CHEMICAL MANUFACTURERS ASSOCIATION

December 12, 1980

To : CMA Members Potentially Affected By Regulation of PCB's

Re : Collection of PCB Related Data From CMA Members

It is the preliminary judgment of a number of CMA members, staff, and outside counsel Covington & Burling, that CMA should quickly agree to provide data to EPA which will help the Agency define the size and nature of a PCB rulemaking proceeding. This memorandum explains the basis for that conclusion and identifies issues which need to be addressed very rapidly by interested CMA members.

Since the issues involved do not fall neatly within the jurisdiction of any CMA committee this memorandum is being prepared for distribution to any members who may have an interest in PCB regulation.

1. Background.

The urgency and importance of this matter are the result of the D. C. Circuit Court of Appeal's decision in EDF v. EPA, 79-1580 (D. C. Circuit, decided October 30, 1980). The Court's opinion overturned EPA's determination to exclude from its PCB regulations:

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

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

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 it could not make a rational "unreasonable risk" analysis.

*/ 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 railroal transformers; use and servicing of mining equipment; use in

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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 which PCB uses were in fact intact and nonleaking. The court was impressed with the omission of procedures for inspection and self reporting.

The court has not yet issued its so-called "mandate" or order. Various procedural filings, including motions for rehearing, are in process and decisions on those filings will probably not be issued for a month or so. In the interim, EPA and EDF are trying to agree on a timetable for a rulemaking proceeding on the two issues remanded by the court. If they can agree, they will file a joint motion urging the court to stay its mandate pending the rulemaking proceedings. The incentive for industry to assist in defining that regulatory schedule is that without a stay of the court's mandate, 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]

There is a major problem, however. Neither EPA nor EDF know how big a regulatory effort will be required to tackle either of the remanded issues. Predictably, before EDF will agree to join EPA in seeking a stay of the court's mandate it wants some idea of how fast the regulatory process will move.

*/ (Footnote continued from page 1)
heat transfer systems; use in hydraulic systems; use in existing stacks of carbonless copy paper; use in pigments; 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.

EPA has solicited industry assistance. The industry intervenors (including most prominently Edison Electric Institute) and amicus curiae participant Dry Color Manufacturers Association are planning to conduct data surveys of their members. Other affected industry groups have attended joint meetings with EPA and EDF and some or all appear to be preparing to make data available to EPA. Among these other industry groups are: American Paper Institute, National Paint and Coatings Association, The Fertilizer Institute, Chemical Specialties Manufacturers Association, National Food Processors Association, U. S. Brewers Association, Inc., Frozen Food Institute, and others.

2. CMA Involvement.

At the invitation of intervenor General Electric's outside counsel, Jeffrey D. Cerar, Esq., of Squire, Sanders and Dempsey, I attended a meeting of the litigants where it became apparent that CMA might have an important role in providing data to EPA. CMA's potential interest was then confirmed in a quickly arranged conference call between legal and/or technical representatives of Dow, duPont, Monsanto, Allied, Stauffer, Exxon, and Peter Hutt, Randy Schumacher and myself. That conference call resulted in our accepting an invitation to meet with EPA on December 5, 1980, and, in a premeeting involving most of those same people we decided, in what we carefully described to EPA was on a good faith explanatory basis, to inform EPA that CMA:

(1) Was anxious to cooperate;

(2) Would like to consider with its members the possibility of providing the following data to EPA:

(a) Presently available test information on the presence of PCB's in concentrations of less than 50 ppm in our members':

- *transformers
- *heat exchangers
- *capacitors
- *process/product/waste stream sources

This was on the understanding that the quality of such data might range widely from data showing merely the presence of PCB's at some unidentified concentration less than 50 ppm, to data which would show a range of concentrations within certain confidence levels.

(b) Estimates of the costs and practical problems of conducting qualitative and quantitative tests to determine the presence of PCB's in concentrations less than 50 ppm in each of the sources identified above.

(c) Would submit an analysis of disposal problems. This would include reference to the disposal problems yet to be resolved by the government and industry for materials containing PCB concentrations greater than 50 ppm. It would also contain information on the problems of disposing of new materials contaminated with PCB concentrations of less than 50 ppm.

(d) Available information on the various components of an unreasonable risk determination:

- *PCB toxicity
- *PCB exposure information
- *Associated costs and other regulatory impacts

(3) Would insist, as a condition to such cooperation, that company data be submitted to EPA only in a form which had been aggregated, perhaps by an outside consultant, in a fashion which precluded identification of the company source of the data.

(4) Also would want to submit information on the "totally enclosed" issue, not just on the 50 ppm issue.

EPA was appreciative and receptive. It distributed a previously prepared draft of questions to which it anticipated needing answers. (Copy attached) CMA indicated it would review those questions.

I then attended a second meeting of the litigants and interested observers on December 10, 1980. The results of that meeting were as follows.

*Interim Measures Program. (copy attached)

During the interim effort to scope the size and nature of the appropriate regulatory proceeding, EDF, as a priority matter, wants agreement on an interim measures program -- an inspection, reporting and remedial effort addressed to potential PCB exposures posing significant health and environmental risks, especially significant risks to human and animal food chains. Unfortunately, the breadth of the language in the attached draft goes far beyond that goal. For instance, it would potentially require an interim measures program for chemical companies operating packaging plants where some portions of the packaging material was used by the food industry. A further complication is the fact that no one has yet

developed a satisfactory definition of those facilities with a sufficient nexus to food chains to be of concern. The attached draft uses the term "food and feed related facilities." FDA's proposed regulation of PCB's includes a proposal to prohibit or limit PCB's "in sealed electrical transformers and capacitors used or stored in or around food feed, and food-and-feed packaging materials plants or storage facilities." (45 Fed. Reg. at 30985, May 9, 1980). EPA's companion proposal, to prohibit PCB's in facilities manufacturing, processing or storing fertilizers or agricultural pesticides, again uses the term food and feed related industries (Id at 30989).

Accordingly, the government asked industry to submit its own preferred definition by Tuesday, December 16, 1980, using as a point of departure the definitions in the May 9 Federal Register. A meeting to further discuss the details of the proposed interim measures has not yet been scheduled.

*Appropriateness of EPA's draft questionnaire; Schedule for industry submission of data.

Industry was asked to present its official reaction to EPA's proposed questionnaire and an estimate of its schedule for the submission of data at a 9:30 a.m. meeting on Tuesday, December 23, 1980, at EPA of the litigants and other interested persons (contact Mary Clark, 202/755-0794, for location).

*Formerly "totally enclosed" study.

A meeting of persons interested in further discussion plans of the Edison Electric Institute study of this issue was scheduled for 3:00 p.m., December 15, 1980, at the law offices of Wald, Harkrader & Ross, 1300 - 19th Street, N.W., Washington, D.C.

The following issues and action items face CMA.

ACTIVITY	COMPLETION DATE
1. Interim Measures	Tuesday, December 16, 1980
(a) Agreement on the definition of activities with a sufficient nexus to human and animal food chains to make the activities an appropriate target of an interim inspection and remedial program.	
(b) Agreement on the details of such interim measures as may apply to our members.	Meeting not yet scheduled

ACTIVITY	COMPLETION DATE
2. Agreement on the formating and wording of questions CMA members are prepared to agree to answer and the date responses can be provided to EPA.	Tuesday, December 23, 1980
3. Agreement on the need for, and identity of, a consultant to receive, aggregate and assure the confidentiality of industry data; completing contract negotiations.	Soon
4. Agreement on funding sources and procedures for this project, e.g., (a) regulatory CMA budget (b) special projects	Soon
5. Selection of an appropriate multi-disciplinary member steering group* embracing legal, operational, TSCA, environmental and other technical expertise.	Soon

David Forsyth Zoll
Assistant General Counsel
for Antitrust & Regulatory
Litigation

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