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JOHN W. GRAVES
Director of Environmental,
Safety and Health Affairs

House Judiciary Committee
The Honorable Mark M. Cohen, Chairman
Pennsylvania House of Representatives
Room 324
Main Capitol Building
Harrisburg, PA 17120

RE: House Bill 1012
Toxic-Free Workplace Act

Gentlemen:

Pennzoil Company is a natural resources company engaged with its subsidiaries in the exploration, production, refining and sales of petroleum products, and in the mining and sales of sulphur. Pennzoil operates several facilities in Pennsylvania including two refineries, several distribution terminals and bulk plants, numerous service stations and oil and gas production and distribution facilities. We employ 1,150 persons in the state. Pennzoil contributes about $33 million per year to the Pennsylvania economy in salaries and taxes.

We appreciate the concern for protecting employees from toxic exposures in the workplace. We too believe that employees should work in safe working environments free from overexposure. However, we do not believe that this bill as currently written is a workable means of achieving this goal.

Consequently, we are providing testimony on how we think this bill could be improved to ensure the benefit of worker protection at a reasonable cost in time and resources.

Because this testimony is written, we ask that it be read into the record at the hearing on November 30, 1989.

As a general comment, Pennzoil does not believe that this bill takes the best approach to protecting employees. This bill does not provide any methods for protecting employees from overexposure to regulated chemicals. Instead, it only gives an employee a right of action after his exposure. We believe that a better overall approach would be to enforce the existing workplace standards already adopted by the U.S. Occupational Safety and Health Administration (OSHA).

We also offer several specific comments on the bill. For your convenience, these comments are summarized in the same order as the sections in which they appear in the bill.

§ 8371 Definitions

The purpose of this bill is to protect employees from unreasonable exposures to toxic substances. However, no definitions are given for "toxic substances" or "unreasonable exposure". We believe that definitions for these terms should be given. These terms are so integral to this bill that they must be defined.

We suggest that "toxic substance" be defined as any workplace substance for which OSHA has established a permissible exposure limit (PEL) in Section 29 C.F.R. 1910.1000. These OSHA limits were developed after years of research by OSHA and others. The limits recognize that all substances are "toxic" above particular doses and that most substances can be used safely if exposures fall below these limits. Thus, OSHA's limits take into account the factors of exposure concentration and duration. This bill as it is currently written does not seem to address any of these factors.

We suggest that "unreasonable exposure" be defined as "a known exposure in excess of the OSHA permissible exposure limit (including the applicable duration of exposure) in effect at the time of the exposure, except that this term does not include

exposures in excess of the OSHA PEL which occur as a result of conditions beyond the reasonable control of the facility operator providing that the operator has maintained the source of the exposure with due diligence."

Employers should not be allowed to knowingly expose employees to substances at levels greater than that allowed by OSHA. This bill, with the definition given above, would prevent that. The proposed definition also allows for situations where, due to no fault on the part of the employer, an overexposure may occur. For instance, "unreasonable exposure" would not cover the situation where a valve is adequately inspected and maintained, but suddenly and for no lack of diligence on the part of the facility possessor, begins to leak such that an employee is exposed to a toxic substance at a sufficiently high concentration and for a sufficiently long period of time to cause an exceedance of the PEL for that substance.

§ 8372 Unreasonable Exposure to Toxic Substances

We have several concerns with this section. Many of these will be alleviated by defining "unreasonable exposure" and "toxic substances". For instance, § 8372(a) states that it shall be unlawful to unreasonably expose an employee to any

toxic substance in the workplace. If the definition above is adopted, the reader knows what constitutes an unreasonable exposure.

§ 8372(b) states that it is a per se violation of the law to expose someone in excess of "levels of toxicity beyond that considered safe" by certain organizations. "Levels of Toxicity" is undefined and vague. As discussed above, a substance may be toxic at one combination of concentration and duration but not at another. It is not clear if the phrase "levels of toxicity" recognizes these differences.

We suggest that in order to make this section consistent with the definitions proposed above, §8372(b) be deleted. §8372(a) already states that it will be unlawful to unreasonably expose an employee to any toxic substance. Given the definition we have suggested above, § 8372(b) is unnecessary.

Should this section not be deleted, then we believe that only exposures in excess of the levels set by the Occupational Safety and Health Administration should constitute a per se violation. Neither the Pennsylvania Department of Environmental Resources (DER) nor the Environmental Protection Agency (EPA)

establish workplace standards. It is not clear if these groups (particularly the DER) is actually being given the authority to issue such "safe levels" or if businesses will be responsible for meeting community air and water standards within the workplace. Community environmental standards are established to protect susceptible persons such as asthmatics, heart patients, and invalids, not healthy workers, and consequently we do not know how such standards can be transferred to a workplace setting. We do not believe that it is the intent of this bill to ask an employer to meet community-wide environmental standards within his plant if the community cannot meet them. All of this confusion can be avoided by adopting the definitions given above and limiting the agency which is recognized as being able to set "safe" exposure levels to the federal OSHA.

We also point out that while regulatory standards may appear to establish "safe" levels --in the sense that greater exposures are unsafe-- this is not always the case. For example, since OSHA's permissible exposure limits are often based upon such factors as irritation and smell, exposures to sulphur dioxide could occur at levels much higher than the current OSHA PEL and still be "safe" from a toxicological point of view. The OSHA PEL, however, is set to limit the eye irritation effects of this substance.

Cause of Action

§ 8373 sets out the instances in which an employee may sue someone under this bill. This section presents several problems. First, §8373(a) states that an employee who is "exposed to levels of toxicity in the workplace in violation of this act and who suffers injury or disease caused in whole or in part by such exposure may bring an action for damages against the possessor or owner of the workplace." Our concerns with "levels of toxicity" are discussed above. We are also concerned with imposing liability upon a "possessor or owner". We believe that an employee should only be able to sue his employer. The possessor or owner could be someone other than the employer who had no control over the employer's operations. It is unfair to hold these individuals responsible for no other reason than that they owned or possessed the land. This section should be changed to read "employer".

Second, subsection (a) does not address the situation where an employee's own negligence or refusal to follow safety procedures contributed to his exposure. Employers who in good faith try to provide a safe workplace for their employees should not be liable for injuries occurring as a result of an employee's own negligence.

We would like to point out that this employee is not without compensation. He is still eligible for worker's compensation. The basic premise of worker's compensation is to provide for medical care for work-related injuries regardless of who is at fault. We only suggest that because of his own negligence, he should not also be afforded the cause of action given under this bill.

To address this concern, we suggest § 8373 (a) be revised to read:

> (a) General rule.--An employee who is unreasonably exposed to toxic substances in the workplace and who suffers injury or disease caused in whole or in part by such exposure may bring an action for damages under this law against his employer providing that the exposure was not a result of the employee's own negligence or refusal to follow safety procedures.

§ 8373(b) states that an employee must prove that the "workplace" (implied) possessor knew or should have known of the existence of the toxic substance at certain levels. Again, we suggest that possessor be replaced with employer. If this change is not made, then possessor should be made to read "possessor or owner" to be consistent with § 8373(a).

This section also states that the employee must prove that the toxic substance was present at "unreasonably dangerous levels". This term has not been identified. We believe that in order to be consistent throughout this bill, subsection (b) should be changed to read:

> (b) Burden of proof..--In an action under subsection (a), the employee shall have the burden of proving that <u>the employer knew or should have known that he was unreasonably exposing his employee(s) to toxic substances</u>.

Subsection (c) of § 8373 states that evidence suggesting that the employee knew of the existence of the toxic substances is not admissible. We believe that this evidence should be admissible when it can be used to show that the employee was contributorily negligent or refused to follow safety procedures. We suggest that this section be changed to read:

> (c) Evidence.--
> (1) In an action for damages under this section, evidence that the employee knew of the existence of unreasonable levels of toxic substances shall not <u>generally</u> be admissible. <u>Such evidence shall be admissible to show that the employee was negligent or refused to follow safety rules with regard to the exposure</u>.

Subsection (e) of § 8373 states that an action for damages cannot be brought for "any violation" which occurs prior to the effective date of this subchapter. We assume that "any violation" actually refers to any "unreasonable exposure" which may have occurred prior to any effective date for this bill. We believe that this section should be changed to make this clear. We suggest that subsection (e) be revised as shown:

> (e) Exception.--There shall be no right to bring an action for damages under section 8374(a) (relating to alternative remedies) for any unreasonable exposure to toxic substances which occurs prior to the effective date of this subchapter.

Alternative Remedies

Section 8374(a) states that an employee may elect to bring an action either under this bill or under his worker's compensation options. We do not have a problem with this statement as it reads. However, subsection (b) states that the employee does not have to choose his option until he has exhausted both remedies. We do not believe that an employee should be able to make his election after trying both avenues. The employee's skilled counsel should be able to tell him before bringing any suit what his best option is. By having the employee choose after both avenues have been tried, needless legal expenses have been incurred by both the employer and the

employee, and the Pennsylvania judicial system will have been needlessly burdened with "nothing to lose, so let's roll the dice" lawsuits over injuries which under any accepted legal standard should have been handled under the worker's compensation system. The employee does not necessarily stand to gain any more monetary compensation by being able to make a choice after he sees the settlement figures. Theoretically, he must still pay attorney's fees for two legal actions.

To address these concerns, we believe that subsections (b) and (c) should be deleted.

Conclusion

We appreciate this opportunity to comment on this bill. As stated above, we believe that employees would be better served if the Legislature looked at preventing overexposures in the workplace. Should the Legislature not redirect its focus, then we believe that this bill could be made more workable by: (1) defining the terms "toxic substance" and "unreasonable exposure" such that persons subject to the bill know for what exposures they could be liable; (2) limit the persons who can be sued to employers; (3) allowing evidence which shows that the exposed

employee was contributorily negligent and/or refused to follow the employer's safety rules; and (4) having the overexposed employee make his option to bring a suit or accept worker's compensation benefits prior to beginning any legal action. We hope these comments will be useful to you in your endeavor to compensate injured employees.

Yours very truly,

John W. Graves