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February 1, 1977

MEMORANDUM TO PCB AD HOC
COMMITTEE MEMBERS

In anticipation of the February 7 meeting of the Ad Hoc Committee to discuss whether to appeal the Administrator's decision banning PCB discharges after January 18, 1978, we have prepared this memorandum which briefly describes the four legal arguments we believe can be raised in our attempt to seek reversal of the Agency decision. At the outset, we should note that it is always a difficult matter to persuade a court to reverse what appears to be a scientific decision made by an executive officer entrusted with responsibility for such decisions. You might find it worthy of note that we know of only one instance in the past seven years when a company has successfully overturned an EPA decision in the D. C. Circuit. The record in the Third Circuit, while better, is also far from encouraging.

Four issues seem worthy of attention, if we proceed with the appeal.

1. Preemption by TSCA: By banning PCB discharges altogether, the Administrator had made the contrast between the two and one-half year TSCA ban, and the present ban, apparent. Our argument will be that the TSCA ban must be respected, and the Administrator lacks authority to undermine the scheduled phase-out of PCB use mandated by TSCA, which includes a carefully devised program of exemptions if substitutes are unavailable.

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2. Procedural Irregularities: Under the Agency's procedures, we had the burden of disproving the regulations proposed. This shifting of the burden of proof to the opponents of a rule is arguably a violation of the Administrative Procedure Act. This issue has never been tested under the Federal Water Pollution Control Act. A recent case under the Federal Insecticide, Fungicide and Rodenticide Act, however, has upheld a similar procedure.

3. Arguments on the Merits: If we appeal the case, we must challenge the factual basis for the Administrator's finding that Aroclor 1016 poses an imminent threat to health which warrants a total ban. Challenges involving such technical issues are always difficult to make before a federal court--and require extensive briefing and preparation of appendices--but we believe such an argument can be made which could be understood by the Court. Our argument will be that Aroclor 1016 cannot be treated as identical to the more highly chlorinated Aroclor mixtures and that the Administrator thus erred in choosing to treat them all under a single regulation. We would not attempt to convince the Court that Aroclor 1016 is harmless, or that any specific discharge limitation is appropriate. We would limit the argument to the fact that the record provides no basis for a total ban on Aroclor 1016.

4. Failure of the Administrator to make his decision in good-faith: Based upon the fact that virtually the entire final decision is taken word-for-word from the Agency staff's proposed findings of fact and briefs, we will argue that the Administrator failed to adequately and personally review the entire record and all of the briefs in this case in reaching his decision. However, the fact that the decision and staff submissions are virtually identical will not be sufficient by itself to prevail. We will need the Court's permission to ask Mr. Train certain questions relating to the manner in which he made his decision. Only on rare occasions have the courts permitted a party to ask such questions and it is difficult for us to know whether we have sufficient evidence to persuade the Court to permit the procedure.

We believe all four of these arguments have a chance of success. The likelihood of success is probably greater with the first argument than with the latter three.

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It is most difficult to predict the outcome of an appeal proceeding. At the February 10 meeting we will be happy to answer any questions you might have concerning the Administrator's decision and its likely impact. We will also be happy to discuss any other issues you believe should be raised, in the event we are authorized to proceed with the appeal.

Peter J. Nickles
Steven S. Rosenthal
John Michael Clear

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