

KELLER AND HECKMAN REPORT
TO
THE VINYL INSTITUTE

August 20, 1991

CTL009803

TABLE OF CONTENTS

	<u>Page</u>
A. ENVIRONMENTAL PROTECTION AGENCY	1
1. Volatile Organic Compounds	1
2. Operating Permits	1
B. FOOD AND DRUG ADMINISTRATION	1
1. FDA Continues Slow Progress Toward Completion of Draft Environmental Impact Statement for PVC	1
2. National Food Processors Association and SPI Coalition Draft Industry Guidelines for Recycled Plastic Food Packaging	2
3. SPI Task Group Gathers Data on Plasticizers Used in Plastic Wraps	2
C. CALIFORNIA	3
1. Completion of Final Environmental Impact Report on Use of Plastic Pipe in California Remains Delayed	3
2. Latest Proposition 65 List Adds Only Two Chemicals; Plans to Raise Vinyl Chloride Exposure Level Still Pending	3
3. August Hearing Set for Emergency Regulation Incorporating Proposition 65 Workplace Warning Requirements into State Occupational Safety and Health Plan	4
D. SOLID WASTE	5
1. New York Court of Appeals Reverses Lower Court Decisions Against Suffolk County on Plastic Packaging Ban; Suffolk County Legislature Enacts Temporary Moratorium of Ban	5
2. Refinery Recycling to Be Pursued as a Subcommittee of the Technical Advisory Committee of the CSWS	5
3. Minnesota and Washington Restrict Presence of Four Heavy Metals in Packaging Materials	6
4. Pending Bill in California Would Require 10% Recycled Content in Rigid Plastic Containers by 1993	6

TABLE OF CONTENTS
(cont.)

	<u>Page</u>
E. ENVIRONMENTAL LABELING	7
1. SPI Testifies at FTC Hearings and Files Comments on Environmental Claims	7
F. TRANSPORTATION	9
1. Vinyl Chloride Manufacturers Forming a Voluntary Transportation Mutual Aid Network (VCNet)	9

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THE VINYL INSTITUTE**

This report was prepared for the September 13, 1991, meeting of the Vinyl Institute (VI) Executive Board. It summarizes Keller and Heckman's activities for the VI as well as relevant SPI projects arising since the preparation of our last report.

A. ENVIRONMENTAL PROTECTION AGENCY

1. Volatile Organic Compounds

On May 13, 1991, we filed comments on behalf of the SPI's Occupational Health and Environmental Issues Committee (OHEIC) regarding the EPA's proposed definition of volatile organic compounds (VOCs). EPA proposes to define VOCs as "any organic compound that participates in atmospheric photochemical reactions." The concern is that this definition is vague and could be interpreted to expand the number of substances that are subject to regulation as VOCs. We urged EPA to clarify the definition by (1) providing for exclusion of negligibly reactive compounds and (2) allowing use of vapor pressure and boiling point to determine volatility.

2. Operating Permits

On July 9, 1991, we filed comments for SPI regarding EPA's May 10, 1991 proposed operating permit program. The proposed rule would establish a program for issuing operating permits to sources of hazardous air emissions. The permitting regulations require sources to obtain a permit addressing all applicable pollution control obligations. Under the proposed program, which is required by statute to be in place by November 15, 1991, many sources previously unregulated under the Clean Air Act (CAA) would have to obtain operating permits.

In the comments, we underscored the following points: (1) the importance of operational flexibility and expedited permit revisions; (2) the potential adverse impact the permit proposal may have on small businesses; (3) the need for state permit programs to parallel the federal program; (4) the value of the use of general permits to relieve the burdens on small businesses; and (5) the prohibitive costs of unnecessary monitoring.

B. FOOD AND DRUG ADMINISTRATION

**1. FDA Continues Slow Progress Toward Completion of Draft
Environmental Impact Statement for PVC**

On August 16, 1991, we spoke with Buzz Hoffman of the FDA Center for Food Safety and Applied Nutrition's Environmental Impact Section regarding the status of the Environmental Impact Statement (EIS) on polyvinyl chloride (PVC) that the Agency is preparing as a prerequisite for final action on its five year old proposed rule governing the use of PVC food-contact materials. *51 Fed. Reg.* 4173 (Feb. 3,

1986). According to Dr. Hoffman, they are still working on a draft of the EIS for internal Agency review. Their goal is to complete the draft by the end of this year.

2. National Food Processors Association and SPI Coalition Draft Industry Guidelines for Recycled Plastic Food Packaging

As reported in May, SPI and the National Food Processors Association (NFPA) have formed a Plastics Recycling Task Force to perform research and develop guidelines to assure the safe use of recycled plastics in food-contact applications. We are providing legal and scientific assistance to the Task Force in drafting the guidelines, while NFPA is providing staff resources to administer the Task Force and laboratory research to assist in developing the guidelines.

The Task Force has drafted guidelines that provide a test method to screen materials for chemical contaminants. The test method is now being studied to determine its effectiveness.

3. SPI Task Group Gathers Data on Plasticizers Used in Plastic Wraps

As we have previously reported, a Plasticizer Task Group was formed last winter under the SPI Food, Drug, and Cosmetic Packaging Materials Committee's Technical Subcommittee to respond to the questions raised by recommendations from the United Kingdom's Ministry of Agriculture, Fisheries and Food (MAFF) last November advising British consumers to avoid using plastic wraps in certain food-contact applications because of insufficient toxicological data on the plasticizers used in the wraps. On November 12, 1990, MAFF recommended that consumers avoid use of "plastic wrapping films" either to wrap foods when cooking in a microwave oven or to wrap "foods with a high fat content, such as cheese, due to the lack of toxicological data on plasticizers that may migrate from the wraps into food." Although MAFF clearly stated that the wraps posed no health hazard, certain mass media outlets in this country distorted the MAFF announcement into a cancer scare story.

At a December 14, 1990 meeting, FDA requested that we attempt to gather and supply food-contact use data on currently marketed plasticizers. FDA's main interest is in data regarding the use of di-2-ethylhexyl phthalate (DEHP), di-2-ethylhexyl adipate (DEHA) and acetyl tributyl citrate (ATBC), and their potential substitutes in food wrapping films. The food-contact applications of interest to FDA are polyvinyl chloride (PVC) and polyvinylidene chloride (PVDC) films, closures and gaskets for baby food jars, and tubing used in dairy applications. Following the FDA meeting, and an industry meeting on December 18, 1990, a questionnaire developed by the Group has been circulated to known producers of the plasticizers and films of interest to develop the data FDA seeks.

In June, the Food Safety Advisory Committee (FSAC) of the Government of Ireland published a report concluding that "there is no evidence to suggest that the

use of cling film for wrapping fresh meat or cheese for refrigeration purposes is a health hazard," according to a June 13, 1991 press release from the PVC Cling Film Information Bureau. The FSAC consists of leading food scientists, bacteriologists, and other health officials of the Irish government. The FSAC's report took into consideration MAFF's previous findings but emphasized the food protection virtues of plastic wraps.

C. CALIFORNIA

1. Completion of Final Environmental Impact Report on Use of Plastic Pipe in California Remains Delayed

As we have previously reported, in August 1989, the State of California released a highly favorable final draft of a long-awaited Environmental Impact Report on the environmental effects of expanding the use of plastic pipe for certain plumbing applications. After carefully evaluating the potential impact of the increased use of plastic pipe on public health, worker health and safety, fire safety, economics, and ecological systems, the report concluded that "[o]verall, no significant environmental impacts are associated with more widespread use of plastic plumbing pipe." If made final in its present form, the report should clear the way for the use of polybutylene (PB) and chlorinated polyvinyl chloride (CPVC) plastic pipe in water service distribution and acrylonitrile-butadiene-styrene (ABS), polyvinyl chloride (PVC), and CPVC in drain, waste and vent piping for fire-rated construction.

Public hearings were held on the draft report last fall, and SPI filed comments on the report last November. Stanford Research International (SRI), which developed the draft report for the California Department of Housing and Community Development, was charged with reviewing the comments and preparing a final EIR to be submitted to the Housing Department. However, because of cost overruns, SRI has not delivered the final report. SRI is attempting to renegotiate the contract with the Department of Housing before completing the project. Thus, the date for receipt of the final EIS has been severely delayed. While negotiations continue, SRI has submitted a partial final EIR, which the Department is still reviewing. We anticipate further developments in the new few months.

2. Latest Proposition 65 List Adds Only Two Chemicals; Plans to Raise Vinyl Chloride Exposure Level Still Pending

According to the Proposition 65 staff, issuance of a proposed regulation establishing a 3.0 $\mu\text{g}/\text{day}$ permissible exposure limit for vinyl chloride is still planned but is being postponed until the state completes the rulemaking process for exposure limits proposed last Spring for other Proposition 65 chemicals.

At its April 26 meeting, the California Scientific Advisory Panel reviewed and accepted the state's risk assessments recommending a 3 μg permanent permissible daily exposure level (in the language of Proposition 65, the "no significant risk" level) for vinyl chloride and a 4 mg level for butylated hydroxyanisole (BHA). The State

currently has an interim Proposition 65 daily exposure limit of 0.3 $\mu\text{g}/\text{day}$ for vinyl chloride and no level for BHA.

Meanwhile, on July 1, the State issued its quarterly update of the Proposition 65 chemical list. The only new listings were oxymetholone (as a carcinogen) and benomyl (as a reproductive toxicant). In July, the State also published a Notice of Intent to add ethyl chloride to the Proposition 65 list as a reproductive toxicant.

3. August Hearing Set for Emergency Regulation Incorporating Proposition 65 Workplace Warning Requirements into State Occupational Safety and Health Plan

On August 22, 1991, the California Occupational Safety and Health Standards (OSH) Board will hold a hearing in Sacramento on its proposal to incorporate the workplace warning requirements of Proposition 65 -- recently adopted as regulations by the Board on an emergency basis in compliance with an order of the state Court of Appeals -- into the state Occupational Safety and Health plan (OSH plan). If approved by the U.S. Secretary of Labor, adoption of the emergency regulation as a permanent regulation would rule out federal preemption of Proposition 65 workplace warnings under the Federal Hazard Communication Standard (HCS), 29 C.F.R. § 1910.1200. In addition, the California Court of Appeals estimated last year that incorporation of Proposition 65 into the state OSH plan would expand the scope of the current workplace hazard communication requirements under the OSH plan to cover an additional 66 carcinogens and 18 reproductive toxins.

In the informative digest accompanying the hearing announcement, the Board explained the impact of the incorporation as follows:

When the exposure is one to which the preexisting Hazard Communication Standard . . . and Proposition 65 apply, the employer must satisfy Proposition 65 by complying with the Hazard Communication Standard. When only Proposition 65 applies because the exposure and/or chemical concentration level is lower than the Hazard Communication Standard levels, or because the chemical and/or its usage is exempt from the Hazard Communication Standard, the employer can comply with Proposition 65 warning requirements by complying with the Hazard Communication Standard or by complying with the Proposition 65 regulations

The informative digest notes that following the hearing, "the Board . . . may thereafter adopt the above proposal substantially as set forth without further notice." Consideration of adoption of the emergency regulation as a permanent regulation is reportedly already on the agenda for the Board's September 26, 1991 meeting.

D. SOLID WASTE

1. New York Court of Appeals Reverses Lower Court Decisions Against Suffolk County on Plastic Packaging Ban; Suffolk County Legislature Enacts Temporary Moratorium of Ban

As you know, on May 9, 1991, the New York Court of Appeals reversed the lower courts' judgments in SPI's favor against Suffolk County, New York and its plastics packaging ban. The Court's four-three decision did not reach the merits of whether the Suffolk County Legislature complied with SEQRA in passing the plastics ban. Instead, the Court held that SPI and Lawrence Wittman & Co. lacked "standing" to bring a SEQRA challenge, and dismissed the case on that basis alone. "Standing" is a legal concept which requires the party bringing suit to demonstrate that it has a sufficient interest in the controversy before the court.

According to the four judge majority, SPI was not a proper party to challenge the County's compliance with SEQRA because the protection of its member companies from local conditions, such as air pollution, was not "germane to the purposes of this nationwide trade organization," a threshold requirement under the representational standing test. Lawrence Wittman & Co., on the other hand, failed to meet the requirements of standing because it had not demonstrated that it would suffer any environmental harms different in kind or degree from that of the community at large. Such a demonstration is necessary when the action at issue will have localized "as opposed to generalized" effects -- the situation the majority contended was present in Suffolk County.

In June 1991, the Suffolk County Legislature passed a Resolution placing a moratorium on the plastics ban until (1) ninety days after the Suffolk County Health Department issues regulations implementing Local Law 10-1988, or (2) December 31, 1991, whichever date comes first. It is our understanding that County Executive Lawrence Halpin signed the moratorium.

2. Refinery Recycling to Be Pursued as a Subcommittee of the Technical Advisory Committee of the CSWS

Chemical manufacturers and oil companies held an *ad hoc* meeting in Chicago on July 18, 1991 to discuss tertiary recycling, *i.e.*, full circle recycling or refinery recycling where basic chemicals or fuels are recovered from plastics waste. The meeting focused on the concept of taking commingled plastic waste with no higher recycling applications (*i.e.*, remove PET and LDPE) and using it as a feed stream for an oil refinery as a substitute for crude so that the hydrocarbon content of the resin can be recovered.

If such a recycling process were feasible and could be implemented on a broad scale, it could minimize the need for sorting and expensive handling procedures

involved in current recycling systems and it should lead to all plastics being recycled to essentially the same extent.

At the July meeting, the group concluded that potential regulatory and legislative restrictions on the disposal of plastics require that tertiary recycling be developed as an alternative to landfilling and incineration for materials that cannot be recovered by primary (conversion into new products with similar characteristics to the original product) or secondary (conversion into new products with less demanding physical and chemical properties) recycling. It was further agreed that the threat posed by regulatory and legislative restrictions is so imminent that joint industry action is the only way to develop refinery recycling in time to be considered as an alternative in public policy debates on plastics waste management.

It was also agreed that future meetings would be held under the auspices of the SPI Council for Solid Waste Solutions' Technical Advisory Committee. The next meeting was scheduled for August 19, 1991.

3. Minnesota and Washington Restrict Presence of Four Heavy Metals in Packaging Materials

Minnesota and Washington State have both adopted laws based on the Coalition of Northeastern Governors' (CONEG) model legislation limiting lead, cadmium, mercury, and hexavalent chromium in packaging bringing to ten the number of states with some variant of the CONEG restrictions. Minnesota's law will ban the intentional presence of lead, cadmium, mercury, and hexavalent chromium in inks, dyes, pigments, adhesives, stabilizers, or other components of packaging as of August 1, 1993. The law will also restrict the incidental presence of the four heavy metals in packaging components to 600 parts per million (ppm) in two years, 250 ppm in three years, and 100 ppm in four years.

Washington State's law, which went into effect on May 21, 1991, will restrict the intentional presence of lead, cadmium, mercury, and hexavalent chromium in components of packaging beginning July 1, 1993. Unlike most other CONEG-based heavy metal statutes, the Washington measure neither imposes a complete ban on the intentional presence of the four metals nor sets any limits on the incidental presence of the metals in packaging components. Instead, Washington's statute only limits the *intentional* presence of the four metals in packaging components to 600 ppm by July 1, 1993, 250 ppm by July 1, 1994 and 100 ppm by July 1, 1995. Thus, Washington's law will have no effect on manufacturers who do not intentionally add lead, cadmium, mercury, or hexavalent chromium to their packaging, even if the metals are incidentally present.

4. Pending Bill in California Would Require 10% Recycled Content in Rigid Plastic Containers by 1993

A bill is pending in California that would ban, as of January 1, 1993, rigid plastic packaging containers containing less than 10% post-consumer material. S.B. 235

would require, as of October 1993, that rigid packaging container manufacturers report to the California Department of Conservation, on a monthly basis, the tonnage of rigid plastic containers they made or sold in the state and the tonnage of post-consumer material used to manufacture those containers.

The bill permits the Conservation Department to grant an exemption, two years after the ban goes into effect, to manufacturers who can prove that 50% of their rigid containers are being recycled. In addition, the Department may grant waivers from the post-consumer material content requirements based upon either a showing that (1) the requirement is not technologically feasible for the manufacturer; (2) adequate post-consumer material is not available; or (3) state, federal or local health regulations prohibit the use of post-consumer material in the type or class of rigid containers the manufacturer produces. The bill is reportedly undergoing mark-up by the Senate Ways and Means Committee and will be the subject of a hearing by that Committee on August 28, 1991.

E. ENVIRONMENTAL LABELING

1. SPI Testifies at FTC Hearings and Files Comments on Environmental Claims

The Federal Trade Commission (FTC) held hearings on environmental advertising and marketing claims on July 17-18, 1991 in Washington, D.C. The goal of the hearings was to obtain views on whether the FTC needs to provide further guidance on environmental marketing claims, and if so, what form this guidance should take. SPI testified and submitted written comments responsive to the FTC's May 21, 1991 proposed rulemaking.

Most of the industry witnesses at the hearings stressed the need for uniform national standards on environmental claims and supported development of FTC voluntary guidelines based on the guidelines developed by the National Food Processors Association (NFPA). The environmental groups who testified, as well as several other organizations, endorsed limited FTC guidelines based on the State Attorneys General Task Force's "Green Report II," published in May, arguing that green claims are primarily an environmental issue and that, therefore, the Commission should let the Environmental Protection Agency take the lead in regulating them.

With regard to EPA's plans, EPA Deputy Administrator Henry Habicht told the FTC that EPA intends to publish for public comment a range of possible options for setting standards for the terms "recycled" and "recyclable" "in the next few months." He said EPA currently favors a recommendation that products making "recycled" claims clearly disclose the percentage of recycled content in the product, but he did not say how EPA would define "recycled" material. Habicht said that should the FTC decide to issue guidance, EPA will provide the Commission with some specific recommendations such as the meaning of "recycled" and "recyclable." Should the FTC choose not to issue guidelines, EPA is "prepared to move forward on our own in the

hope that the Commission would find EPA guidance useful in enforcement actions, and the states would adopt the guidelines for their own use."

Consistent with the policy on environmental claims recently adopted by the Board, in its comments and testimony (SPI Vice President for Government Affairs Lew Freeman testified for The Society), SPI emphasized two principles. First, the public benefits from truthful, non-misleading information about the environmental attributes of products. Second, industry has a responsibility to present such information in a manner that does not deceive the consumer either directly or by implication. SPI argued that industry can best meet this obligation by presenting environmental claims in context and by assuring that, in context, the claims are truthful and substantiated. In keeping with the First Amendment protections afforded to commercial speech, the FTC should stand by its stated goal of providing maximum guidance while minimizing the likelihood of inadvertently encouraging misleading claims or chilling the making of truthful, non-misleading claims. This goal, SPI argued, dictates that the regulation of environmental advertising should be based on accepted principles of substantiation rather than blanket prohibitions, or extreme restrictions on the use of certain terms.

SPI supported the promulgation of federal guidelines and suggested that the FTC use the preamble to such guidelines to urge state and local regulators to adhere to them for the sake of national uniformity. Mr. Freeman told the Commissioners that if state and local authorities choose not to adhere to the federal standards, we would strongly advocate that the Commission adopt a preemptive trade regulation rule.

With regard to specific issues raised by the NFPA and Attorneys General Task Force recommendations, SPI argued that factory waste should be recognized as a legitimate source of "recycled material" since the critical consideration in determining what materials may properly be described as recycled is whether the material being reused would otherwise have been thrown away. Therefore, the Society contended, there is no need to distinguish post-consumer waste from industrial waste when determining the recycled content of a product. Similarly, SPI argued that limiting claims that a product is "recyclable where recycling facilities exist" to instances where a product is being recycled "in many areas of the country," as recommended by the Attorneys General Task Force, is more restrictive than necessary, as are the Task Force's recommendations that such claims be accompanied by an "800" number, or elaborate additional information on the extent to which recycling is occurring.

SPI urged the Commission to reject the recommendations of the Task Force regarding "trivial" and "irrelevant" claims (the example of an "irrelevant" claim offered by the Task Force being a claim that a foamed polystyrene cup "preserves our trees and forests") noting that, like some of their other restrictive recommendations, their proposed limitations of "trivial" claims might violate commercial speech rights protected by the First Amendment. SPI also criticized the Task Force's recommendation that "special care" be used in promoting the environmental attributes of single-use products to avoid encouraging consumers to choose single-use over "more durable" products. Finally, SPI defended reliance on life-cycle assessments in advertised

product comparisons so long as the FTC's normal rules of substantiation are followed. The Society acknowledged, however, that limitations as to methodology make it doubtful that life-cycle studies can presently support general claims of environmental superiority.

The options for further FTC guidance on green claims are (1) increased case-by-case enforcement, (2) voluntary guidelines, or (3) a trade regulation rule. The general belief is that the FTC is unlikely to issue a trade regulation rule. Throughout the hearings, various Commissioners also expressed doubts about the need for guidelines as well as about their ability to fashion guidelines that would do more good than harm. However, nearly all of those testifying supported adoption of FTC guidelines, including a White House representative (from the Office of Consumer Affairs), so it may be difficult for the Commission to avoid taking this action.

FTC staff members have told us that it is unlikely that the Commissioners will reach a decision before the end of the year on whether to issue guidelines. Regardless of what the Commission ultimately chooses to do, the decision will be announced in the *Federal Register* and parties will then have 60 days to submit comments.

F. TRANSPORTATION

1. Vinyl Chloride Manufacturers Forming a Voluntary Transportation Mutual Aid Network (VCNet)

Manufacturers of vinyl chloride have joined together to form a Vinyl Chloride Transportation Network (VCNet) which will coordinate chemical company and for-hire response to distribution incidents involving vinyl chloride. Representatives of the eight domestic manufacturers met on August 8, 1991, at the Washington, D.C. headquarters of the Chemical Manufacturers Association (CMA) to finalize the agreements which will govern VCNet's initial operations.

VCNet is operated as an independent working group of the recently formed Vinyl Chloride Panel of CMA's CHEMSTAR program. The industry-funded coalition will coordinate emergency response activities for all distribution incidents involving vinyl chloride in conjunction with CMA's Chemical Transportation Emergency Center "CHEMTREC".

VCNet will operate as a mutual aid network and will provide technical expertise and assistance at the scene of serious Vinyl Chloride Distribution Incidents (VCDIs) when the shipper cannot respond promptly.

At the August 8 meeting, industry representatives approved the circulation of a policy statement and operating rules for the coalition. Those documents outline the fundamental operation of VCNet as follows:

- If the shipper cannot respond promptly to an incident that requires the presence of a chemical expert, the shipper, through CHEMTREC will request

a nearby VCNet member company to respond to the scene. If another VCNet member company cannot respond, the shipper, through CHEMTREC will authorize a for-hire response company to go to the scene;

- Only VCNet member companies and for-hire responders that are qualified to handle the hazards of VCM will be requested to respond;
- Upon request and whenever possible, VCNet member companies will respond to another shipper's VCM incident;
- The shipper, upon request, shall reimburse the responding VCNet member company for extraordinary expenses, and will compensate authorized for-hire responders according to schedules of charges to be negotiated by VCNet.

The companies participating on the Vinyl Chloride Panel hope to have executed copies of the VCNet Policy Statement and Agreement, and the VCNet Operating Rules by August 30, 1991.