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REPORT ON
FEDERAL CONTROLS FOR TOXIC SUBSTANCES

(CONFIDENTIAL)

BACKGROUND

Based on a 1971 CEQ report on Toxic Substances, the President asked Congress to enact a Toxic Substances Control Act which would authorize EPA to curb the use of hazardous materials in commercial products and processes. Its aim, in the words of CEQ's most recent annual report, "would be to control problems of environmental contamination for which air and water pollution laws are inapplicable . . . or for which such laws provide only belated, after-the-fact controls." The bill would empower the Administrator of EPA to restrict or prohibit use or distribution of a chemical substance if necessary to protect health and the environment and would also require him to prescribe tests for chemicals which manufacturers must perform before they can market such chemicals. Modified versions of this bill, S. 1478, passed both the Senate and the House during the 92nd Congress but failed of enactment when the two Houses were unable to resolve their differences before adjournment.

A number of events occurring since the President's original request for this legislation may now permit -- or even require -- a review and reconsideration of the position of the Administration in this area. These events include the enactment of new legislation which significantly

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narrows whatever gaps may have existed in the network of environmentally protective legislation, improved information as to the number of new chemicals commercially introduced in any year, and the development of information as to loopholes in the proposed toxic substances legislation.

THE NEW LAWS

Several pieces of significant new legislation enacted during the 92nd Congress greatly extend the scope and power of the Federal authority to deal with environmental problems, including those which may be caused by the introduction of hazardous chemical substances. These include:

1. Water Pollution Control Act Amendments, P.L. 92-500, enacted over veto.
2. Ocean Dumping legislation - The Marine Protection, Research and Sanctuaries Act, P.L. 92-532.
3. Coastal Zones Protection Act, P.L. 92-583.
4. Consumer Product Safety Act, P.L. 92-573.
5. Environmental Pesticide Control Act, P.L. 92-516.

Recent enactment of these statutes substantially reduces the number of areas and activities which are not subject to Federal environmental regulation and hence reduces the need for legislation dealing with toxic substances.

In addition to these new laws, there is already a wide body of existing law which confers great power on the Federal government with respect to the environmental threat which might be posed by hazardous or toxic chemical substances.

These other laws include: The Clean Air Act; the Federal Hazardous substances Act; the Occupational Safety and Health Act; the Food, Drug and Cosmetic Act; and related statutes like the meat and poultry inspection acts.

Furthermore, there are two other major avenues which serve, with great effectiveness, to protect the public and the environment from the consequences of toxic chemical substances. These are:

1. The responsibility and self-interest of chemical manufacturers provides a strong and effective measure of public protection. In the light of today's public concern over environmental protection, no business enterprise can long survive if it disregards the public interest in the use and distribution of its products. This public interest and concern is, of course, backed by the common law provisions of liability. In point of fact, a considerable volume of environmental and toxicity testing has long been a standard procedure for chemical producers.

2. The use of "jawbone" controls by Federal officials. For instance, manufacturers are at present "voluntarily" withholding NTA from the detergent market as a substitute for phosphates at the request of the Surgeon General and the EPA, and the manufacturer of PCB is voluntarily restricting its use and distribution.

THE REAL PROBLEM

Despite these substantial protections, there are some gaps in the network of existing Federal statutes and industry practices which might warrant the enactment of some legislation for control of toxic substances. One is administrative and involves the effective coordination of the vast legal powers now available to the Federal government for environmental protection. The authority of EPA, FDA, the Consumer Product Safety Commission, the Department of Transportation (with respect to transportation of hazardous substances), and a host of other agencies must be effectively meshed into a workable unity. This problem, obviously, cannot be solved by enactment of a Toxic Substances Control Act. Its enactment could worsen rather than improve the situation.

The other significant gap includes the absence of Federal controls over the use, distribution, or disposal of chemical substances which are not employed in foods, drugs, cosmetics, or pesticides. A situation could arise where the production and use of a toxic substance might not be subject to the media pollution controls (air, water, and solid waste controls) but might pose a significant environmental hazard. Such problems must be largely a matter of conjecture, because few of them can be identified today. One example might be an asbestos-type material which enters the environment in small quantities from a variety of sources and which could create a problem from long-term low exposure.

The introduction of a hazardous new chemical substance of pervasive potential use which cannot be controlled by existing statutes might be a source of concern. Such a possibility may be real -- but not nearly as real or likely as it might seem.

The number of new chemicals introduced into commercial use each year is relatively small. Several thousand new chemicals are discovered each year, but most are laboratory curiosities that will never be produced commercially. Many others are minor and insignificant variations or derivatives of well known existing compounds. Still others are used only as chemical intermediates, catalysts, or reagents and as such are confined to the industrial environment of the chemical plant or laboratory and thus subject to the full range of occupational safety and media pollution controls. Others may be employed only in uses which will not involve any environmental hazard. A portland cement additive, embedded in the footings for a bridge, can hardly be regarded as a threat to the environment.

The need, if one assumes there is in fact a need, is not critical or broad, and the scope of any proposed Toxic Substances Control Act must be evaluated in the light of the real needs.

THE DEFECTS IN S. 1478

Unfortunately, the Toxic Substances Control Act, as proposed, and in its various congressional forms, suffers from serious defects which cast grave doubts on its potential usefulness.

One problem arises from the definition of "chemical substance" which is common to all the legislative versions of S. 1478. That definition declares that "chemical substance means any organic substance of a particular molecular identity, or any uncombined chemical radical or element."

The phrase "substance of a particular molecular identity" is of crucial importance. It means that the bill may be applied to every chemical substance which has a particular molecular identity, no matter how insignificant or minor may be the difference in the particular molecular identity between two substances. Polymeric plastics, like polyethylene, are an example. Polyethylene can be produced in a wide variety of molecular weights, and each individual molecular weight may constitute a different chemical substance under the definition in S. 1478, despite the fact that the environmental properties may be identical.

An additional problem arises from the exclusion of tobacco, an agricultural crop, from the bill in the versions considered by the House and the Senate. The specific exclusion of tobacco raises a serious question as to whether or not the bill would apply to other agricultural products which are potentially hazardous such as castor beans, mushrooms, etc.

In short, the proposed legislation suffers from overkill in many areas -- and from significant loopholes which may make it ineffective in some potentially important aspects.

CONCLUSION

In consideration of all these factors, it is neither wise nor desirable to immediately take further steps toward the enactment of additional or alternative controls over toxic substances, especially before adequate experience can be gained with respect to existing law -- including the new enactments of 1972.

Instead, the circumstances argue forcefully for a more careful and thorough review of the nature of the problem and the most effective and fruitful way to solve it.

The imposition of unnecessary testing and regulatory burdens on the chemical industry is not in the public interest. There is some evidence from the drug field that imposition of comprehensive testing and regulatory schemes may be harmful to research and innovation. A New York Times article of July 2, 1972, mentions "a monstrous concretion of overlapping controls, precautions, and delays in drug research" which "have grown up in response to widely publicized scare stories about the risks and alleged inadequacies of drugs and drug research." The article contends that these controls have significantly reduced the number of new therapeutic compounds becoming available to physicians in the U. S. and may be driving such research and development overseas. Such a situation could confront the chemical industry if unnecessarily stringent legislation were to be enacted.

RECOMMENDATION

The public interest would be well served if a full review of toxic substances control could be undertaken within the executive branch of government through the appointment by the President of a Toxic Substances Study Commission to determine the extent of need for additional toxic substances legislation. Such a study should be completed within a reasonable length of time. A broadly representative Commission should be empowered to make inquiry into the entire scope of this issue and to make appropriate recommendations.

If such Commission is established, the member companies of Manufacturing Chemists Association and Synthetic Organic Chemical Manufacturers Association will assist and co-operate wholeheartedly toward fulfillment of the Commission's objectives.