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Sent: Tuesday, May 20, 2003 2:53 PM (GMT)
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Subject: FW: Negotiations with EPA on TRI Lead PBT Lead Rule Lit NMAID=2269921
Attach: Lead TRI PBT negotiations with EPA.doc

-----Original Message-----

From: NMA Legal [mailto:legal@nma.org]
Sent: Monday, May 19, 2003 12:32 PM
To: jcarter@doerun.com
Subject: Negotiations with EPA on TRI Lead PBT Lead Rule Lit NMAID=2269921



Memorandum *CONFIDENTIAL*

To: TRI Work Group
From: Rod Dwyer, Deputy General Counsel
Date: May 19, 2003
Subject: Negotiations with EPA on TRI Lead PBT Rule Litigation

Please treat this memo and its attachment as confidential. These materials describe the settlement discussions currently underway among the Ad Hoc Metals Coalition (of which NMA is a member), the National Federation of Independent Businesses (NFIB) and EPA concerning the agency's 2001 rule declaring lead and lead compounds to be "PBT" (persistent, bioaccumulative and toxic) chemicals. The rule lowered the reporting threshold for lead and lead compounds from 25000 pounds 100 pounds, and prohibited the use of the de minimis exemption, range reporting, and alternate reporting Form A for lead and lead compounds. The Metals Coalition is represented by Jane Luxton of King & Spaulding.

In 2001, the Metals Coalition and NFIB challenged that EPA rule in the U.S. District Court for the District of Columbia. *Ad Hoc Metals Coalition v. Whitman*, (C.A.No. 1:01CV00766). At this point in the proceedings, the next step would be to file a motion for summary judgment and supporting memoranda.

The Coalition and NFIB have approached EPA to determine if the agency is willing to negotiate a stay in the litigation while the SAB process works its way to conclusion. Attached is a description of the situation excerpted from a memorandum prepared by outside counsel Jane Luxton. Note that one factor in this matter is the financial situation of the parties challenging the rule.

Despite that fact, the Coalition during the course of the litigation has brought pressure to bear on EPA in a number of additional ways. The coalition has succeeded in having the EPA Science Advisory Board (SAB) take up the question of proper screening methodologies for assessing risks posed by metals. Indications are that there is a growing body of scientific knowledge agreeing with the Coalition's position, i.e., that as a matter of sound science it is highly inappropriate to use the PBT criteria for metals and metal compounds.

There appears to be some real hope that EPA could agree (1) that no other metals or metal compounds would be designated "PBT" until after the SAB process is completed, and (2) that EPA would discuss reconsideration of the 2001 lead PBT rule when the SAB's conclusions on PBT and metals are inconsistent with the PBT basis of the lead rule. The current sticking point in discussions with EPA seems to be restoration of the de minimis exemption, range reporting and use of Form A for lead and lead compounds. EPA is reluctant to agree to flat out restoration of those items for lead and lead compounds.

Here is where you could help: can you envision means of achieving the same kind of relief offered by the de minimis exemption, range reporting, and or Form A that would not have to depend upon a formal restoration of those particular items ("a rose by any other name" approach, as one person has described the situation). You'll see half a dozen ideas that occurred to some of us; those ideas may or may not work for mining facilities (e.g., the MSDS approach might be of more limited use to mining than to other Metals Coalition members, so maybe we have to look for a combination of approaches).

If you have some thoughts on this subject, please fax (202/463-2666) or e-mail (rdwyer@nma.org) me by Thursday, May 22. Thanks for your help, and thanks for keeping this memo and its attachment confidential.

Enclosure

cc: (w/enc)

Jane Luxton, Esq.

National Mining Association 101 Constitution Avenue, NW . Suite 500 East . Washington, DC 20001 . 202/463-2600

**CONFIDENTIAL--ATTORNEY-CLIENT PRIVILEGE--PREPARED
FOR PURPOSES OF LITIGATION NEGOTIATIONS**

As you know from previous communications, we have been unable to obtain the necessary funding to take the case through the next major phase and the remainder of the litigation, despite our strong legal position. That situation has brought us to the necessity of either settling the case, negotiating or seeking a ruling to stay the court action, or dropping it. Of those options, any alternative to dismissing the suit is obviously preferable. We initiated discussions with EPA in December to explore the possibilities, and I believe we are now in a position that will allow us to negotiate a favorable outcome on this rule.

We have proposed that EPA agree to three critical points:

1. An agreement that no additional metals will be evaluated under the PBT criteria until the SAB review of EPA's proposed Metals Assessment Framework has been completed.
2. An agreement that EPA discuss reconsideration of the TRI lead rule when the SAB reaches conclusions on PBT and metals that are inconsistent with the PBT justification for the TRI lead rule. We want to ensure that our opportunity to raise this issue is available as soon as possible. We would expect EPA to commit that if it is clear that the TRI lead rule no longer is supportable, the Agency will initiate a rulemaking to revise the basis for any continued lowering in the TRI reporting threshold. We have offered that if EPA would agree now to abandon the PBT justification for lead, we would not oppose a 100-pound reporting threshold based on a children's health rationale supported by prior EPA precedent on lead. Our agreement to this alternative was conditioned on removal of the bar to using the de minimis, Form A, and range reporting provisions available to non-PBT substances under the TRI program. We made no commitment as to our willingness to agree to this alternative rationale if EPA does not adopt the change now or with the conditions we set forth.
3. As explained in point 2 above, an agreement to reduce burden, including restoration of the de minimis, Form A, and range reporting options.

We expect to meet with EPA later today by phone to discuss the Agency's reactions, but we believe items 1 and 2 can be worked out, although the wording will take time and effort. Item 3 is more difficult. EPA feels that it has gone on record as saying that PBT substances, including lead, are so dangerous that the Agency cannot permit information to be "lost" to the public, even if minimal, under the de minimis and other provisions. EPA therefore feels it will be open to severe attack if it reverses itself on this point. Instead, it has been suggested that we consider alternative ways to accomplish what we need in terms of burden relief. This is an opportunity and, frankly, a challenge to our creativity. EPA has announced that it must put forward, before October 2003, a package of TRI reforms. This initiative is in response to OMB pressure as a condition of continued OMB approval of EPA's authority to collect information under the TRI program. Many of you were instrumental in our success in urging OMB to take this position, including comments filed with EPA and OMB and also

our meeting with OMB during the ICR (Information Collection Request) process in fall 2002. Kevin Bromberg of the Small Business Administration's Office of Advocacy has also been a powerful ally in these efforts.

Several of us (Fern Abrams, Andy Bopp, Rod Dwyer, Al Collins, Karen Harned, Marty Kaufman, Neil King, and I) have tried to come up with some possible ideas that might get at the relief we need, by some means other than an EPA reversal on de minimis, Form A, and range reporting. These ideas are listed below for your consideration and as thought starters for additional suggestions you may have. We are aware that no one idea will solve everyone's problems, but we are hoping to develop a package of proposals that we could put forward to EPA. We do not expect to offer these during today's call except as examples of some concepts we are thinking about, and will make it clear that we need to meet among ourselves to discuss this issue further before we can propose anything concrete to EPA.

The ideas that occurred to us were:

1. If a company has reported zero or very low (to be defined) TRI releases (where "releases" does not include recycling, off-site transfers or similar events) for the first year (or two) of the new reporting requirement, and where its production process remains essentially the same, that facility would not need to report so long as conditions remained the same.
2. If a company is willing to report that it has released lead at low levels (less than 100 pounds), and can certify that its releases do not exceed 100 pounds, it could have the option of simply checking a box, rather than tracking and reporting the precise amount of releases.
3. For lead (and perhaps other PBT substances), reporters could use a "de micromis" rather than "de minimis" provision, such that the cutoff level would be decreased by a factor of 10 from where de minimis levels are set.
4. Reporters whose inputs and processes were essentially the same from year to year could report every other year.
5. Reporters would be allowed to rely on MSDS forms for the amount of lead in a material received and used in their process. If the MSDS did not show that lead was present at or up to a specific concentration, the reporter would not need to conduct further inquiry to quantify the amount of lead being processed or used. (There would probably need to be provisions for reporters who knew the amount of lead from another information source, but the idea is to let reporters know when they can stop searching for additional information.)
6. A reporter whose process is stable and predictable could record data for one quarter and then extrapolate to obtain a full year's data set for reporting purposes. (Again, some safeguards would probably need to be built into this proposal.)

We have not broadcast the fact that we are in settlement negotiations, as these kinds of efforts are generally more successful if kept confidential, so I ask you to be discreet with this

information. If we are successful in reaching an agreement with EPA, it would involve our jointly asking the court to hold the lawsuit in abeyance while EPA followed through on burden reduction rulemaking and events unfold on the metals framework-SAB front. If we felt that EPA had not lived up to its commitments or we were unsatisfied with the outcome of the rulemaking initiative(s), we could revive the lawsuit.

Best regards,
Jane