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Mr. Tyler Nourse
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Dear Ty:

You have asked that we review the various options available to the capacitor industry should EPA-proposed regulations on marking and disposal of items containing PCB, promulgated pursuant to the Toxic Substances Control Act (TSCA), prove unacceptable to members of the PCB Ad Hoc Committee and their customers who use PCB-impregnated capacitors. As you are aware, there appears to be a serious risk that EPA may propose regulations that apply to manufacturers who use capacitors in completed products. Such an extension of TSCA is arguably improper, and might seriously affect the ability of the capacitor industry to sell capacitors. If the EPA takes this position in its final regulations, it might be appropriate to seek a court review of EPA's construction of TSCA.

Although EPA's proposed regulations on the marking and disposal of PCBs have not as yet been published in the Federal Register, we expect that EPA will issue the proposed regulation shortly since TSCA requires that final PCB regulations must be in force no later than July 1, 1977. In order to insure that the industry's position is presented to EPA as forcefully and persuasively as possible, steps must begin immediately to formulate an industry position on marking and disposal, and to find knowledgeable individuals who would be

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willing to submit statements for the record. Even if the proposed regulations are satisfactory, the industry should nonetheless submit comments and perhaps participate in hearings before the Agency in order to protect the industry's right to initiate a court challenge should the final regulations differ markedly from those originally proposed.

In this letter we will review the proposed procedures the EPA will follow in adopting substantive PCB regulations, and then offer our recommendation concerning action the industry may wish to take to protect its rights under TSCA.

1. Proposed Procedural Rules

Section 6 of TSCA, which pertains to PCB's generally as well as to regulation of any potentially hazardous chemicals, requires that the public be permitted to participate in the development of all rules promulgated under the Act. EPA on Thursday of last week issued proposed regulations seeking to implement these provisions to TSCA. (42 Fed. Reg. 20640, April 21, 1977.) The proposed regulations limit the ability of an interested party to participate in rulemaking proceedings before the adoption of rules, such as PCB marking and disposal regulation, and thus arguably violate TSCA. We discuss these proposed rules below. A copy of the Notice of Proposed Rulemaking is enclosed herewith.

The proposed procedural rules contemplate a three-tier process by which rules such as those relating to PCB labeling and disposal may be adopted by the EPA. First, after such rules have been proposed and published in the Federal Register, members of the public may file written submissions which "shall contain all comments on and criticisms of" the proposed regulations. These submissions which are called "main comments" will have to include all arguments and factual material industry wishes to submit.

Second, the Agency will hold a "legislative hearing", to be conducted by Agency employees "having special responsibility for the final rule or special expertise in the topics under discussion." Members of the panel conducting the legislative hearing may question any person participating in the hearing. While persons in the hearing audience may request that the panel ask certain questions, the decision whether to ask questions and to what extent is within the panel's discretion.

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Finally, after the close of the "legislative hearing," any participant in that hearing may request cross-examination as part of what the proposed procedural rules describe as an "informal hearing." It is not clear from the rule whether such a request must be limited to participants in the legislative hearing or may be of any individual who has relevant information to provide. (It should be noted in this regard that the Agency has the power to compel witnesses to appear by issuing subpoenas.) Within one week after a request for cross-examination is made, the hearing panel must determine whether to grant the request and, if granted, whether to limit the scope of cross-examination.

Following the completion of cross-examination, parties will be permitted two weeks within which to file reply comments. These comments may only be based upon other comments, material in the hearing record, and any additional materials not reasonably available when the "main comments" were submitted.

2. Criticism of Proposed Procedural Rules

The proposed procedural rules vary in several important ways from the procedures described in TSCA, and may have a serious effect on the ability of interested parties to participate in rulemaking proceedings concerning PCBs. TSCA makes no provision for a "legislative hearing." Therefore, it can be argued that participation at such a hearing ought not to be a necessary predicate before being permitted to request cross-examination. In addition, the proposed rules do not provide for the submission of rebuttal evidence, nor do they set forth procedures by which rebuttal witnesses can be cross-examined. The absence of such a right is particularly important since the Agency will be the principal party submitting rebuttal evidence. Finally, the rules place severe restrictions on the right to cross-examine both in terms of procedures to be followed by requesting parties, and in terms of the restrictions that appear to be contemplated on its exercise. These objections to the proposed procedural rules are sufficiently serious to merit the submission of comments by the industry. All such comments are due by May 9, and if we are to prepare such comments we should begin almost immediately.

3. PCB Regulations: Recommendations

The EPA Administrator will shortly propose rules as to the labeling and disposal of PCBs and products containing PCBs. These rules will be adopted pursuant to the final procedures

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established by the EPA under Section 6 of TSCA, and thus the Agency's decision with respect to its procedural rules will directly affect the capacitor industry's ability to participate in substantive rulemaking proceedings concerning PCBs.

TSCA permits judicial review in an appropriate United States Court of Appeals of all final substantive rules adopted by the EPA. Thus, if the final regulations adopted by the EPA are arbitrarily adopted, or violate TSCA (or if the EPA's procedures violated TSCA), we can seek review in any circuit in which a member company has a principal place of business. On review, we can raise such issues as (i) whether procedures followed by EPA were proper; (ii) whether the EPA's proposed rules violate TSCA; (iii) whether the proposed rules are supported by the evidence in the record; and (iv) whether the EPA evaluated and responded to the comments submitted by the public. Naturally we cannot predict at this time whether such an appeal will be necessary, or what issues might be appropriate to be raised.

EPA has already placed itself in a difficult position by not as yet proposing PCB marking and disposal regulations. The Agency may therefore seek to limit the exercise of rights provided for in the proposed rules and in TSCA itself, in order to adopt final PCB rules by July 1, 1977. Even under the proposed procedural rules (which fall short of guaranteeing all parties the opportunity fairly to participate in the rulemaking proceeding), it will be impossible to permit comments and a hearing on proposed PCB rules prior to adoption by July 1, 1977. In effect, industry would be prejudiced in its hearing and comment rights by the Agency's delay in proposing labeling and disposal regulation. Attention should therefore be given to whether a letter should be sent to the Administrator bringing this delay to his attention and indicating the industry's intention not to permit the delay to prejudice its rights to comments both orally and in writing, should that prove necessary.

In sum, we recommend the following:

First, the capacitor industry should object to the procedural rules proposed by the EPA last week, which would have the effect of impairing the industry's opportunity to participate in substantive rulemaking proceedings. This must be done by May 9, and we would be able to prepare a brief set of comments preserving our right later to raise the issues upon adoption of substantive rules.

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Second, the capacitor industry should prepare position on marking and disposal of PCBs, so that a full response can be submitted when the EPA proposes its regulations sometime during the next several weeks.

Third, the capacitor industry should consider whether it wishes to participate in a rulemaking proceeding concerning the substantive disposal and labeling PCB regulations. This decision can only be made following the promulgation of the proposed rules, but it should be borne in mind that a failure to participate in the rulemaking proceeding may severely limit the industry's ability later to protest the adoption of final regulations.

Fourth, we suggest that the EPA be put on notice that the industry objects to the failure of the Agency promptly to propose substantive PCB labeling and disposal regulations in time to permit full rulemaking proceedings prior to July 1, 1977.

If you have further questions as to the legal options available to the industry in connection with PCB regulations, please feel free to call us. In addition we will notify you as soon as any proposed regulations are promulgated by EPA.

Best regards


Peter J. Nickles
Steven S. Rosenthal
John Michael Clear

Enclosure

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