

MEMORANDUM

TO: Nik Skrinjaric
FROM: John Field
RE: Nevada Power Co. v. Monsanto
DATE: 5 December 1989

After reviewing Chuck McCrea's review of your memorandum on prospective claims in this matter, I have an observation to offer regarding whether we might argue, as Chuck advised, that the equipment was defective, not the PCBs.

This is a singularly ingenious argument that ought to be tendered notwithstanding the arguable presence of a fatal flaw. The flaw is this: the EPA order requires that all high-voltage equipment containing PCBs be removed. If the EPA's concern lay with equipment that was not capable of preventing the escape of PCBs in a fire, then the order should have been restricted to such equipment and made allowances for equipment that presented no significant possibility of fire-related leakage. Either the order was seriously overbroad, or this argument does not prevent the escape of water. Opposing counsel or the court may argue, I believe validly, that the EPA considered PCBs so ultrahazardous that no equipment containing a significant amount of it, regardless of design or manufacture, was acceptable. Hence it is the PCBs, not the equipment, that posed an unacceptable risk and were therefore "defective."

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