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CHEMICAL MANUFACTURERS ASSOCIATION

January 5, 1981

To : General Counsels Group
Chemical Regulations Advisory Committee
Environmental Management Committee
Other CMA Members Potentially Affected by PCB Regulations

Re : Special Report On CMA's PCB Project

This report will be of immediate interest to any company which might, intentionally or unintentionally, generate any amount of PCB's anywhere in its processes, waste streams or products, or which owns an electrical transformer or capacitor which might contain PCB's. A recent court decision has significantly altered EPA's regulatory scheme for PCB's. This report details CMA's ongoing efforts to work with EPA, EDF, other parties to the litigation and other affected industries to resolve the problems created by that court decision.

Background

For the last few weeks, CMA staff, with guidance from selected company members, have participated in an intense schedule of meetings with EPA, the Environmental Defense Fund, and other interested industry groups in an effort to identify an appropriate response to the recent decision in EDF v. EPA, 79-1580 (D.C. Circuit, decided October 30, 1980). (Copy attached.) That decision overturned EPA's determination to exclude from its May 31, 1979, PCB regulation (see 44 Fed. Reg. 31514):

(1) Materials containing PCB's at less that 50 ppm;

(2) Certain commercial uses of PCB's defined as "totally enclosed" */ (Including non-railroad transformers, capacitors and electromagnets.)

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*/ The court, however, did not overturn EPA's determination to allow the continued use of eleven non-totally enclosed uses: servicing of non-railroad transformers; use and servicing of railroad transformers; use and servicing of mining equipment; use in heat transfer systems; use in hydraulic systems; use in existing stacks of carbonless copy paper; use in pigments;

The court held that EPA did not offer substantial evidence to support its conclusions that PCB concentrations excluded from regulation would not pose an unreasonable risk. EPA had indicated that zero exposure was the only "safe" level. Since it had poor information on the source or extent of the risks at less than 50 ppm the court concluded it could not make a rational "unreasonable risk" analysis.

The Agency, in the court's view, also provided no rational basis for exempting an intact, nonleaking class of "totally enclosed uses" in large part because the Agency had no idea what it was exempting. It had no idea what PCB uses were in fact intact and nonleaking. The court was impressed with the omission of procedures for inspection and self reporting.

CMA was not a party to that litigation but the court's opinion may have serious and widespread consequences for our industry. If the court issues an order, or "mandate," implementing its decision, industry will have only two avenues of relief from TSCA's ban of PCB's:

(1) The annual filing of a petition for an exemption from regulations which EPA could grant or deny by rule only upon a finding that:

(a) no unreasonable health or environmental risk would result;

(b) good faith efforts had been made to develop a chemical substance which does not present an unreasonable health or environmental risk and which may be substituted for the subject PCB. [§6(e)(3)(B) of TSCA].

(2) An EPA rulemaking proceeding authorizing the use of a PCB if the Administrator finds that such activity will not present an unreasonable health or environmental risk. [§6(e)(2)(B) of TSCA].

*/ (continued from preceeding page) servicing of electromagnets; use in natural gas pipeline compressors; use in small quantities for research and development; and use as a microscopy mounting medium. (See 44 Fed. Reg. at 31549-51 (1979), to be codified in 40 C.F.R. §761.31.) Notice that detailed conditions attach to each of the authorizations.

Also not affected by the court's decision is EPA's Disposal and Marking Rule (43 Fed. Reg. 7150, February 17, 1978, as amended by 43 Fed. Reg. 33198, August 2, 1978).

In the absence of such relief, PCB's would be banned, regardless of their concentration, and whether intentionally manufactured or inadvertently generated in products, waste streams, or processes.

Since, theoretically at least, PCB's may appear in connection with a wide range of the chemical processes of our industry -- in chlorination reactions, in connection with the use of chlorinated intermediates or chlorinated solvents, in connection with a great many combinations of chlorine, hydrocarbons and heat, to name only the most likely, the removal of a 50 ppm cutoff and the ban of PCB's appearing in any concentration could have a severe impact on our industry.

However, EPA and EDF, the principle litigants in the case, may be able to persuade the court to "stay its mandate" if EPA and EDF jointly petition the court and present a rigorous schedule for the development of new PCB regulations. A major problem, however, is that neither EPA or EDF have reliable information about what happens if materials containing PCB's at or below 50 ppm are exempt from regulations. For instance, they don't know how much protection such a cut-off achieves, the analytical problems and costs in identifying PCB's at such concentration levels, the risks posed by PCB's below that "cut-off" or the burdens and problems for business or their own enforcement difficulties if that or some other cut-off level were employed.

Furthermore, while TSCA authorizes the continued use of PCB's in a "totally enclosed manner," EPA, in proposing to exempt only "intact, nonleaking" equipment, does not really know which "uses" of PCB's fall into that category. It does not have information on the probabilities or magnitudes of leaks from capacitors.

EPA's Request for Industry Assistance

EPA has turned to industry for assistance. The Agency wants information -- data on hand or reasonably obtainable estimates, which will permit the Agency to understand the nature of the PCB regulatory problems it faces. With this information it will file a joint motion to the Court of Appeals for the D. C. Circuit with EDF requesting a stay of the Court's mandate pending the development of further regulations. Current plans call for a joint petition to be filed by January 21, 1981.

On the "totally enclosed" issue the lead data gathering effort is being conducted by the Edison Electric Institute, intervenors in the litigation. Attached to this report is a draft of the data gathering protocol which EEI has presented to EPA as a preliminary reponse to EPA's request for assistance.

CMA's members are significantly affected by both issues. Accordingly, CMA staff called upon selected representatives of a number of CMA companies which had petitioned for exemptions from the PCB regulations, to provide urgent assistance in determining whether and how CMA should respond to EPA's request. **/ Attached is a letter from CMA to David Menotti, Esq., of EPA, describing CMA's efforts to date. In general, we have agreed to cooperate and to request certain categories of data from our members if we can be certain that the confidentiality of the company source of the data will not be disclosed to EPA and if adequate time is allowed for the collection and analysis of the data. Our current estimate of the time CMA would need to collect and analyze the data is approximately six months.

One point should be emphasized. This project presents an unusual fact situation for CMA. Normally it would not be in a company's strategic interest to describe in advance of a formal proposal by an Agency, all the nooks and crannies in which a problem chemical might exist (as opposed to detailed information on where it actually exists). However, at this time, in CMA's view and in the view of the company representatives who have been advising us, such does not appear to be the case here. It appears to be in industry's interest and in EPA's interest to learn now where the PCB problem might exist in our industry so that the rulemaking proceeding is designed, in the beginning, to consider all of industry's problems and concerns. Industry will have an opportunity of submitting its views and data to the Agency in the eventual rulemaking proceeding. Our goal now, however, is to make EPA understand the complexity of what will be involved so that the schedule they propose for that rulemaking and the issues and facts they consider in designing that rulemaking will reflect industry's concerns.

**/ Member participants to date have been: (1) Allied Chemical -- Ed Shields; (2) Dow -- Charles J. Kalil, Esq., Kenneth L. Burgess, James Hanson, Esq., Gerry Daigre; (3) duPont -- Mark L. Christman, Esq.; (4) Exxon Chemical -- Carl Umland; (5) Monsanto -- Phocion Park, Esq., John H. Craddock, Peter H. Smith; (6) Stauffer -- John Ronan, Esq., James Silverman, Esq., John Murphy, Esq.

Interim Measures Program

As part of their submission to the Court EPA and EDF are determined to impose an interim program for inspection, recordkeeping and remedial actions for certain types of PCB related electrical transformers and capacitors. A copy of EPA's proposed program is attached. Persons anxious to take advantage of a stay offered by the court would have to abide by this program. Presumably those not abiding by the conditions of the program who were subsequently challenged by EPA in an enforcement action would have to rely upon the language of TSCA for their defense and could not rely upon the court's stay of the TSCA ban on PCB's.

The primary focus of this program is equipment posing an exposure risk to food and feed products. The last page of the attached document, however, would affect all other PCB related electrical transformers. CMA is continuing its effort to minimize the impact of such a program on our members.

Related Litigation

Alcoa and General Electric are pursuing companion litigation in this same D. C. Circuit. They are challenging EPA's proposed regulation of unintentionally generated PCB's as beyond the intent of Congress. Unfortunately, through a procedural confusion (largely by the court's own doing), the court, in footnote 37 of its opinion in EDF v. EPA already addressed the issue even though no factual record had been presented on the issue and the issue had been scheduled for subsequent briefing by all parties in the GE/Alcoa suit. The court held that Congress, while it might not have intended to cover unintentionally manufactured PCB's, did so.

Litigants in that suit have asked CMA to consider joining them, through an amicus or intervention. Extensive discussions are underway to determine the best course of action for CMA, which involves a consideration of a number of complex issues. We are considering whether the arguments to be raised by those already in litigation are adequate to protect CMA's interests without CMA having to risk the res judicata effect of an adverse decision. We are also considering whether the issue of unintentional manufacture can be framed persuasively to the court in the absence of facts developed in a rulemaking and whether the issue can be thus framed to consider the diverse interests of CMA's members in the different aspects of unintentional manufacture (e.g., such manufacture which results in in-process destruction of PCB's, or the inclusion of PCB's in a final product or the creation of PCB's in wastes).

These and the various other complex litigation issues involved will be reviewed, at a minimum, with the same companies who have been advising us to date.

Future CMA Activities

In the next few days the following activities are planned:

(1) Solicitation of CMA members who have filed PCB exemption petitions to serve on a formal ad hoc committee to oversee continuing activities on this project by contributing legal and technical and/or scientific representatives to the effort. (CMA member companies that have filed such petitions are listed in an attachment.)

(2) Refinement of the content and format of the CMA data survey, including preparation of a survey protocol and questionnaire instructions, and possible selection of a statistical sampling of respondents.

(3) Selection and retention of an outside consultant to assist CMA in the preparation of the survey instrument, the receipt and collection of (confidential) responses, and analysis of data. Negotiations are currently in progress with the Regulatory Research Service of Washington, D.C.

(4) Selection of members or consultants who can provide narrative responses to the technical and scientific issues described in our attached letter to David Menotti, Esq., of EPA.

CMA has been coordinating its efforts with the Dry Color Manufacturers Association and the National Paint and Coatings Association. Those two associations presently contemplate submitting data to EPA and may use the formal eventually developed by CMA.

Additional special reports on this project will be submitted to CMA members in addition to those companies serving in a direct advisory capacity.

Sincerely,

David Forsyth Zoll
Assistant General Counsel
for Antitrust and Regulatory
Litigation

Attachments: See next page

Attachments:

1. Opinion, EDF v. EPA, 79-1580 (D. C. Circuit, decided October 30, 1980) Opinion not included here.

2. December 30, 1980, letter from David Zoll to David Menotti and attachment

3. December 24, 1980, letter from Ruth Bell to EDF v. EPA negotiation participants

4. List of CMA members who have filed PCB exemption petition

5. Draft EEI Survey Protocol.