

GENERAL COUNSEL'S REPORT

1. RCRA Regulations. On February 25, 1982, EPA deferred its total ban on the landfilling of containers containing any liquids and proposed an alternative regulatory approach derived in part from suggestions made by CMA and the National Solid Waste Management Association (NWSMA) in the context of the Shell Oil litigation settlement. A new group of hazardous waste management companies which emphasize incineration (as opposed to landfilling) immediately sought administrative and judicial reversal of EPA's deferral. CMA is intervening in support of EPA's deferral. (Hazardous Waste Treatment Council v. EPA, D.C. Cir. No. 82-1207.)

2. RCRA Litigation. With respect to the litigation challenging EPA's substantive hazardous waste regulations under RCRA (Shell Oil v. EPA), CMA and other parties are actively negotiating settlements on various issues with EPA. Major issues of concern (definition of solid waste, recycle-reuse, "mixture" rule, incinerator standards, etc.) are being negotiated and resolved on different time-tracks. We expect this process to continue for at least the next six months.

3. Superfund Regulations. On March 12, 1982, EPA proposed the National Contingency Plan (NCP) for public comment. Under Judge Pratt's order of February 12, 1982 (EDF v. EPA, D.D.C. No. 81-2083), EPA may allow only 30 days for public comment and must promulgate the final NCP by May 13.

On March 4, 1982, EPA moved for reconsideration of this schedule. EPA asked Judge Pratt to extend the public comment period to 60 days, and to leave the date for final promulgation open until EPA had a chance to analyze the public comments and to suggest a date to him. EDF and the other plaintiffs are opposing EPA's motion, which (as of March 17) is still under submission.

4. Access to Exposure and Medical Records. OSHA has released a draft N.P.R.M. on the Revised Access to Records Regulation and at the same time requested one more year's stay of proceedings in I.U.D. v OSHA (D.C. Cir.) and L.C.A. v Bingham (W.D. La.). Some of the litigants have opposed the stay and argued that the entire standard should be stayed pending the completion of administrative review. The administrative revision has reduced the number of records that must be maintained and provides increased trade secret protection. CMA does not oppose OSHA's request for a stay of the D. C. Circuit litigation.

5. Labeling Developments. CMA anticipates that the President's Task Force on Regulatory Reform will intervene to end the stalemate between OSHA and OMB as to whether the labeling proposal should be approved under the criteria of E.O. 12291.

On March 11, 1982, the House Subcommittee on Manpower and Housing of the Government Operations Committee held oversight hearings on OSHA that were critical of the degree of influence granted OMB by E.O. 12291. The labeling proposal was cited as a prime example.

CMA's Issues Booklet on hazards communication for use by member companies facing local Right-to-Know initiatives has been completed.

6. OSHA's Voluntary Programs. On March 15, 1982, CMA filed comments with OSHA recommending that OSHA's novel approach to labor-management committees be redirected toward employers in high hazard industries where consultation programs might succeed in lowering injury rates.

7. Patent and Trademark Committee. On March 2, 1982, CMA welcomed the Commissioner and Deputy Commissioner of the PTO to an open meeting on the status of the U.S. Patent System.

CMA submitted a letter to the House Judiciary Subcommittee on Courts, Civil Liberties and Administration of Justice in support of the Patent Term Restoration legislation under mark-up.

The PATC is alerting the membership of the need to advise European governments of the need to oppose upcoming motions to weaken the international Treaty for the Protection of Industrial Property (Paris Convention).

8. OECD/Proposed Council Decision on the Minimum Premarketing Set of Data (MPD). The Commission of the European Communities and France have rejected the latest U.S. counterproposal for the text of an Interpretive Note to the proposed Decision on MPD, in large part because it would not commit the U.S. to amend TSCA. We are awaiting additional responses from other OECD member countries to this U.S. language of January 6, 1982. The U.S. Department of State has responded by cable that the U.S. will not accept language which would imply an amendment of TSCA.

There are growing indications that Sweden will attempt to have the proposed Decision changed to a Recommendation and proceed to the Council in that context, regardless of U.S. support. The U.S. may shortly have to decide, should that occur, whether to abstain from the Recommendation or whether to accede with a unilateral U.S. Interpretive Note.

9. EEC Confidentiality. The EEC's new system for reporting chemical substances marketed in the EEC provides inadequate confidentiality protection for chemical identity in the program to construct the European Inventory of Existing Commercial Chemical Substances (EINECS) and in the anticipated procedures for filing premarket notifications for so called "new" chemicals. In the United States, under the Toxic Substances Control Act (TSCA) and its implementing regulations, the chemical identities of substances reported for the inventory of existing substances and during the premanufacture notification process may be exempt from disclosure, provided that the appropriate confidentiality claims are submitted and substantiated. The EEC system does not provide comparable protection. In the EEC system, chemical identity may be protected only for a period of up to three years in the premarket notification process, and there is no provision at all in the Sixth Amendment for protection of chemical identity in the inventory compilation process.

Companies having to disclose the chemical identity of their substances may suffer substantial competitive harm. In addition, such disclosure in the EEC may affect the confidentiality protection presently provided in the U.S. under TSCA. The substantiation accompanying confidentiality claims currently required to be filed in the U.S. includes an explanation of whether, and where, the information is otherwise publicly available. It could be difficult to maintain that protection is warranted under TSCA if the same information is subject to public disclosure in the EEC.

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CMA has expressed concern about this matter by letter dated February 18, 1982, to the Environmental Protection Agency and the United States Trade Representative and has met with appropriate government officials.

10. Natural Gas. CMA sent a letter to Charles Butler, Chairman of the Federal Energy Regulatory Commission, expressing interest in administrative measures by the Commission to help assure long-term natural gas availability and orderly gas markets. Noting that decontrol legislation now appears unlikely to be adopted in the regular session of this Congress, CMA stated that it would strongly support Commission efforts to conduct a rulemaking that addresses market ordering problems arising under the Natural Gas Policy Act.

11. EIA Data Gathering Authority. CMA met with Albert Linden, Deputy Administrator for the Energy Information Administration (EIA), to discuss data collection activities of the EIA. At the meeting and in a subsequent letter, CMA recommended specific legislative changes to assure that EIA information requests are reasonable and necessary and that confidential information is protected.

12. Toxic Substances Control Act.

(a) EPA's ANPR Concerning the Disposal of TCDD-Contaminated Waste. On January 5, 1982, EPA published an Advance Notice of Proposed Rulemaking (ANPR) announcing that the Agency is reevaluating its rule governing the disposal of chemical waste contaminated with 2,3,7,8-TCDD. 47 Fed. Reg. 193. That rule, promulgated under Section 6 of TSCA, prohibits Vertac, Inc. from disposing of TCDD-contaminated wastes located at its Jacksonville, Arkansas facility. It also requires all persons who intend to dispose of wastes resulting from the production of 2,4,5-TCP or its pesticide derivatives to notify EPA at least 60 days before the disposal occurs.

In its comments on EPA's ANPR, CMA demonstrated that the notification requirements of EPA's rule are unjustified and should be revoked for two basic reasons. First, EPA lacks any basis for concluding that the disposal of 2,3,7,8-TCDD-contaminated wastes by firms other than Vertac presents an "unreasonable risk of injury" under Section 6 of TSCA. Second, except where an immediate threat to public health exists, EPA should not use TSCA to control the disposal of hazardous wastes but should instead develop such controls as part of its final regulations under Section 3004 of the Resource Conservation and Recovery Act (RCRA).

If EPA continues regulating the disposal of TCDD-contaminated wastes under TSCA, CMA urged that the Agency should adopt a more flexible approach than its present notification requirement. CMA recommended that EPA revise its present rule so that companies have the option of either using an approved incineration technology or employing other appropriate disposal methods in accordance with guidelines developed by EPA.

(b) Voluntary Testing Program Under Section 4 of TSCA. CMA will be submitting its recommendations to EPA for developing and implementing voluntary testing programs under Section 4 of TSCA by the end of March. The CRAC Testing Task Group is in the process of preparing a final draft of CMA's views on the development of a more efficient, flexible and expeditious program than the promulgation of formal test rules. CMA proposes various approaches that EPA could adopt to encourage cooperative action in implementing Section 4. CMA's

recommendations include:

- (1) The collection of existing information on substances and determinations where the data gaps exist before designation of the substances for EPA action;
- (2) Avoid designation broad and unmanageable categories of substances and focus on specific substances;
- (3) Prioritization chemicals recommended for preliminary EPA review;
- (4) Development of a set of written guidelines with an explanation of EPA's policies and procedures;
- (5) Initiation of discussions between the public and EPA on designated chemicals;
- (6) Promotion of in-depth informal scientific discussions between EPA and industry representatives and provision of information on current developments to interested members of the public; and
- (7) Submission of industry proposals for voluntary testing of designated chemicals for EPA's consideration, modification, and acceptance.

(c) Indemnification Study Under Section 25 of TSCA. CMA has been requested by the Research Group, Inc., an EPA contractor, to review a draft of a study (mandated by Section 25 of TSCA of the feasibility and desirability of indemnifying affected industries for significant compensable losses caused by EPA actions. The draft is expected in mid-March and any interested member companies may request a copy of this study, (as soon as it is available), by contacting Staci Davis at (202)887-1352.

13. CMA v. EPA (Nonattainment/PSD Case). As mentioned at the last meeting, the final settlement of this case was filed with the D.C. Circuit Court of Appeals on February 22, 1982. The settlement resolves a number of issues, including a method for calculating "net increase" in emissions from source modifications a potential emissions basis, deletion of the "federal" enforceability requirement, and consideration of fugitive emissions. Due to the extended schedule for EPA rulemaking on the "net increase" issue, EPA has agreed to periodic meetings with industry to report on the status of its technical studies and rule development.

14. Clean Air Act Amendments. Congress's consideration of the Clean Air Act proceeds at a deliberate pace in both the House and the Senate. By the time of the meeting, the House subcommittee on health and the environment will have concluded mark-up of H.R.5252, the Luken (or Dingell-Broyhill) bill that CMA has endorsed, and reported it to the full committee. Full committee action should be rapid, but the schedule for floor debate is speculative. In the Senate, the environment and public works committee continues to struggle, although a package of amendment proposals that Chairman Stafford has put forward may provide a focal point for debate. We cannot predict the schedule for Senate action; there is some talk of carry-over to 1983, at least for stationary source issues.

15. Clean Water Act. Because the picture here changes from week to week, a written summary will be provided at the April 1 meeting of the General Counsels' Group.

16. NRDC v EPA (General Pretreatment). The litigation has remained dormant,

but EPA has moved on the regulatory front to address the procedural issues raised by the petitioners. On February 1, 1982 EPA allowed the noncontroversial aspects of the general pretreatment rules to go into effect. Late February, 1982, EPA followed with a Federal Register draft proposal rulemaking to revise one of the controversial sections, dealing with credits for removal by municipal treatment. Meanwhile, in a D.C. circuit case centering on the same Administrative Procedure Act issues that NRDC has raised in the pretreatment case (Public Citizen v Dept. of Health and Human Services, et al) the D.C. circuit has agreed to postpone a decision pending the outcome of corrective rulemaking initiated by the government, thereby tacitly accepting the government's position on the law.

17. Regulatory Reform. As this report goes to press, the Regulatory Reform Act, S.1080, is the subject of floor action in the Senate. A full report on the Senate's actions will presented at the meeting.

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