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CONFIDENTIAL
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MEMORANDUM FOR THE AIHC LEGAL COMMITTEE

You have asked for our views concerning a court review of the OSHA proposed generic occupational carcinogen regulation. This appraisal is necessarily based on a consideration of the regulation as proposed since OSHA has not indicated changes it is likely to make.

This memorandum addresses the procedural aspects of review rather than the substantive issues. Timing is also unknown at this time, but it is assumed that OSHA will try to keep to its schedule of publishing a final regulation by end-of-1978/early 1979.

## Conclusions

We have concluded as a judgmental matter that there are reasonable grounds for review and that the prospects for successful review are better than 50%. The prognosis depends on the determination whether the regulation is a standard subject to the "reasonably necessary" criterion of Section 3(8) and on the court in which the review action is brought. The unions have demonstrated in both the benzene and lead cases that they intend to "race" to the court they regard as favorable. (D.C. Circuit in benzene; 3rd Circuit in lead.)

While the issue is still open, we believe that a regulation which includes generic determinations which pre-empt later proceedings

on individual substances will likely be regarded as a standard issued under Section 6(b) of the Act. In our view therefore review lies in the Court of Appeals under Section 6(f) and must be brought within 60 days of promulgation.

There are, however, grounds for arguing that the proposal is a regulation reviewable under the Administrative Procedure Act in the district court. Because of uncertainty as to which court has jurisdiction we recommend a simultaneous filing of a complaint in the district court.

If review is to be sought,

(1) We recommend that the petition for review be filed in the Fifth Circuit. By cooperation with API, AISI and MCA a filing system can be established with a reasonable chance of achieving priority of filing.

(2) A complaint should be filed in the district court in the Fifth Circuit, the selection of the district to be made when the companies participating in the review are known.

(3) We recommend that a petition for stay be filed promptly in the Court of Appeals. At this point, it is our view that the prospects for a stay may exceed 50%. Much will depend on how OSHA handles the final regulation.

Discussion

1. Review in District Court or Court of Appeals. The Proposed Regulation cites Sections 6(f), 8(c) and 8(g) as statutory authority for the regulation. Because of the generic nature of the regulation, there is some ambiguity whether the regulation is a standard under Section 6(b) or a regulation under Sections 8(c) and

8(g). The distinction is relevant since Section 6(f) provides for review of standards in the courts of appeals. No specific provision is made for review of regulations under Sections 8(c) and 8(g); presumably such regulations would be reviewable in the district courts under the Administrative Procedure Act.

There is ambiguity as to which court - the court of appeals or the district court - has jurisdiction to review the Proposed Regulation. While the Proposed Regulation is not described as a standard, Section 6(b) dealing with standards is cited as statutory authority. Section 3(8) defines an "occupational safety and health standard" as a standard "which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes . . ." The Proposed Regulation contains requirements which satisfy the definition when the regulation is applied to a particular substance. The argument would be that the Proposed Regulation is a standard since it mandates certain requirements even though a second proceeding is necessary to make those requirements applicable to a particular substance.

The Proposed Regulation also cites the more general regulatory authority in Sections 8(c) and 8(g). The proposal is described as a "regulation" not a standard. It could be argued, therefore, that the Proposed Regulation is subject to review in the district court under the Administrative Procedure Act.

We believe that it is likely the Proposed Regulation will be construed to be a standard under Section 6(b)(and hence reviewable in the courts of appeals). There would appear to be two advantages in urging this view. First, the "reasonably necessary"

requirement of Section 3(8) as interpreted by the Benzene decision relates to standards. Second, review in the court of appeals is faster than district court review.[1/] The issue, however, is not free from doubt. To be safe, a complaint should be filed in the district court at the same time as the petition for review is filed.

We would anticipate an early determination of the jurisdictional issue by the court of appeals if, as we recommend, a motion for stay is filed promptly. Should the court of appeals conclude that it has jurisdiction, the district court case could probably be "put on ice" until final determination on the petition for review.

2. Venue. If the review lies in the courts of appeals, the petition for review can be filed in the circuit where a plaintiff resides or has a principal place of business.

If review lies in the district court, the complaint must be filed in the district where the defendant resides (District of Columbia), where the cause of action arose (District of Columbia) or where the plaintiff resides (residence for this purpose means the district (or division) in which the company has its corporate headquarters).

So long as venue is appropriate for one petitioner or plaintiff in the court of appeals or the district court other plaintiffs can join in the action even though they could not have brought the action as petitioner or plaintiff.

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1/ It should be noted that the standard of review under Section 6(f) (substantial evidence) is different from the APA standard (arbitrary and capricious). However, in cases involving informal rule making the two "tend to converge." Superior Oil Co. v. Fed. Energy Reg. Comm. 563 F. 2d 191, 199 (5th Circuit 1977).

3. Time for Filing. The action in the Circuit Court of Appeals must be filed within 60 days of the promulgation of the standard. If the action should be brought in the district court, there is no specific time limit; the filing of the action is governed by laches.

4. Choice of Court. If the conclusion is reached that court review should be sought, we would recommend that the petition for review be filed in the Fifth Circuit, or if for any reason the Fifth Circuit is not acceptable or available, in the First Circuit.

The Benzene decision[1/] in the Fifth Circuit is an excellent precedent for the proposition that under Section 3(8) of the Act, OSHA must demonstrate by substantial evidence that the quantified benefits bear a reasonable relationship to the costs. The Benzene decision follows earlier decisions in the First[2/] and Fifth Circuits[3/] under the Consumer Products Safety Act construing a similar "reasonably necessary" provision in the CPSA. (15 U.S.C. § 2056(a)). The First Circuit, therefore, is an alternative to the Fifth Circuit.

Should it be decided to institute a simultaneous district court proceeding, a district in the selected circuit would be chosen. Since the venue provisions for district court actions are relatively strict (must be brought where the plaintiff has corporate headquarters) it is not possible to recommend a specific district (or division) until we know which parties will join in the action.

5. The Filing Race. It should be anticipated that the unions will engage in a race to file (as they did in benzene and

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1/ The American Petroleum Institute v. OSHA, F. 2d 89

2/ D. D. Bean & Sons v. CPSC. 574 F.2d 643 (1st Cir. 1978).

3/ Acqua Slide "N" Dive Corp. v. CPSC 569 F.2d 831 (5th Cir. 1978)

lead) in order to select the reviewing court. The commencement of the race is governed by 29 C.F.R. § 1911.18(a). That subsection adopted last December by OSHA in response to the decision of the District of Columbia Court of Appeals regarding the race in the benzene matter[1/] provides that a standard shall be considered issued when it is "officially filed" with the Federal Register.

We have discussed review strategy with API, AISI and MCA. If, as seems likely, the four associations can agree, a mechanism can be set up with open telephone lines to file the petition as soon as the document is stamped by the Federal Register. It must be assumed that the unions will have a similar network.

We do not anticipate a union race to a district court. However, we recommend that the complaint be filed in the district court as soon as possible.

6. Transfer. If the matter is reviewable in the court of appeals, all actions filed in the various circuits will be transferred pursuant to Section 2112(a) of the Judicial Code to the court with priority as to filing time.

If the matter is reviewable in the district court, the actions may be transferred to a single court under Section 1404 or 1407 of the Judicial Code. Priority in the district court is not as automatic as in the courts of appeals. However, priority of filing will be an important determinant.

7. The Issues. It is difficult to forecast which issues should be selected to be pressed on review. The issues fall into

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1/ Indust. U. Dept., AFL-CIO v. Bingham 570 F.2d 965 (D.C.Cir. 1977).

The significant factual issues based on the record are scientific. In general, scientific issues are not good review issues because of the tendency of the courts to defer to the agency when there is a dispute as to a particular scientific point. There are, however, some scientific issues which offer a reasonable basis for review.

(i) OSHA's wooden choice of positive animal data over negative data without criteria as to quality of the data.

(ii) OSHA's erroneous reliance on MTD test results beyond the effect attributed to those data by NCI.

(iii) OSHA's reliance on short term tests before the validation process is complete and without criteria as to conduct, number and interpretation of the tests and the results.

(iv) OSHA's generic determinations designed to exclude scientific evidence in individual substance proceedings. OSHA thus proposes to freeze science contrary to the statutory directive to use the latest scientific data. OSHA's proposal for amendments to generic determinations fails to correct this defect.

There are some other lesser important points which may figure on appeal.

(i) OSHA labeling requirement exceeds its statutory authority.

(ii) Various provisions of the model standards are unreasonable.

8. The Parties. We have assumed that AIHC would be a party to any petition for review and complaint. For venue purposes AIHC would be treated as having its residence in the Second Circuit and its "corporate seat" in the Southern District of New York. Since we would not recommend filing in the Second Circuit or the Southern District, it is important both from a venue and substantive

point of view that a number of member companies join in any complaint and petition for review. Since one petitioner must reside or have a principal place of business in the circuit in which review is sought, the recommendation that the petition be filed in the Fifth Circuit will depend on whether a petitioner satisfying the venue requirements joins. The choice of the district court will depend on the options available when we know the corporate headquarters of the participating companies.

9. Stay. The requirements for a stay are:

(i) a demonstration that the applicant is likely to prevail on the merits;

(ii) showing of irreparable harm unless a stay is granted.

The first point will turn on an argument on the issues selected for review. It is our view that this argument has a better than 50% chance of prevailing.

The demonstration of irreparable harm is more difficult. While OSHA has stated an intention to apply the regulation to the NIOSH list, OSHA will argue that there are no threatened damages until the regulation is applied to particular substances. Attached are two memoranda which discuss the private and public harm which may be suffered unless the regulation is stayed.

The points outlined in the attached memoranda on a stay should be developed in affidavits. An important contribution of the Legal Committee would be for each member to undertake a review of his company's situation to determine what affidavits of private and public harm can be prepared.

Before filing a motion for stay in the court, an application for an administrative stay must be filed to exhaust administrative remedies. OSHA normally acts promptly. A denial of a stay by OSHA is anticipated, with the motion filed promptly thereafter. If there is good affidavit support, it is our view that there is a reasonable chance of obtaining a judicial stay pending review.

10. Timing of Decision on Review. There is doubt as to OSHA's timing for issuance of the final regulation. Assistant Secretary Bingham said recently she still has a target date of year end. However, Judge Greene has opened the record for comment on the OSHA Regulatory Analysis up to December 19, 1978. This points to a conclusion that February/March 1979 is a more likely "earliest" date.

In view of the uncertainty, it seems wise to begin plans now if AIHC concludes that it is likely a court review of the final regulation will be sought. We will need time to coordinate with the other associations and to lay plans for the "race". Identification of member companies desiring to become parties to the review will also require some time. Drafting a petition for review is simple; drafting a complaint involves more effort and preparation.

Any tentative decision to seek review should include authorization to file the petition for review and complaint. This authorization is necessary because the "race" will preclude consultation between the date of signature of the regulation and the time of its promulgation (filing at the Federal Register).

A tentative decision to seek court review is always subject to reconsideration until the date of filing the petition for review and complaint. A petition or complaint can always be dismissed.

Robert C. Barnard

Attachments

cc: Fred Hoerger, Chairman Scientific Committee
Carl Umland
E. P. Blanchard, Chairman Alternatives Committee
William McCarville

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CLEARY, GOTTLIEB, STEEN & HAMILTON

October 10, 1978

MEMORANDUM FOR ROBERT C. BARNARD, ESQ.

Re: Proof of Irreparable Harm Arising From Issuance of the OSHA Generic Regulations

This memorandum will supplement Rob Glicksman's September 15, 1978 memorandum on the above subject. The memorandum will set forth several additional effects on manufacturers that may be considered components of a set of circumstances that satisfied the irreparable harm requirement for the issuance of a preliminary injunction. In addition, the harm to the public interest is also discussed, since courts will always consider the public interest implications of granting or denying a preliminary injunction.

I. Irreparable Harm to Companies Due to Business Uncertainty

The proposed OSHA generic regulations will create substantial uncertainty in the industrial community concerning the ultimate classification of chemicals. This uncertainty could well lead to businesses making decisions that would result in irreparable harm to them. Rob's memo described the possible irreparable harm that a company could suffer if it decided to invest in equipment necessary to comply with OSHA requirements in the erroneous belief that a product produced or used by it would be classified a Category I carcinogen. Another possible business decision by such a company would be to discontinue production or use of the product. For companies which make such

products a decision to cease production would result in lost sales, losses due to underutilization of manufacturing capacity, disruptions in marketing efforts and other irreparable damage. Companies using such products would be forced into searching for substitute products which would likely be of higher cost or less desirable for their intended use.

As Rob discussed in his memo, the possibility of ultimate Category I classification of a substance could result in adverse publicity for producers or users of that substance. Thus, in the face of uncertainty, there could well be an impetus, because of a desire to avoid adverse publicity, to act to limit worker exposure to a particular substance, even if the company believes that Category I classification is inappropriate.

A company producing or using a product whose classification is uncertain will face a situation which will encourage it to adopt control methods or cease using the product, either action possibly being ultimately unnecessary. The aspects of the proposed rule which will simplify categorization of substances as carcinogens will increase the number of products whose future status will be uncertain and, thus, result in a greater likelihood that companies will make erroneous decisions to their irreparable harm. The aspects of the proposed rule that require strict control if a substance is found to be a Category I carcinogen will likely cause an erroneous decision to control exposure to be expensive, and will tend to increase the likelihood of a switch to substitute products.

## II. Irreparable Harm to the Public Interest

### A. Business Uncertainty

Business uncertainty over future classification will not only affect individual businesses, but would also likely harm the public interest irreparably. For example, erroneous decisions by businesses to invest in control facilities would result in higher costs and, consequently, in higher prices to consumers. Unnecessary cost increases in numerous industries due to uncertainty as to how specific products will be categorized will irreparably harm the consuming public by increasing inflationary pressures in a period when there is general consensus that inflation is the most serious economic problem facing the United States.

If business uncertainty manifests itself in shifts away from the use of products that are questionable, the public interest could be irreparably harmed in several ways. To the extent that such questionable products are end products of a production facility, a stop in production will likely result in a loss of jobs and other economic dislocation in the community in which such facilities are located. In some cases, it may be possible for such productive capacity to be used to manufacture other products. Yet there would still likely be some economic dislocation involved in such a switch.

For consumers of such products there are several likely adverse effects from decisions by businesses to stop production. Consumers will have less consumer choice, and could well be forced

into substitutes that are less effective in satisfying the consumer's requirements. It is also likely that the consumer will end up paying more for the substitute products. The supply of the total group of products that will satisfy the customer's needs, that is the questionable product and its substitutes, will be decreased. Demand for the total group of such products will likely remain the same so that prices of each of the substitutes will likely increase as demand increases for them.

In addition, if some, but not all, firms stop production of a questionable product, prices could be affected by a decrease in competition that would likely result. Consumers would be faced with a decrease in the number of sources for that product. Depending upon the structure of the market, the elimination of a source of supply could have significant anticompetitive effects.

If all producers of a product decide to stop manufacturing a questionable product, a restraint on the pricing actions of producers of substitute products will be eliminated. Thus, possible anticompetitive effects of decisions of manufacturers to stop producing certain products could extend into other industries.

In short, the likely adverse economic and competitive effects of business uncertainty engendered by the proposed OSHA rule are effects that will irreparably harm the public interest. The possibility that some materials that would be identified as "bad actors" in a substance-by-substance approach would no longer be used as a result of business uncertainty could be viewed by