intervention.	Civil Action No. 79-2581

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION OF
CHEMICAL MANUFACTURERS ASSOCIATION
FOR LEAVE TO INTERVENE AS DEFENDANT

In support of its Motion for Leave to Intervene as Defendant, the Chemical Manufacturers Association (CMA) respectfully states as follows:

I. Intervention as of Right Is Warranted.

A. The Motion Is Timely.

CMA's motion to intervene is being filed less than three weeks after the filing of plaintiffs' complaint. While the time elapsed from the beginning of this litigation is not the sole test,*/ it is reasonable to say that a motion for leave to intervene filed so soon after the filing of the complaint will not unduly delay the proceeding. That is particularly true in this case where an answer has not yet been filed and defendant has 60 days (or until November 26, 1979) to answer.

B. CMA Meets the Requirements for Intervention as of Right.

In Nuesse v. Camp, 128 U.S. App. D.C. 172, 385 F.2d 694 (1967), our Court of Appeals summarized the requirements for intervention as of right under Fed. R. Civ. P. Rule 24(a)(2) as follows:

> "(i) an interest in the transaction, (ii) which the applicant may be impeded in protecting because of the action, (iii) that is not adequately represented by others." (128 U.S. App. D.C. at 177, 385 F.2d at 699).

CMA satisfies each of those requirements.

1. CMA's interest in the transaction

CMA's member companies produce more than 90% of this country's basic chemicals. Many of these chemicals may be considered as potentially toxic materials or harmful physical agents. A considerable number are now regulated by occupational safety and health standards (derived from national consensus standards) promulgated under section 6(a)

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*/ Hodgson v. United Mine Workers of America, 153 U.S. App. D.C. 407, 418, 473 F.2d 118, 129 (1972).

of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(a) (the OSH Act). A smaller number are regulated by new or amended occupational safety and health standards promulgated pursuant to section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5).

Plaintiffs have requested that the Court issue an order "(1) directing the defendant to take action forthwith on plaintiffs' petition for rulemaking . . . (2) directing defendant forthwith under sections 6(b)(7), 8(c)(1) and 8(c)(3) of the OSH Act, 29 U.S.C. §§ 655(b)(7), 657(c)(2)[sic] and 657(c)(3), rules requiring employers to apprise employees and employee representatives of the identity of all potentially toxic materials and harmful physical agents to which they may be or may have been exposed in the workplace, (3) retaining jurisdiction over this action to insure that there is no unreasonable delay by defendant in completing the rulemaking proceedings, . . ." and for other relief. (Complaint, pp. 6-7, emphasis supplied).

Since plaintiffs have requested an order compelling immediate action by the defendant, it is probable that plaintiffs and defendant will submit to this Court for its approval an agreement establishing time limits for proposing a regulation and for the ultimate promulgation of that regulation.*/ CMA has a direct interest in the subject matter of the regulations and in being a party to the rulemaking from its outset.

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*/ See, e.g., N.R.D.C. v. Train, 8 E.R.C. 2120, 6 E.L.R. 20588 (June 9, 1976) (Final Order and Decree, and Settlement Agreement).

2. Denial of intervention may impede CMA in protecting its interest.

If the present parties submit an agreement for approval of the Court establishing the time limits of proposed regulation, CMA's ability to protect its interests and the interests of its member companies may be significantly impaired. It is not enough that CMA may have a later opportunity to participate in rulemaking proceedings before the agency or to seek review of final agency action. As our Court of Appeals said in Natural Resources Defense Council v. Costle, 183 U.S. App. D.C. 11, 561 F.2d 904 (1977):

> "Judicial review of regulations after promulgation may, 'as a practical matter', afford much less protection than the opportunity to participate in post-settlement proceedings that seek to ensure sustainable regulations in the first place, with no need for judicial review." (183 U.S. App. D.C. at 16, 561 F.2d at 909).

While the situation in that case involved motions to intervene after a Settlement Agreement had been reached, the Court's statement is of equal force here. An opportunity to participate in pre-settlement proceedings may also help in producing regulations which are reasonable in scope and timing and not the result of "precipitous actions which ultimately lead to further and additional litigation to set aside regulations so developed in hurried fashion without adequate factual foundation or analysis." (National Resources Defense Council v. Costle, supra, 183 U.S. App. D.C. at 17, 561 F.2d at 910).

3. <u>CMA's interest will not adequately be protected by existing parties.</u>

Plaintiffs in this proceeding are the Public Citizen Health Research Group, the Philadelphia Area Project on Occupational Safety and Health, and United States Congressman Andrew Maguire. These plaintiffs seek immediate promulgation of proposed regulations. CMA believes that such immediacy may lead to the proposal of unreasonable regulations and even of regulations beyond the authority of defendant to issue. CMA's interest will not be protected by the plaintiff parties.

Furthermore, the interests of CMA and defendant "may not coincide" in all respects.*/ Thus, CMA understands that plaintiffs seek regulations which would require disclosure to employees and to employee representatives either by labeling or other means, of the identity of <u>all</u> toxic materials or other harmful physical agents to which employees may be or may have been exposed in the workplace. CMA believes that such an all-encompassing regulation is beyond the authority delegated to the defendant in sections 6(b)(7), 8(c)(1) and 8(c)(3) of the OSH Act, 29 U.S.C. §§ 655(b)(7), 657(c)(1) and 657(c)(3).**/ Since agencies are generally

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*/ <u>National Resources Defense Council v. Costle</u>, <u>supra</u>, 183 U.S. App. D.C. at 19, 561 F.2d at 912 (<u>citing Nuesse v. Camp</u>, <u>supra</u>, 128 U.S. App. D.C. at 181, 385 F.2d at 703).

**/ For example, section 6(b)(7) of the OSH Act, 29 U.S.C. § 655(b)(7) provides:

> "Any standard promulgated under <u>this subsection</u> shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure." (Emphasis added).

[Footnote continued on following page]

reluctant to admit the limitations of their statutory authority, it is unlikely that defendant will raise the issue, and thus CMA's interests will not be protected by defendant.

C. Conclusion

In view of the foregoing, CMA submits that it satisfies the requirements of Fed. R. Civ. P. Rule 24(a)(2) and should be granted leave to intervene as defendant as of right.

II. In the Alternative, CMA Should Be Granted Permissive Leave to Intervene.

Rule 24(b)(2) provides that any person may be granted leave to intervene when his claim or defense and the main action have a question of law or fact in common and when intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

CMA submits that the discussion above establishes that its defense has questions of law and fact in common with the main action, and that intervention should be permitted because of the interests CMA has shown. Also, intervention by CMA will not cause undue delay. The motion for leave to intervene is being filed less than three weeks after the filing of the complaint, and about six weeks before the defendants' answer is due.

[Footnote continued]

The requirement of labels or other appropriate forms of warning is thus limited to cases where standards have been promulgated under section 6(b)(5) of the OSH Act, 29 U.S.C. § 655(b)(5), and does not extend to standards promulgated under section 6(a) of that Act, 29 U.S.C. § 655(a). Relatively few toxic substances are subject to standards promulgated under section 6(b)(5). See 29 C.F.R. §§ 1910.1001-1910.1046. The great majority of toxic substances are subject to standards promulgated under section 6(a). See 29 C.F.R. § 1910.1000, Tables Z-1, Z-2 and Z-3. See also 39 Fed. Reg. 23502, 23540-43 (1974), recodified at 40 Fed. Reg. 23072-73 (1975).

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CCNCLUSION

For the reasons stated herein and in the accompanying motion, CMA should be granted leave to intervene as of right or, alternatively, should be permitted to intervene in this action.

Respectfully submitted,

John H. Pickering

John H. Pickering

p- Andrew

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October 17, 1979

CMA 062663

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October 26, 1979

The Honorable Douglas M. Costle
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Labeling Regulations for Industrial Chemicals Under TSCA

Dear Mr. Costle:

This firm represents the Chemical Manufacturers Association (CMA), a trade association whose member companies account for more than 90 percent of the total production capacity for basic industrial chemicals in the United States. We are writing about an issue of great concern to the chemical industry -- the promulgation of hazard-related labeling requirements for industrial chemicals under the Toxic Substances Control Act (TSCA). According to recent press accounts, the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA) are now proceeding with a joint program to develop such labeling requirements and intend to publish proposed rules on the subject in the next few months.

CMA's members are committed to providing their employees and customers with adequate information concerning the safe use of chemicals. Together with its member companies, CMA has participated actively in developing and implementing voluntary labeling programs to achieve this objective. Based on its expertise and experience, CMA stands ready to assist EPA in developing labeling regulations under TSCA which have similar aims. Indeed, CMA has already offered such assistance to the Agency in a letter

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dated July 6, 1979 which was addressed jointly to you and Dr. Bingham of OSHA.

At the same time, CMA strongly believes that any labeling requirements which EPA adopts must comport fully with the requirements of TSCA. Recent press accounts of public statements by certain EPA officials indicate that, in its current deliberations, the Agency may not be devoting sufficient attention to applicable statutory provisions. Accordingly, before the rulemaking process progresses any further, we wish to direct EPA's attention to certain basic principles, derived from the text and legislative history of TSCA, to which any EPA labeling proposal must conform. These principles, we believe, provide the basic framework within which EPA's labeling rules must be developed.

1. Definition of Unreasonable Risk

The central issue which any labeling proposal must address is the criteria for imposing labeling requirements. EPA must develop principles for determining which chemicals will be labeled, which manufacturers and processors of those chemicals will be subject to labeling requirements, and what level of risk must be presented before those labeling requirements come into play.

In examining these questions, EPA must be guided by Section 6(a) of TSCA, from which the Agency's authority to require labeling derives. Under Section 6(a)(3), EPA may promulgate rules directing that a substance or mixture "be marked with or accompanied by clear and adequate warnings and instructions with respect to its use, distribution and commerce, or disposal . . ." As specified by Section 6(a), the precondition for imposing such requirements is a finding that "there is a reasonable basis to conclude" that the chemical substance or mixture in question presents or will present "an unreasonable risk of injury to health or the environment." In determining whether such a risk exists, EPA must be guided by Section 6(c), which requires it to consider, and publish a statement with respect to, four factors before promulgating a rule under Section 6(a): the effects of the chemical on health and the environment, the magnitude of human and environmental exposure to the chemical, the chemical's benefits for various uses and the availability of substitutes for those uses, and the probable economic effect of EPA's proposed action, including its impact on small business and technological innovation. Thus, EPA must weigh the potential harm associated with the specific chemical against the adverse economic and social impact of regulatory requirements.

These provisions have a number of important implications for any labeling rules which EPA adopts under Section 6(a)(3).

First, EPA cannot promulgate labeling requirements for a chemical which, under its actual conditions of use and exposure, poses no risk or a risk that is insubstantial. Rather, the statute requires a finding of "unreasonable risk" as a prerequisite to labeling requirements. Thus, EPA must make some showing that, absent labeling instructions concerning safe use of a chemical, that chemical will cause significant harm to humans, the environment or both. EPA is not empowered to require labeling information which relates to hazards which are purely theoretical or to hazards which, in view of a chemical's uses and exposure, are remote and of little practical concern. Moreover, since the concept of "unreasonable risk" involves a balancing of costs and benefits, the Agency must show that, for the chemical in question, the harm which labeling will prevent outweighs the expense and effort that labeling requirements will entail. If labeling a particular chemical will provide small benefits and impose large burdens, EPA cannot require that labeling under Section 6.

There is an important corollary to these principles which must shape the procedures that EPA utilizes to determine whether there is an "unreasonable risk" for which labeling can be required. Because risk is a function of the properties, uses and exposure patterns associated with a particular chemical, EPA cannot adopt omnibus labeling requirements which apply to a broad and non-specific chemical class. Rather, the Agency must present evidence concerning the alleged risks of <u>each chemical</u> proposed for labeling requirements, and industry must have a meaningful opportunity to comment on that evidence and respond with evidence of its own. Without a procedure which provides for these factual determinations concerning specific chemicals, the careful balancing test which underlies the Congressional concept of "unreasonable risk" could not be applied, and EPA's labeling requirements would be legally defective.

While an omnibus proceeding covering all or most industrial chemicals would be beyond EPA's statutory authority, a two-stage approach to developing labeling rules could be utilized that would satisfy statutory requirements. During the first stage of this process, EPA could develop a "prototype" labeling rule which (1) defines the different types and degrees of hazard which would trigger labeling obligations, and (2) for each such hazard, prescribes appropriate warnings and instructions and specifies methods for their dissemination. Once EPA has established the basic standards and procedures for labeling requirements, the Agency would then apply these standards and procedures to particular chemicals. This task would necessarily entail separate rule-making proceedings for particular chemicals and, where appropriate, for chemical categories which are sufficiently narrow to satisfy Section 26(c) of TSCA. The focus of such proceedings would be on whether the basic statutory criterion of "unreasonable risk" has been met for a particular chemical in view of that chemical's specific properties, uses and exposure.

CMA would be willing to work with EPA in developing an appropriate "prototype" labeling rule under Section 6. It believes that the existing standard of the American National Standards Institute (ANSI) provides a useful point of departure for acute hazard labeling and could be restructured to embody the statutory concept of "unreasonable risk." It must be clearly understood, however, that such a rule would merely serve as a "model" for subsequent proceedings; and these later proceedings would provide for a full consideration of the unique facts which relate to individual chemicals.

2. The Importance of Minimizing Regulatory Burdens

Complemented by Section 2 of TSCA, Section 6 directs EPA to act prudently and responsibly, with constant and careful attention to the economic consequences of its regulatory decisions. Rules which EPA issues under Section 6(a) must prescribe the "least burdensome requirements" possible, while Section 6(c) directs EPA to make findings concerning the "reasonably ascertainable economic consequences" of any rule that it proposes to adopt. Similarly, Section 2(b)(3) of the Act directs EPA to exercise its authority "in such a manner as not to impede unduly or create unnecessay economic barriers to technological innovation." Section 2(c) amplifies this policy by providing that it is "the intent of Congress that [EPA] shall carry out this Act in a reasonable and prudent manner" and by directing EPA to "consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this Act."

These statutory provisions must be brought to bear on any labeling program which EPA proposes. First, the Agency must devote careful consideration to -- and attempt to minimize -- the potentially massive costs of making detailed labeling information available at nearly every level of a chemical's distribution process, including its sites of manufacture, processing and disposal. If there are alternative communications tools which can minimize these costs and lessen the overall burden of compliance without jeopardizing the goals of the Agency's labeling effort, these alternative tools must form the basis of any EPA rule under Section 6(a)(3).

Equally important, EPA has a responsibility to avoid labeling requirements which place an unwarranted stigma on particular chemicals by exaggerating or misrepresenting the potential risks which they pose. For this reason, every effort must be made to utilize a labeling terminology and format which accurately convey the severity and likelihood of any injury which particular chemicals can cause.

The need for a balanced presentation of potential risks is particularly great with respect to "chronic" hazards like carcinogenicity, mutagenicity and teratogenicity. In designing labeling requirements, EPA must take into account the substantial scientific uncertainty involved in identifying chemicals which can cause these effects. It must also take into account the disparate levels of risk which different chemicals pose depending on such factors as their innate properties, potency, uses and conditions of exposure. Significantly, in its recent policy concerning the regulation of chemical carcinogens, the Regulatory Council stressed the importance of these considerations, indicating that any analysis of a substance's carcinogenic potential involves a "characterization of the extent and quality of the evidence supporting this determination" and an assessment of "the size of the exposed population", "exposure sources, routes, and conditions, the duration, frequency and intensity of exposure, and the relevant characteristics (e.g., age, sex, health) of the exposed population." 44 Fed. Reg. 60038, 60040 (October 17, 1979). Any EPA labeling program under TSCA which does not convey information concerning these matters would be incomplete and misleading.

EPA's goal should be to encourage informed and balanced decisions about chemicals by manufacturers, distributors, processors and workers. An approach which fails to place potential risks in proper perspective and causes undue alarm and disruption among users of chemicals would constitute poor public policy, discriminatory agency action and a violation of the requirements of TSCA.

3. Disclosure of Chemical Composition

Over the past several months, some groups have apparently advocated requiring all manufacturers and distributors of chemicals covered by TSCA to disclose the precise composition of those chemicals to their users, including exposed members of the workforce. In the case of "substances", this disclosure would involve the specific identity of the chemical. In the case of "mixtures", disclosure would involve listing the constituent substances of the chemical and the relative quantities in which those substances are present.

TSCA does not authorize EPA to require such an across-the-board disclosure of chemical composition. Under Section 6(a)(3), the Agency may require manufacturers and distributors to provide labeling information for one purpose only -- to afford protection against "unreasonable risks" within the meaning of Section 6(a). In view of this purpose, EPA cannot require the routine disclosure of chemical composition for all chemicals. Rather, such disclosure can only occur on a selective basis and must be tied to a determination that (1) the chemical in question presents an "unreasonable risk", and (2) that risk can be reduced or eliminated if users of the chemical are informed of its precise composition. The situations where this test is satisfied will be the infrequent exception, not the norm.

4. Confidentiality

Any labeling program which requires the disclosure of chemical composition must also provide full protection for confidential business information. Frequently, the specific identity of a substance or the precise contents of a mixture is a valuable "trade secret" whose disclosure will enable competitiors to market products with identical properties and characteristics. In this situation, it is common for manufacturers to describe the chemical to customers and users in "generic" terms and to withhold more precise information about its composition in order to prevent competitive harm.

Under Section 14 of TSCA and 18 U.S.C. § 1905, EPA has no authority to compel departures from this customary industry practice. Section 14(a) forbids EPA, except in c rtain limited circumstances, from disclosing information that falls within Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4). This exemption applies to "trade secrets and commercial or confidential information obtained from a person and privileged or confidential." Similar obligations are placed on EPA by 18 U.S.C. § 1905, which requires all federal agencies to safeguard trade secrets. Section 14(b) creates a narrow exemption from EPA's duty to withhold competitively sensitive information for "any health and safety study" submitted to the Agency. Clearly, however, labeling information covered by a Section 6(a)(3) rule could not be considered part of a "health and safety study." Moreover, Section 14(b) does not permit EPA to compel disclosure of confidential procedures used in manufacturing or processing a chemical or the portion of a mixture comprised by its component chemical substances. Much of the information concerning chemical composition which EPA's labeling rules might encompass would clearly fall in this category. This information would still be immune from disclosure even if Section 14(b)'s exemption for "health and safety studies" were to apply.

It is true that Section 14(a)(4) permits EPA to require the disclosure of confidential commercial information when "necessary to protect health or the environment against an unreasonable risk of injury . . ." CMA questions, however, whether the disclosure of precise information concerning chemical composition will ever be "necessary" within the meaning of this provision. Instructions concerning proper use and handling of a chemical, augmented by a "generic" description of its composition, will be sufficient to enable the chemical's users to protect exposed persons. For this reason, a more precise description of the chemical's identity would not add to the goal of safe chemical use. Since an adequate labeling program can be developed without disclosing the precise composition of the chemicals it covers, EPA has no authority under TSCA to require such disclosure where it would compromise the protection of trade secret information.

* * *

The above principles provide a necessary legal framework for any labeling program which EPA proposes under Section 6 of TSCA. If the Agency conforms to these principles, we believe that it can develop a labeling proposal which is constructive, effective and in keeping with statutory requirements. Within the basic legal framework outlined in this letter, CMA stands ready to assist the Agency in formulating the particulars of such a labeling proposal. The undersigned and other CMA representatives would be happy to discuss this matter further with you or your staff on a mutually convenient date.

In conclusion, we wish to emphasize that any industry-wide labeling program that EPA adopts would be a massive undertaking which involves substantial cost and effort by industry and significant long-term effects on the attitudes of those who make and use chemicals. Any program of this scope and impact deserves the most careful consideration by all concerned.

Sincerely yours,

Peter Barton Hutt

Peter Barton Hutt

Robert M. Sussman

Robert M. Sussman

cc: Dr. Eula Bingham
Steven Jellinek
John DeKany
Cynthia Kelly
Flo H. Ryer
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