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U S W A G

USWAG

2001 RESULTS & BENEFITS

**Highlights of
Accomplishments
and Activities**

USWAG has continued its regulatory advocacy, legislative technical support, and litigation efforts, when necessary, on important solid and hazardous waste, PCB and hazardous materials transportation issues. While USWAG continues to pursue long-term core interests — e.g., protecting the non-hazardous regulatory status of fossil fuel combustion products and penta-treated wood and remediation waste reform — this document highlights some of the immediate results and benefits that USWAG members received in 2001.

- **PCB Litigation Victories** — USWAG achieved a major legal victory in 2001 when the U.S. Court of Appeals in Washington ruled that EPA had illegally skirted procedural requirements when it amended its regulation authorizing the use of porous surfaces contaminated by spills of PCBs (40 C.F.R. § 761.30(p)). EPA had changed the regulation so that conditions for using contaminated porous surfaces were triggered when a porous surface was contaminated by a spill of PCBs of ≥ 50 ppm, regardless of the resulting surface contamination. This change in the regulation would have vastly broadened the scope of the rule and the regulatory burden on USWAG members. The Court agreed with USWAG that EPA could not make such a substantive change to a rule without first providing the public with notice and an opportunity to comment. The Court therefore nullified the amendment and reinstated the original regulation, including the criterion that the use conditions in § 761.30(p) apply *only* when the level of PCB contamination on the porous surface is $\geq 10_g/100cm^2$. This has greatly reduced the regulatory burden for USWAG members seeking to use porous surfaces (e.g., concrete) contaminated by PCBs.

USWAG was also successful in persuading the United States Court of Appeals in New Orleans in the PCB Mega Rule litigation to remand the storage for reuse regulation applicable to PCB Articles (40 C.F.R. § 761.35) back to EPA. The Court ordered EPA to explain why it failed to grant USWAG's request for an electric utility industry variance from the rule. USWAG will have another opportunity to assess the rule as applied to electric utilities when EPA responds to the Court's remand.

- **Reclassification Rule and Historic Retrofills** — USWAG obtained important regulatory relief in EPA's final PCB reclassification rule when the Agency responded favorably to virtually all of USWAG's comments on the proposed rule (e.g., elimination of the 50°C requirement and extending the new reclassification procedures to other categories of electrical equipment). The final rule simplifies the procedures for reclassifying PCB and PCB-Contaminated electrical equipment and is already providing significant benefits to USWAG members engaged in PCB phase-down efforts.

USWAG's successful advocacy on reclassification issues continued even after the final rule was published. When the final rule was issued, EPA failed to adopt USWAG's suggestion to "grandfather" retrofills that were conducted in accordance with the proposed rule. Due to the importance of the issue to many utility companies, USWAG continued discussions with EPA on our "grandfathering" recommendation after the rule was issued. After further consideration of the issue, EPA did an about-face and issued an interpretive letter adopting USWAG's position that, as long as the historic retrofill operations meet the requirements of the new rule, it makes sense to view these retrofills as "reclassified." This belated change of position by EPA provided immediate regulatory relief to USWAG members across the country.

- **PCB Interpretive Guidance** — In addition to success on litigation and rulemaking fronts, USWAG obtained extremely useful PCB interpretive guidance over the course of the year, including confirmation from the EPA Region 6 PCB Coordinator on a number of important compliance issues for USWAG members. Over the years, USWAG has obtained dozens of PCB interpretive letters from EPA that are not otherwise readily available to the public. These interpretive letters are routinely distributed exclusively to USWAG member companies and provide important and practical guidance for reducing regulatory costs and facilitating compliance with applicable PCB regulations.
- **Deferral of Land Disposal Restrictions for PCBs in Metal-Contaminated Soils** — In agreement with comments submitted by USWAG, EPA indefinitely deferred the applicability of the RCRA land disposal restrictions for PCBs present in contaminated soils that exhibit a hazardous characteristic for metals. As a

result, when such hazardous waste soils are generated and destined for land disposal, they *do not* require treatment for PCBs, only for other hazardous constituents subject to treatment (e.g., the metal contaminants).

- **Environmental Litigation Challenge to Bevill Regulatory Determination Dismissed** — Following EPA's May 2000 regulatory determination that fossil fuel combustion products do not warrant hazardous waste regulation, a coalition of environmental activists filed a legal challenge to the determination in the United States Court of Appeals in Washington. In response, USWAG led an industry coalition, which filed a motion to dismiss the appeal before briefing and argument because in USWAG's opinion, the environmentalist appeals were so clearly flawed that full-scale litigation was unnecessary to decide the case. In January 2001, the Court granted USWAG's motion to dismiss the case, bringing to an end the legal challenge of the non-hazardous designation for fossil fuel combustion products. *The preservation of this key victory avoids the imposition of hazardous waste regulations on fossil fuel combustion products, which according to USWAG's estimates would have cost the utility industry approximately \$13.8 billion per year.*
- **Elimination of Dual Regulation of Mixed Waste** — As a result of years of USWAG advocacy, EPA issued a final rule this year excluding radioactive/hazardous waste ("mixed waste") from RCRA's hazardous waste program, conditioned on the waste being managed in accordance with applicable NRC regulations. EPA was generous in the final rule in giving USWAG credit for having initiated the regulatory process in 1992 that led to EPA's action granting regulatory relief from RCRA regulation for mixed waste. The rule is premised on USWAG's long-standing contention that dual regulation of mixed waste under RCRA and the Atomic Energy Act is duplicative and wasteful.

The rule removes commercial nuclear power plants from the lingering specter of RCRA enforcement actions attributable to the regulatory inconsistencies of the dual regulatory regime for mixed waste. *The rule is expected to save the electric utility industry millions of dollars in avoided RCRA permitting and compliance costs.* Moreover, USWAG counsel is continuing to work with EPA in obtaining favorable interpretations for implementing the rule to fit the circumstances of USWAG members, as well as assisting members in encouraging their authorized states to adopt the rule as part of their respective hazardous waste programs.

- **Development of Treated Wood Guidelines** — In light of increasing public and regulatory scrutiny on treated wood, USWAG developed a set of voluntary Treated Wood Guidelines for the purpose of demonstrating the utility industry's continued commitment to responsible use and management of treated wood products. There are several important messages in the Guidelines, including (1) underscoring the responsible nature of electric utility treated wood sale/donation programs, (2) encouraging companies to continue to evaluate, where practicable and appropriate, potential alternatives to treated wood for future projects, (3) emphasizing the continuing need for electric utilities to provide adequate information regarding safe handling and *disposal* practices to recipients of the used, treated wood poles, and (4) underscoring the continuing commitment by electric utilities to evaluate additional management options for used, treated wood poles.
- **Hazardous Materials Workshop** — USWAG offered members a workshop on hazardous materials transportation issues tailored specifically to the needs of the utility industry. Participants indicated that the workshop fills a need that is not addressed in any other forum, and USWAG plans to expand the workshop in the future.
- **Hazardous Materials Transportation Security Response** — Following the events of September 11th, USWAG was positioned to represent the electric utility industry in response to the heightened regulatory scrutiny of hazardous materials transportation security issues. USWAG worked with DOT staff and a multi-industry coalition to monitor and respond to a bevy of regulatory and legislative developments. Through USWAG's representation, members were kept informed of relevant developments and their interests in maintaining cost-effective hazardous materials transportation requirements were protected without jeopardizing security.

- **USWAG Participates in Other Rulemaking Initiatives of Importance to Electric Utilities** — In addition to the accomplishments described above, as part of its overarching mission to advance and protect the interests of its members, USWAG advocated utility industry positions on key issues arising under or affecting RCRA, TSCA, and HMTA, including (1) EPA's proposals to streamline RCRA's hazardous waste manifest and permit programs; (2) EPA's position in the Binational Toxics Reduction Strategy initiative regarding the role of penta-treated poles as a source of dioxin to the environment; (3) EPA's development of general national guidelines for the management of industrial non-hazardous wastes under RCRA Subtitle D; (4) EPA's rulemaking to develop tailored national standards for management of coal combustion products under RCRA Subtitle D; (5) the development of Regional and National Programs designed to encourage the voluntary phase-out of PCB-containing electrical equipment; (6) the development of SPCC regulations; (7) EPA's proposal to reduce the drinking water standard for arsenic, which could significantly affect Bevill and other RCRA regulatory actions; and (8) the DOT rulemaking to establish the jurisdictional boundaries between EPA, OSHA, and DOT on hazmat transportation issues.
- **Individual Member Counseling** — USWAG counsel (Piper Marbury Rudnick & Wolfe LLP) continued to provide members with individual counseling on an array of regulatory issues, ranging from day-to-day hazardous waste and PCB compliance questions to large-scale rulemaking and remediation strategies. Additional information, in the form of technical and legal analyses of proposed and final regulations, frees members of the burden of tracking new Federal rules and allows members to concentrate their time and effort to maintaining compliance with new and revised regulations. *This counseling service, which is included as part of USWAG membership, provides USWAG members with prompt, specialized and cost-effective regulatory counseling, avoiding the need for additional counsel/consulting fees.* In addition, as the need arises, USWAG provides regulatory workshops tailored to the needs of the utility industry, at no additional charge to its members, most recently on hazmat transportation issues.
- **Leveraging Resources** — USWAG continues to leverage the value of members' dues in developing and implementing advocacy positions and generating technical data through participation in coalitions, strategic alliances, co-funding and use of EPRI tailored collaboration programs. For example, in 2001, USWAG contributed only a fraction of the costs for: preparing analyses of EPA-proposed hazardous waste exit levels; a critique of EPA's groundwater risk model; a report on management options for used treated wood; draft international PCB risk assessments; rulemaking comments on streamlining site remediation regulations; and intervention in a lawsuit addressing hazardous waste listing determinations.

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