

**BEFORE THE SURFACE TRANSPORTATION BOARD**

**STB Ex Parte No. 698**

**ESTABLISHMENT OF THE TOXIC BY INHALATION HAZARD COMMON  
CARRIER TRANSPORTATION ADVISORY COMMITTEE**

**COMMENTS OF ARKEMA INC.**

**2000 MARKET STREET**

**PHILADELPHIA, PENNSYLVANIA 19103**

**SEPTEMBER 24, 2010**

Arkema Inc. (“Arkema” or the “Company”) is pleased to provide these comments pursuant to the Surface Transportation Board’s (“STB”) decision of August 3, 2010 seeking comments on the creation of a Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (“TIHCCTAC” or “the Committee”). Arkema is a manufacturer of chemicals and operates 23 manufacturing and research and development facilities in 14 states, with over 2,200 employees across the United States. Arkema routinely uses railroad carriers to move both raw materials and finished products to and from its plants, and several of these

materials are Toxic by Inhalation Hazard (“TIH”) chemicals.<sup>1</sup> As such, Arkema is directly impacted by the common carrier obligations of the railroads, especially as they relate to transportation of TIH chemicals.

### **I. Arkema’s Commitment to Safe and Secure Transport of TIH Chemicals**

The ability to move TIH chemicals by rail is the foundation on which our TIH-related businesses operate. As a producer of chemicals for the industrial and commercial sectors, Arkema is proud to work with other TIH shippers, receivers, railroads, tank car manufacturers, and the security and safety regulatory community to continually improve the safe and secure transport of TIH chemicals. Arkema is a member of the American Chemistry Council and adheres to its Responsible Care® Codes of Management Practices and has participated in industry-wide efforts such as the Department of Transportation rulemakings for improving safety for railroad tank cars.<sup>2</sup> Arkema continuously monitors our safety performance and works diligently to improve safety. The Company has been recognized by various railroads more than a dozen times over than last ten years for our safety performance, and we apply the same diligence to safety for rail transportation that we apply to safety at our manufacturing facilities.<sup>3</sup>

Rail transport of hazardous materials is considered the safest method for moving these materials throughout the country. Rail affords TIH shipments secure movement over corridors with access strictly controlled by the railroads. This stands in stark contrast to highways, which are not only open and accessible to anyone with a motorized vehicle, but also see significantly increased accident rates during periods of congestion. The railroads should be applauded for

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<sup>1</sup> For the purposes of these comments, “TIH shipper” refers to both entities that produce TIH chemicals and their customers that use TIH chemicals in downstream processes.

<sup>2</sup> Department of Transportation, Pipeline and Hazardous Materials Safety Administration, “Hazardous Materials: Improving the Safety of Railroad Tank Car Transportation of Hazardous Materials,” Docket No. FRA-2006-25169.

<sup>3</sup> Most recently, Arkema was named a 2009 Chemical Safety Excellence Award Winner by CSX Transportation; see: [http://www.csx.com/?fuseaction=about.news\\_detail&i=50609](http://www.csx.com/?fuseaction=about.news_detail&i=50609).

their commitment to improving safety with respect to the transportation of TIH chemicals. This commitment and the strong partnerships that exist between shippers and railroads concerning technical, safety and security matters are critical to the safe movement of TIH chemicals that can and does occur under the existing common carrier structure.

## **II. Arkema and the Important Economic Role Played by TIH Chemicals**

Today, Arkema manufactures and ships Methyl Mercaptan (“MeSH”), in addition to receiving Chlorine (“CL”) and Hydrofluoric Acid (“HF”) as raw materials. These TIH chemicals are critical not only to the operations of Arkema, but also those of our customers. These are also chemicals that cannot be cost-effectively substituted in the production process.

Arkema’s Beaumont, Texas plant is the largest MeSH production facility in the world, safely shipping over five billion pounds of MeSH by rail since 1975.

HF is received by Arkema’s Calvert City, Kentucky plant and is used as a raw material in our fluorochemicals business, including the production of Forane® refrigerants and Kynar® resins. In 2007, Arkema opened the world’s largest HFC 32 plant. HFC 32 is a key component in a new generation of zero ozone depleting refrigerants. This plant represented a \$45 million investment that supports more than 250 jobs in the Calvert City, Kentucky area.

Arkema uses Chlorine in Tin Stabilizer production at its Carrolton, Kentucky and Axis, Alabama facilities. Tin Stabilizers are used in the production of vinyl siding and PVC pipe, both critical to the nation’s construction industry.

At this time, these TIH products are materials that Arkema would not consider shipping by truck – the safety of the public demands the security and safety offered by controlled rail transportation.

The TIH chemicals used and produced by Arkema play a significant economic role in the United States. It is imperative that Arkema and our fellow TIH chemical shippers continue to be able to ship these TIH materials via rail, since this transport mode is by far the safest of all alternative methods. As such, Arkema feels that maintaining the spirit of the common carrier obligation as well as steps to address the costs associated with shipping TIH materials for both shippers and the railroads are key factors for the Committee to address in its recommendations.

### **III. The Board's Creation of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee (TIHCCTAC)**

Arkema is pleased to see the Board's August 3, 2010 decision creating TIHCCTAC and requesting comments on its scope, mandate, and structure. Prior to this announcement, the Board has received comments on two dockets, the Common Carrier Obligation of Railroads, EP 677 and the Common Carrier Obligation of Railroads – Transportation of Hazardous Materials, EP 677 (Sub-No. 1). These two dockets, which included comments and hearings, raised concerns from both the shipper and railroad communities over the current issues facing the shipment of TIH chemicals. Arkema has commented in both of these proceedings and appreciated the opportunity to present our views to the Board.

As noted in the Board's August 3, 2010 decision, the lack of industry-wide consensus shown during the consideration of both dockets is a sign that more focused discussion between industry stakeholders is needed. As both a participant in these proceedings and as a TIH shipper, Arkema agrees with the Board's decision to place these dockets in abeyance and to establish the TIHCCTAC to provide independent policy advice and recommendations to the Board.

By noting Arkema's support for the creation of the Committee, Arkema does not waive or otherwise impair its rights to continue to provide comments to the Board in accordance with its request under the August 3, 2010 decision. As such, below are outlined Arkema's specific comments on the four areas where the Board is seeking input.

**A. What should be the appropriate scope of the Committee's mandate?**

Past efforts to address the issue of TIH chemical transportation have resulted in a wide variety of suggestions to the Board, several of which would have resulted in significant negative impacts to the United States economy, the safety of the public, and the loss of possibly thousands of jobs across the country. Thus, as an initial matter, the Committee's mandate must include a provision to protect the American economy, its vital manufacturing sector, and the safety of the public at large. As a core element of this recommendation, Arkema calls upon the Board to include specific language in the Committee's charter that prohibits the consideration of proposals to remove or substantially alter the spirit of the existing common carrier obligation of the railroads. As noted in comments to both EP 677 and EP 677 (Sub-No. 1), the common carrier obligation is critical to the nation's economy as it allows for the shipment of TIH chemicals across the safe and secure national rail network.

Arkema also believes that part of this competitiveness mandate requires the Committee to evaluate the impact of TIH rail rates on industry, and determine the economic soundness of such rates. While there may be some limits on this discussion due to anti-trust concerns, rail freight rates faced by TIH shippers are a major concern to the manufacturing shippers, as noted above. Any competitiveness or liability discussion has to include freight rates and/or the impact of the

Committee's recommendations on both rates and the Board's review of rates under the established rate case process as one essential component.

Ensuring that the Committee recognizes the broad economic impact of TIH chemicals is important to their deliberations; however, the current scope for the Committee's function does not directly provide it with the ability to hear from outside groups. As noted above and below in these comments, the TIH industry, including producers, receivers, users, and the transporting railroads, is large and varied. There are numerous potential ways to increase representation without increasing the size of the Committee, including the following suggestions:

1) Allow the Committee to receive comments in a way similar to that of the current Board process. This would allow stakeholders without direct representation on the Committee to petition the Committee and provide their thoughts on various issues. Arkema believes that allowing comment in writing to the Committee is important and should be preserved. If the Board approves allowing written comments, it will also need sufficient staff to review and synthesize the comments in a way that is useful to the Committee's process.

2) Another tool might be to provide a role for the major trade associations that represent stakeholders in this debate: the Association of American Railroads ("AAR"), the American Chemistry Council ("ACC"), Chlorine Institute ("CI"), The Fertilizer Institute ("TFI") and others. However, while these organizations have a great deal of knowledge regarding these important issues, Arkema feels that direct business participation is critical to achieving a successful result from the workings of the Committee. Trade associations do not directly see the financial impact of TIH rates, liability, and policy decisions; as such, they lack the important stake in the process that the Board rightly feels is important to the functioning of the Committee. Arkema feels that, because of these limitations, Committee membership should not be provided

to trade associations; however, the Board might use these organizations in an *ex officio* capacity for non-committee TIH stakeholders.

3) Arkema believes that the most effective method for the Committee to hear the concerns and thoughts of those not on the Committee is to hold hearings whereby stakeholders could testify before the Committee. Such a process has been used by the Board many times, including several in which Arkema has directly participated in the comment process. This hearing process provides the Board with the ability to hear from a wide variety of industry views and experiences; the Committee could benefit from the same process. Individuals and organizations that are not directly members of the Committee, or in some cases do not have a form of representation on the Committee, could testify and share their views and experiences with the members of the Committee. Such a process would provide important information and outside experience to the Committee without impacting the Committee's structure or function in a way that would prevent it from arriving at a decision on recommendations to provide to the Board.

**B. How would the scope of the Committee's mandate affect its utility?**

As noted above, Arkema strongly supports the establishment of the Committee and feels that it provides an opportunity to develop industry consensus on the issues of TIH transportation. However, the mandate and scope outlined in the August 3, 2010 decision provide some limits on the ability of the Committee to provide such consensus recommendations in a timely manner. Before outlining our specific concerns, Arkema wants to take this opportunity to discuss the impact of time on our ability as a TIH producer and shipper to remain globally competitive.

As Arkema and our industry partners have noted in EP 677 and EP 677 (Sub-No. 1), rail freight rates for shipment of TIH chemicals have seen significant increases during the past

several years – increases that directly impact the competitiveness of these chemicals and the products using them.

Thus, the Committee needs to move quickly in its efforts to address this situation, and not delay and defer action on this critical issue until there is a full-fledged crisis in the country. Delay in addressing these important issues would significantly impact the goals of the Committee and the Board's desire for it to develop true policy recommendations that ensure the safe and economical transportation of TIH chemicals by rail. As such, Arkema recommends that the Board adjust the charter for the Committee by strengthening the language regarding the need for the Committee to take action and to make recommendations by the end of its two-year charter. Such a clear discussion of the goals for the Committee will ensure that all parties have an understanding of the Board's expectations for its actions. It will also ensure that all parties come to the discussions in good faith and with a commitment to working together to find solutions.

### **C. What would be the optimum size for the Committee?**

Arkema feels that the Board should not increase the size of the Committee beyond the currently proposed 27 voting members. Arkema further proposes that the Board consider reducing the number of voting members to 20, representing only the railroads and shippers, and install all other Committee members as *ex officio*, non-voting members. Under the current proposed board structure, representatives of organizations that do not have a financial or commercial stake in the outcome would have a vote of equal value to a representative of a railroad or of a shipper. The four "academia/policy" representatives will not be directly impacted by the recommendations of the Committee, even though they certainly have a great

deal to offer to the debate and discussion. Additionally, the insurance industry representatives certainly will provide insight into the necessary commercial structure of any liability solution considered or developed by the Committee, but their financial impact ends there – there will need to be insurance policies taken out regardless of what the liability chain ends up looking like. Finally, while the tank car industry has the potential for liability exposure in the case of a TIH release, history and court rulings have shown that standards developed by the Department of Transportation provide significant protection for the tank car industry, as long as tank cars are manufactured and maintained according to the necessary standards.

While Arkema does not feel that the size of the Committee should increase, we do feel that the process and work of the Committee would be enhanced by the participation of at least one economist, perhaps under an advisory position, in lieu of some of the Academia positions. The role of the economist would be to conduct an analysis of each proposal, but not simply looking at the impact of proposals on the bottom lines of either the TIH shipper or rail industry, but to also looking at the impact of these proposals on topics like safety, jobs, and global competitiveness. Arkema has over 1,000 employees in the United States who have some connection to our TIH business. All of the TIH industry, including companies and government organizations that utilize TIH chemicals, employ thousands of workers. The overriding goal of any policy recommendation must be to cause no harm to the nation's economy or its transportation safety. The inclusion of an economist as an advisor, who is focused on these issues, would provide significant and much-needed perspective on the impact of any recommendation by the Committee.

Arkema recognizes that the TIH chemical transportation issue is not without controversy, and many of the organizations that would consider themselves stakeholders to the discussion

outlined by the Board in its August 3, 2010 decision have interests beyond simply resolving issues related to liability and the cost to transport TIH chemicals. Therefore, while some may argue that there is a need to increase the size of the Committee to ensure broad representation of stakeholders, Arkema feels that the Board has sized the Committee appropriately, especially if the Committee is permitted to conduct public hearings. A Committee with 27 (actually 32 if members currently listed as *ex officio* in the decision are included in the count) will ensure broad debate while still being small enough to allow productive discussions. Arkema feels that reducing the number of voting members to 20 will further ensure that decisions are made in a way that reflects the cooperative efforts of the industry organizations.

**D. How should the Committee's membership be allocated among various stakeholder groups?**

The Board, in its August 3, 2010 decision, developed a proposed Committee make-up that represents a very good starting point in meeting the goals of a fairly balanced "cross section of those directly affected, interested, and qualified," as required under the Federal Advisory Committee Act and its pertinent regulations. Arkema has a number of recommendations focused on strengthening the representative value of the Committee and improving its organization to ensure better decision-making.

First, the Committee charter must be adjusted to ensure a TIH presence that is representative of the industry. The Board's proposal recommends ten shippers, five representing CL shippers and five representing AA shippers. While this proposal will certainly ensure the involvement of those who ship large volumes of TIH chemicals around the nation, it does not reflect the broader nature of the TIH chemical industry. As noted above, while Arkema

manufactures and ships MeSH, we also receive CL and HF, two major raw materials. We would like to see representation from non CL and AA shippers, giving a broader perspective to the committee.

The Board notes in its decision that it serves as the economic regulatory body for the railroad industry – it is not a technical expert in chemical manufacturing or in logistics. However, the recommendations made by the Committee will have direct impact on chemical manufacturing processes and the logistics of our companies. It is critically important, therefore, that the shipper representation on the Committee adequately reflect the broad and varied nature of the TIH industry.

Arkema feels that the Board can achieve this by placing non CL and AA shippers in several shipper slots on the Committee. By opening these slots, the Committee will ensure that decisions have the needed input from the broader TIH community.

Arkema proposes that the Board also provide clarification in its definition of “TIH shippers” under the August 3, 2010 notice. The issues impacting TIH transportation are not limited to those that manufacture TIH chemicals. Indeed, in the many industry-wide safety efforts where Arkema proudly participates, the TIH community is represented by both manufacturers and end users. These TIH receivers play an important role in the discussion over TIH safety and technical matters, and their ability to provide input into the discussions of the Committee needs to be clearly noted and strengthened.

There is also a need for representative balance across company size within the shipper community. While the Committee provides smaller Class III railroads a defined seat at the table, there is no such defined seat for medium and small companies within the make-up of the shipper representatives. Arkema believes that the Board wishes to have a Committee that includes a

clear representation of the shipper community, and that such representation is crucial to arriving at a successful set of recommendations. For many companies, TIH transportation is a significant part of their business, and their specialization prevents shifting away from such business. Many of these TIH chemicals, as is the case with Arkema, are critical chemicals to the United States' economy and cannot be cost-effectively produced in a manner that does not result in shipment by rail. Users of many TIH chemicals cannot simply move to another chemical to manufacture their products; they need what in many cases are very specialized chemicals that are only produced in very small volumes in the United States. While the companies in this situation are small in size, their need for continued, reasonably priced TIH rail transportation is large. As such, the Board must make a clear commitment to providing representation for TIH shippers of all sizes.

This need for balance carries through when Arkema examines the Board's proposed allocation of seats among the railroads. Under the proposed structure included in the August 3, 2010 decision, there will be ten seats allocated among the railroad industry: seven seats allocated to representatives of Class I and Class II railroads and three seats allocated to representatives from Class III railroads. Arkema feels that this unnecessarily biases the railroad representatives in favor of the interests of the major Class I railroads. Smaller, Class II and Class III railroads play an important role in the shipment of TIH chemicals, often serving as the important final link between a TIH producer or user and the main line of a Class I railroad. Under the Board's proposed structure, the entire Class I community could serve on the Committee while providing only limited representation for the smaller regional and short-line railroad community.

To provide a more representative balance of the railroad community, Arkema proposes that the ten seats allocated to the railroads be divided as follows: four seats to representatives of Class I railroads, three seats to representatives of Class II railroads, and three seats to

representatives of Class III railroads. Such a division would ensure a balanced, broader discussion of the impact of proposals on the railroad industry and more diverse perspectives regarding the importance of TIH shipments to a railroad's business.

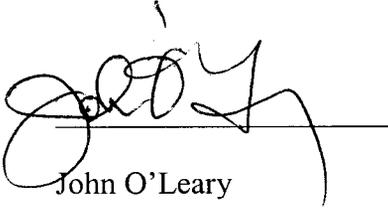
The leadership of the Committee is also critically important to its success. Under the August 3, 2010 notice, the Board proposes a single chair for the Committee, appointed from its membership by the Chairman of the STB. Given the nature of this issue and the need for the leadership of the Committee to serve an important role in keeping the Committee on task, Arkema proposes that the Board consider two co-chairs instead of a single chair for the Committee. Under such a structure, one of the co-chairs would be appointed from the members of the Committee representing the railroad interests and one co-chair would be appointed from the Committee's shipper interests. This will ensure that one side or another does not dominate the focus of the Committee, as well as the way it carries out its business and develops recommendations, and that there is balance in the Committee's actions.

#### **IV. Conclusion**

Again, Arkema appreciates the opportunity to provide comments to the Board on its August 3, 2010 decision regarding the creation of a Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee. As noted in our comments above, access to reasonably priced rail transportation is important to the continued competitiveness of several of Arkema's business units here in the United States. Having a broad representation of TIH shippers and receivers will allow for a comprehensive evaluation of the issues facing our industry with regards to the shipment of these products. We feel that this scope should be narrowed by clearly stating that the existing spirit of the common carrier obligation should not be eliminated or significantly

adjusted and that the Committee should develop recommendations that will help the Board address the costs seen by Arkema and other TIH stakeholders. Arkema applauds the Board for creating the Committee and for laying out an ambitious scope of issues for recommendation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "JOH O'LEARY", is written over a horizontal line. The signature is stylized and cursive.

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