



Advice & Counsel

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The State of the "Union"

After nearly 200 members of AESF, NAMF and MFSA descended upon Washington, DC in September, to urge our legislative representatives to provide regulatory relief, I thought it might be beneficial to share the issues with our readers. Here is a summary of activities that may affect your business in the near future:

EPA's Budget May Be Trimmed

The Senate Appropriations Committee acted to cut \$1 billion from the EPA budget for the next fiscal year. The full Senate voted to restore all but \$230 million of the cut, leaving a disagreement between the Senate and the House of Representatives (which voted for a \$340 million cut). It looks like EPA may face a funding cut, unless the Clinton Administration

(which requested an increase of almost \$1.5 billion) vetoes the spending bill.

Of note is a rider on the spending bill that eliminates mandatory car-pooling programs in non-attainment zones under the Clean Air Act.

If EPA's budget is trimmed, it may impact the agency's regulatory schedules and some of its financial assistance programs.

Superfund Re-authorization

Republican representative Michael Oxley of Ohio, chair of the House Subcommittee on Commerce, Trade, and Hazardous Materials, plans to introduce a Superfund Re-authorization bill this fall, and is working toward passage by the end of 1995. Oxley's plans differ from those of Republican Senator Robert Smith of New Hampshire, and the resolution of their differences may have a significant impact on metal finishers.

Senator Smith favors elimination of retroactive liability under Superfund for any legal disposal of waste prior to December 11, 1980, which coincides with the date that Superfund regulations were finalized. Oxley is proposing elimination of retroactive liability for activities prior to the year 1987, the year that recordkeeping requirements under RCRA were finalized.

EPA, under the Clinton Administration, opposes elimination of retroactive liability altogether. If it is not eliminated, the legal profession will continue to receive substantial fees from small businesses that become ensnared in a nightmare scenario. A company could have performed all of its legal duties and used federally-approved disposal practices and facilities prior to 1980, but because the disposal facility has reached a point when it is no longer considered environmentally sound, all contribu-

tors of waste to that site can be held responsible for up to the total cost of clean-up, regardless of the quantity of their contribution to the problem. This is known as joint and several liability.

EPA's techniques for identifying "potentially responsible parties" (PRPs) are questionable. If, for example, the name of a company is on a drum in a landfill, that company will be considered a potentially responsible party, even if the company can show it never disposed of any waste at that site. There also have been cases of truck drivers using their long-term memories to recall that they hauled a drum of waste from a generator to a certain disposal site, prior to 1980.

EPA's response is that it has a *de-minimis* program, wherein companies that represent less than one percent of the total volume of waste at a Superfund site are offered settlement at less than the calculated contribution. While this sounds good, at least one waste generator has discovered that he is a PRP at 11 Superfund sites, because his hauler disposed of his waste at all 11 sites (in violation of a contract that identified only one site for disposal). Because the average cost of a Superfund clean-up is in the neighborhood of \$25 million, *de-minimis* settlements can cost more than \$250,000, so this generator may be in for a cost of over \$3 million, despite qualifying as a *de-minimis* contributor.

The metal finishing industry supports the following changes to the Superfund program (source NES, Washington, DC):

1. Elimination of retroactive joint and several liability for wastes disposed of legally prior to 1987.
2. Creation of a proportioning system for liability for waste disposed of legally after 1986.

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3. Elimination of Superfund liability for lenders and property owners that are not generators.
4. Establishment of reasonable rules and limits on natural damages.
5. Infusion of cost/benefit, risk prioritization and site-specific risk assessment concepts into decisions on remedial actions and resource allocations.
6. Creation of budgetary and management discipline for EPA's administration of Superfund.
7. Capping and reviewing the current National Priorities List (currently at 1,300 sites).
8. Enhancing the role of the states under the program.
9. Redirection of all Superfund taxes to actual clean-up activities.
10. Creation of a fairer and more efficient taxing mechanism, without increasing existing burdens.

Clean Water Act Re-authorization

While Clean Water Act re-authorization appears to be in doubt in the near future, the House has passed HR 961, which addresses several key issues for metal finishers:

1. The bill allows the issuance of a permit that modifies effluent limitations where it is determined that the source is undertaking pollution prevention measures that will achieve an overall reduction of emissions from that source, resulting in a net environmental improvement.
2. HR 961 allows a POTW to require industry to comply with local pretreatment standards in lieu of national categorical standards, if EPA and the state determine that the POTW will remain in compliance with all imposed regulations.
3. The bill requires that major regulations under the Clean Water Act, issued after February 15, 1995, be reviewed. Regulatory provisions costing the public \$100 million or more would require sound risk assessment and a cost/benefit study.
4. HR 961 provides for \$1 billion for state grants and \$2.5 billion for a new state revolving loan fund solely for non-point sources.

Dole's Regulatory Reform Bill

Senate bill 343, jointly sponsored by Senator Robert Dole (R-KS), and Senator Bennet Johnson (D-LA), would require cost/benefit analysis and risk assessment for regulations with an annual economic impact of at least \$50 million. Application of cost/benefit and risk assessment would be on the same plane as protection of public health. According to EPA Administrator Carol Browner, the bill would require EPA to wait until public health was actually harmed before the agency could take action. Browner is advocating regulatory

reform that is sensible, wise, legitimate, and contains no loopholes for special interests (Common Sense).

Note: The House passed a similar bill (HR 1022), which will yield a conference to resolve differences for a final bill passed by both houses.

Even if you were not able to go to Washington, DC, to let legislators know what you think of pending legislation, it is not too late to write your congressional representatives and urge them to support the legislation that you would like to see passed. o