ATTACHMENT 1

NOT SUBJECT TO REQUEST FOR PRODUCTION OR OTHER REQUESTS FOR DISCOVERY ATTORNEY — CLIENT PRIVILEGE APPLIES

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October 9, 1984

HAND DELIVERY

Mr. Lewis R. Freeman, Jr.
The Society of the Plastics
Industry, Inc.
605 14th Street, N.W.
Washington, D.C. 20005

Re: Potential New York State Requirement on the Collection and Filing of Combustion Toxicity Data on Building Materials

Dear Lew:

Enclosed herewith is a copy of our memorandum analyzing the legal issues presented by the anticipated proposal of the New York State Fire Prevention and Building Code Council to include into the State Uniform Building Code a requirement for the filing of combustion toxicity data for selected furnishings and building materials. I believe Jerry Heckman showed you an earlier draft of this memorandum while the two of you were at the Polymeric Materials Producers Division meeting in Florida last week.

In short, any proposed action by the Building Cod Council to implement the recommendations of the Secretary of State would amount to a "rule," the promulgation of which would be subject to the New York State Administrative Procedure Act. As such, the Council must publish, in the State Register, a notice setting forth the proposed rule at least 30 days prior to any public hearing which will occur. In addition, the Council will be required to prepare a regulatory impact statement discussing the statutory authority for the proposed rule, a needs and benefits analysis, projected costs of th rule, and a statement indicating whether significant alterna-

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tives to the rule were considered by the Agency, and, if so, why they were not incorporated into the rule.

Following the informal public hearings and the receipt of written comments from interested persons, the Council will promulgate the final rule. Judicial review would then be available to any aggrieved party. We do not know the specific terms of the proposed rule as of yet, but it is likely to require extensive testing of large numbers of materials by the Pittsburgh test and the filing of data from these tests with the Council or the Secretary of State. In that event, it would appear that SPI would have at least a colorable argument that the rule should be struck down by a court on the grounds that it is arbitrary and capricious, unreasonable, and not consistent with the statutory authority and mandate of the Council. Lawsuits based upon these grounds against administrative agencies are almost always an uphill battle, and, in our judgment, a suit by SPI in this instance would be no exception. To have any chance of success, SPI would need to develop a very strong administrative record demonstrating the inappropriateness of small-scale toxicity tests in general and of the Pittsburgh test in particular, and would need to make a strong showing that the proposed rule would not advance the cause of fire safety. In this regard, we feel it would be particularly important not just for the views of industry to be stated, but to obtain supporting expert opinion from independent sources such as academia or the government as w ll.

Of course, it is premature to make a judgment as to whether such a suit should be filed, but when it comes tim to make a decision, we should keep in mind the possibility that a lawsuit might well delay implementation and enforcement of the new code requirements for a sufficient period of time to obtain legislative relief even if the lawsuit is ultimately unsuccessful. As you may recall, this tactic was successful in the Minnesota ban on plastic milk bottles several years ago.

In his memorandum to you of September 14 describing the Building Code Council's meeting of September 12, 1984, Roger Bernstein raised the issue of whether a proposal to require data collection and filing would be in accordance with the 1982 statute that directed the Secretary of State's recommendations to be in the form of "performance standards." To be sure, a data collection requirement is not a "performance standard." However, making this argument presents an opportunity for SPI to be hoist on its own petard, i.e., the Building Code Council could "correct" this situation by simply issuing performance standards. In any event, since the Building Code Council has authority to set performance standards, it seems to us that they have an excellent argument that they have the inherent authority to require proof that a specific material meets a given performance standard through collection and filing of data.

It also goes without saying that any argument which SPI would wish to make that the ranking of the relative combustion toxicity of various materials by use of the Pittsburgh test is unreasonable would be enhanced if there were a "reasonable" alternative way of ascertaining and assessing the hazards of combustion toxicity. I recognize that there is no current agreement of any "reasonable" way to do this, but if some consensus could be achieved it would be beneficial.

Finally, the enclosed memorandum does not address the issue of enforcement of any changes which may occur in the State Uniform Building Code. We think this would be premature until we have a proposed rule and a proposed method of enforcement. It may well be possible to raise roadblocks in this area.

If you or Roger have any questions, please do not hesitate to call.

My best,

Cordially yours,

John

John S. Eldred

Enclosure

cc: L. William Sessions
Thomas J. McGrath
John R. Lawrence
R. Bernstein

M E M O R A N D U M

TO: Lewis R. Freeman, Jr.
Roger Bernstein

FROM: Keller & Heckman

RE: New York State Proposal Re Filing of Combustion Toxicity Data

DATE: October 9, 1984

This memorandum examines what legal avenues might b taken with respect to New York State's proposal to adopt a requirement that combustion toxicity data be filed for certain categories of building and furnishing products. The variety of administrative, procedural, and constitutional issues researched include: (1) the authority of the State Fire Prevention and Building Code Council, (2) the authority of th Secretary of State, (3) what process must be followed in adopting the proposed regulations, (4) the availability of review by another administrative agency, the Office of Business Permits, (5) the availability of judicial review, (6) the constitutionality of the action from the standpoint of procedural due process, (7) whether the proposed action violates substantive due process, (8) whether the regulations constitute a taking, (9) whether the regulations are a burden on interstate commerce, (10) standing, and the necessity of pleading a specific injury, and (11) limitations on the use of discovery material outside the litigation process. Since the regulations have not yet been adopted, or even proposed, it has been assumed, based on the reports of Roger Bernstein, that the proposed regulations will fail to give guidance as to what, specifically, must be tested.

I. FACTS

In 1982, the New York State Legislature found that there was "a growing concern regarding injuries and deaths related to the toxic behavior of certain building and furnishing materials when exposed to fire or high temperatures". The Legislature recognized the existence of model test methods for rating the toxicity of combustion products, and that no adequate program had been instituted to integrate such tests into the State Uniform Fire Prevention and Building Code. The legislature directed the Secretary of State to conduct a study of the toxicity of smoke and gases given off under various temperatures by materials used in building construction and furnishings, and to make recommendations to the State Fire Prevention and Building Code Council (the Council). The legislature specified that these recommendations should be in the form of performance standards for various materials at various temperature conditions. N.Y. [Exec.] Law § 370 (McKinney, Supplement 1984).

The Secretary employed Arthur D. Little, Inc. to evaluate the various combustion toxicity testing methods, and to determine whether these tests could be incorporated into a regulatory process. The A. D. Little study, conducted by Rosalind Anderson, Paul Croce and J. David Sakura, reviewed the 14 published toxicity test methods, but chose the National Bureau of Standards' (NBS) and the University of Pittsburgh (Alarie) tests for in-depth evaluation. They also studied four regulatory options available to the state: data filing, product labeling, product performance standards, and material-specific regulation. A. D. Little recommended that the Pittsburgh method be chosen, and that numerical toxicity test data generated for specific products be filed with the Secretary of State's office. The A. D. Little report specifically noted that "performance standards," under which certain material would be banned from use, would not be feasible since an appropriate standard reference material was not available. SPI filed comments, critical of the A. D. Little report, with the Secretary of State. The A. D. Little conclusions also elicited 12 responses in the form of peer review comments filed with the Secretary of State. Only four of the comments favored the results.

In May, 1984 the Secretary recommended that the Council implement these recommendations, and that the Council also require filing of information regarding the ignitability and flame spread characteristics, and the percent halogen content of certain materials. Materials to be tested under the Secretary's initial recommendations included: furniture upholstery; mattresses; bed pads; interior wall, ceiling, and floor finishes; electrical wire insulation and conduit; and water distribution and sanitary pipes. The Building Code Council met over the summer to analyze how to implement the Secretary of State's recommendations, and appointed a subcommittee to investigate the question. The Toxicity Subcommittee of the Council recommended adoption of the data filing requirement and also recommended that insulation, duct work, window treatments and all furniture be added to the list. While the A. D. Little laboratory evaluation used finished products, it is unclear if toxicity data must be filed for all component parts of a product, for the composite products alone, or both.

On September 12, 1984, the Council voted unanimously to accept the Secretary's recommendations. The Council will meet again on October 10, and consider suggested language for the new sections to be placed in the Code, effectively implementing the Secretary of State's recommendation. The Council is also expected to announce a schedule of public hearings on the matter.

SPI, throughout this process, has attempted to persuade the Council that 1) there is no currently available toxicity test capable of relating toxicity test data to a real fire; 2) the Pittsburgh test is a poor choice for a standard small-scale test method because of serious technical shortcomings; 3) filing of test data would lead to choices of material in construction based solely on toxicity, perhaps leading to less safety for consumers if data such as ignition temperature, rate of heat release, etc. are ignored; 4) the A. D. Little report was biased because of the relationship of Dr. Anderson with Yves Alarie, the University of Pittsburgh scientist primarily responsible for developing the Pittsburgh protocol, and because of the likely financial benefit to A. D. Little which would result from adoption of its recommendations; and 5) the economic impact of the data filing requirements would be enormous.

Working with a coalition of industry groups, SPI has contacted the chairperson of the Council, members of the Council subcommittee appointed to address the issue of how to implement the A. D. Little recommendations, and other members of the Building Code Council perceived to be somewhat sympathetic to the industry's position, i.e., that the Alarie protocol was not an appropriate test, and that the toxicity testing contemplated would result in de facto elimination of materials from the marketplace based on toxicity data alone, something that might result in less safety for consumers if other combustibility characteristics were not also considered. As the Code Council has not been receptive to industry's arguments about the lack of technical merit to the proposal and the resultant negative effect on safety, nor to the intense self-interest of A.D. Little in making the recommendations, it has become clear that other alternatives should be pursued, including exploring what legal remedies might be available to those injured as a result of the Council's action.

II. LEGAL ANALYSIS

A. Authority of the New York State Fire Prevention and Building Code Council

1. Delegation of Authority by the Legislature to the Council

a. General Authority

Effective July 21, 1981, the New York State Legislature created the Council, and granted it the authority to formulate a uniform fire prevention and building code, to take effect on January 1, 1984. N.Y. [Exec.] Law § 377, New York State Uniform Fire Prevention and Building Code (McKinney 1982), provides, in pertinent part, that the Uniform Fire Prevention and Building Code shall:

> a. provide a reasonably uniform standard and requirements for construction and construction materials for public and private buildings, consonant with standards of engineering and fire prevention practices;
>
> b. formulate such standards and requirements, so far as may be practicable, in terms of performance objectives, so as to make adequate performance for the use intended the test of acceptability;
>
> c. permit to the fullest extent feasible, use of modern technical methods, devices and improvements which tend to reduce the cost of construction without substantially affecting reasonable requirements for the health, safety and security of the occupants or users of buildings;
>
> d. encourage, so far as may be practicable, the standardization of

construction practices, methods, equipment, material and techniques; and

e. eliminate restrictive, obsolete, conflicting and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs or retard unnecessarily the use of new materials, or provide unwarranted preferential treatment to types or classes of material or products or methods of construction.

Section 375 of the Act further authorizes and empowers the Council to:

2. Study the operation of the Uniform Fire Prevention and Building Code, local regulations and other laws relating to the construction of buildings and the protection of buildings from fire to ascertain their effects upon the cost of building construction and the effectiveness of their provisions for health, safety and security, particularly as such provisions relate to the protection of life and property from the dangers of fire.

3. To recommend tests and approvals or to require the testing and approval of materials, devices and methods of construction to ascertain their acceptability under the requirements of the Uniform Fire Prevention and Building Code.

In these sections of the Code, the Legislature has delegated to the Council the authority to promulgate rules, and appears to have established sufficient standards for the Council to follow. The Legislature may constitutionally delegate rulemaking authority to an administrative agency only if it furnishes the agency with at least a broad outline in which to act. Bates v. Toia, 410 N.Y.S.2d 265 (1978). The standards of the Council's action are clearly set forth in section 377, which sets standards for the Uniform Code; in section 375, which describes the powers of the Council; and in Section 371, the statement of legislative findings and purposes, which declares the public policy of the State of New York in regard to establishing these regulations. It is well settled that legislative delegations of power to administrative bodies are legitimate so long as adequate standards exist to channel the exercise of that power. Suffolk County Builders Association, Inc. v. County of Suffolk, 415 N.Y.S.2d 821 (1979).

b. Specific Authority Regarding Combustion Toxicity

In a 1982 amendment to the Building Code Act, N.Y. [Exec.] Law, 370 (McKinney, Supplement 1984), the Legislature directed the Secretary of State to:

> conduct or have conducted a study of the toxicity of smoke and gases given off under various temperatures by materials used in building construction and furnishings. Such study shall assess the hazards of smoke and gases produced by the combustion of such materials, and the feasibility of developing or adopting a system of rating the toxicity of such materials, and shall result in the development of a set of recommendations to the State Fire Prevention and Building Code Council . . . such recommendations shall be in the form of performance standards for various materials at various temperature conditions. For purposes of effectuating this section the Secretary of State shall consider appropriate tests and standards as currently exist in the field of combustion toxicology. (emphasis added)

By directing the Secretary to make these recommendations to the Council, the legislature was indirectly commanding the Council to adopt combustion toxicity standards. This command is in accordance with the general grant of authority, as provided in section 375(3) of the Act, which empowers the Council "to recommend tests and approvals or to require the testing and approval of materials . . . ." This original grant of authority to the Council empowering them to require "testing and approval" gives them the power to adopt a data filing requirement or performance standards, regardless of the 1982 Amendment.

It is a settled rule of statutory construction that an original statute and all its amendments must be read together and viewed as one act passed at the same time, so the whole act operates, not the amendment alone. Kruger v. Pace Management

Co., 432 N.Y.S.2d 295 (1980); 56 N.Y. Jur., Statutes, § 239 (1967 and Supp. 1984). Portions of the original statute remaining unchanged are deemed to be continued; thus, the original enactment will not be deemed repealed by an amendment unless a repugnancy exists which makes it impossible for the two portions of the statute to coexist. Harwood v. City of Rensslaer, 324 N.Y.S.2d 634 (1971); 56 N.Y. Jur, Statutes, § 88. (1967 and Supp. 1984). The legislature's specific directive to the Council to adopt combustion toxicity performance standards did not change the original statutory enumeration of the Council's power. The Council's broader original authority to require "testing and approval" is not repugnant to the authority to adopt combustion toxicity performance standards. Thus, the amendment does not limit the Council's power in this area. Reading the statute and the amendment as one, the Council is empowered to adopt performance standards, a data filing requirement, or any type of "testing or approval" in the combustion toxicity area.

Additionally, there are no restrictions upon the power of the Legislature to assign new functions to an administrative agency. The New York Constitution, CLS New York Constitution, Article 5 § 3, provides that the Legislature may assign new powers and functions to departments, officers, boards or commissions, and decrease, increase or modify their powers. Benedetto v. Kern, 4 N.Y.S. 2d 844, aff'd 7 N.Y. 227, aff'd 279 N.Y. 798 (1938).

2. Proper Use of Authority by the Council

Although the Legislature has properly delegated th authority to require product testing, the Council, in adopting the proposed regulations, might be acting outside the scope of its power by adopting regulations which are unnecessary and restrictive. The Building Code Act, section 377(2)(e) provides:

> the Uniform Fire Prevention and Building Code shall:
>
> e. eliminate restrictive, obsolete, conflicting and unnecessary building regulations and requirements which tend to increase unnecessarily construction costs or retard unnecessarily the use of new materials, or provide unwarranted preferential treatment to

types or classes of material or products or methods of construction.

Assuming, arguendo, that the Council adopts regulations which impose strict testing requirements on manufacturers of construction, building, and furnishing products, or components of those products, proof that these requirements restrict the introduction into the marketplace of new products, and increase costs to the producers and ultimately to the consumers would lead to a finding that the regulations are in conflict with § 377(2)(e) of the Building Code Act.

There is a colorable argument that combustion toxicity regulations which would require multitudinous testing would violate this section because they are unnecessary and restrictive and because, given the technical limitations inherent in toxicity testing, they cannot accomplish the goal of increasing fire safety. The adoption of the A. D. Little recommendation to use the Pittsburgh test also arguably provides unwarranted preferential treatment to certain materials, which are rated differently under the Pittsburgh test than they are under other similar testing methods.

Such testing would also undoubtedly increase construction costs. The state policy of inhibiting the increase in the cost of doing business in the state is set forth in section 371, Statement of Legislative Findings and Purposes, where the Legislature declared that:

> e. The multiplicity of fire protection and building construction requirements poses an additional problem for the people of this state since it increases the cost of doing business in the state by perpetuating multiple requirements, jurisdictional overlaps in business uncertainties, and, in some instances, by artificially inducing high construction costs. (emphasis added)

By adopting regulations which are overly restrictive and increase costs, the Council may be acting in violation of its enabling statute. If an administrative agency oversteps the boundaries of the jurisdictional area marked out by the enabling statute, its action is ultra vires and void. See, Schwartz, Administrative Law, p. 511 (2d Ed. 1984).

Administrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute whose purpose the regulations seek to further. Jones v. Berman, 37 N.Y. S.2d 42 (1975), citing Manhattan Company v. Commissioner, 297 U.S. 129 (1936); City of New York v. New York State Department of Environmental Conservation, 437 N.Y.S. 2d 246, aff'd 456 N.Y.S. 2d 462 (1982). The adoption of a data filing requirement or toxicity performance standards would conflict with the New York Uniform Building Code since the test chosen is a small-scale test which does not necessarily predict real-life fire hazards,[1] would be extremely costly, and would conflict with the practice of other jurisdictions which do not require toxicity testing.

A further qualification on the power of an administrative agency to promulgate regulations is that the regulations be reasonable. Tarrant Manufacturing Company v. State of New York, 390 N.Y. Supp. 2d 658 (1977). "Reasonableness" obviously is a vague standard, but this may be a helpful argument, ancillary to the ultra vires argument. Assuming again that the regulations require a myriad of costly tests, and that they give no guidance as to how to conduct the testing, it could be argued that the regulations are unreasonable. Also, the regulations would arguably be unreasonable in that they will not further the state's interest in increasing fire safety, but may instead lead to a decrease in fire safety if choices of materials are made based on toxicity data alone.

B. Authority of the Secretary of State

N.Y. [Exec.] Law § 90 (McKinney 1982) provides, in pertinent part:

> In addition to those divisions created and continued within the Department of State by other statutes, the Secretary of State may establish such other divisions and bureaus in the Depart-

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1/ The Federal Trade Commission (FTC) and certain individual respondents entered into a consent agreement in 1974 which, in part, prohibited reliance on certain small scale flammability tests without appropriate disclaimers which pointed out the limitations of such tests. See, In the Matter of The Society of the Plastics, Inc., 84 F.T.C. 1253 (1974).

> ment of State as he may deem necessary. He may prescribe the duties and powers of such divisions and bureaus which shall be exercised and performed under his supervision.

This section grants broad general authority to the Secretary of State, which is supplemented by the specific authority granted in N.Y. [Exec.] Law § 370 (McKinney, Supplement 1984) which directs the Secretary to conduct a study of combustion toxicity testing, and make recommendations to the Building Code Council in the form of performance standards. Section 370 clearly falls within the supervisory powers delegated to the Secretary, and she does not appear to have overstepped these bounds. Although the Secretary recommended a data filing requirement rather than performance standards, this falls within the secretary's general supervisory authority. Accordingly, there is no cause of action available upon the Secretary's actions.

C. Procedural Aspects of Adopting the Regulations.

1. Rulemaking

A data filing requirement or performance standards adopted by the Council would fall within the definition of "rule" provided in the New York State Administrative Procedure Act, N.Y. [A.P.A.] Law, section 102 (McKinney 1982).

> Rule means (1) the whole or part of each agency statement, regulation, or code of general applicability that implements or applies law, or prescribes the procedure or practice requirements of any agency, including the amendment, suspension of repeal thereof . . .

The A.P.A. only requires a hearing if a hearing is provided for in the substantive statute. Accordingly, section 377(1) of the Building Code Act provides that "the Commissioner shall conduct public hearings on said Uniform Code and any ammendment thereto." There is no further discussion of the hearing requirement in the Building Code Act.

The A.P.A., Section 202 provides for rulemaking procedure. It provides that the agency shall publish notice of such hearing in the State Register at least 30 days prior to the public hearing. The notice shall cite the statutory authority under which the action is proposed, give the date, time and place of the public hearing, state the express terms of the proposed rule if 2,000 words or less, or if more, describe the subject, purpose, and substance of the proposal, and include a Regulatory Impact Statement. Section 202(1)(c).

The Regulatory Impact Statement provided by the agency must contain an analysis of the statutory authority for the rule; a needs and benefits analysis; projected costs for the implementation of and continuing compliance with the rule to the state, and regulated persons; a description of the required paperwork; a comparison of the requirements of the rule with any related state and federal requirements; and a statement indicating whether significant alternatives to the rule were considered by the agency, and why they were not incorporated into the rule.

The statute also provides an exemption from the Notice of Hearing Requirements for emergency measures. Section 202(d). If the proposed rule is not adopted by the agency and filed with the Secretary of State within 180 days after the date of the last public hearing scheduled in the NPRM, the notice shall expire. The notice will not expire if the agency publishes a notice of continuation of the proposed rulemaking in the State Register prior to the expiration of the NPRM. Section 202(e). Upon the filing of the final rule with the Secretary of State, the agency shall submit to the Secretary a notice of action taken to be published as soon as practicable in the State Register. The notice shall cite the statutory authority, state the express terms of such action or describe the subject, purpose and substance of such action, state whether there have been any substantive changes reflected by the final action in comparison with the proposed rule, and give the anticipated effective date of the new rule. Section 202(3).

Regarding the type of hearing to be held, hearings in rulemaking proceedings are not subject to the trial-like provisions of the Act governing adjudicatory proceedings. Since the Building Code Act does not provide further guidelines as to the type of hearing that should be held, we probably can assume these would be informal hearings. Such hearings apparently would not violate procedural due process on a state or on a federal level, because an action which is legislative in nature, as opposed to an adjudicative determination, does not generally require a hearing. Kupferman v. New York State Board of Social Welfare, 399 N.Y. S. 2d 949 (1977); Crown Zellerbach Corporation v. Marshall, 441 F.Supp. 1110, 1118 (E.D. La. 1977). Willapoint Oysters v. Ewing, 174 F.2d 676 (1949), reh'g. denied, 339 U.S. 793 (1950). "When a proceeding is classified as rulemaking, due process ordinarily does not demand procedures more rigorous than those provided by Congress." Association of National Advertisers v. FTC, 627 F.2d 1151, 1165 (D.C. Cir. 1979), cert. denied, 447 U.S. 921 (1980).

2. Licensing

A full adjudicatory hearing is required for a licensing procedure, if the substantive statute requires a hearing at all. § 401.1. Section 102.4 provides:

> "License" includes the whole or part of any agency permit, certificate, approval, registration, charter or similar form of permission required by law.
>
> "Licensing" includes any agency activity respecting the grant, denial, renewal, revocation, suspension, annulment, withdrawal, recall, cancellation or amendment of a license.

Although a licensing is generally a process that is administered on an individual basis, as distinguished from the industry-wide regulations expected to be adopted by the Building Code Council, it is feasible that the Council's action could rise to the level of a "licensing" proceeding because products not tested in accordance with the recommendations would not be "approved" for sale in the state. The potential adoption of product performance standards which could foreseeably ban a product which did not meet the standards could be characterized as an approval process, and thus a licensing.

3. Review by the Office of Business Permits

If the Council adopts a procedure which could be characterized as a "license" or an "approval," N.Y. [Exec] Law § 875 et seq., Office of Business Permits, would also apply. § 876.4 defines "permit" as

> the whole or part of any state agency permit, license, certificate, approval, registration, charter, or similar form of permission required by law or by state agency rules and regulations having the force and effect of law.

If this section is applicable, the Council would be required to file its proposed action with the Office of Business Permits for review. That office would review the proposal to determine:

1. Necessity: whether the proposed new or modified permit is the most effective means of carrying out the intent of the legislature;

2. Duplication: whether the permit duplicates or overlaps another existing permit;

3. Simplicity: whether the requirements of the permit impose overly complex or lengthy application or recording procedures and forms. § 889(3)(a).

The Office of Business Permits, which acts as a clearinghouse for all permits affecting business required by th state of New York, would review and comment upon the proposed permit and submit its findings in writing to the submitting agency, the Administrative Regulations Review Commission (a legislative oversight committee), and the Secretary to the Governor within 21 days of receipt of the proposed permit. There is no further indication in the statute or case law on what influence this office has, or what formal avenues are available to persuade this office to intervene in opposition to the Council's proposed adoption of combustion toxicity testing requirements.

D. Judicial Review

N.Y.A.P.A. § 205, Right to judicial review of rules, allows judicial review of rules under Article 78 of the New York Civil practice law. § 205 provides, in pertinent part:

> Unless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under Article 78 of the Civil Practice Law and Rules, or in an action for a declaratory judgment where applicable and proper. The agency shall be made a party to the proceedings. Such a special proceeding or action may not be maintained unless the petitioner has first requested the agency to pass upon the validity or applicability of the rule in question and action has been taken or more than 30 days have elapsed since such request has been filed or the agency has not provided for the issuance of such declaratory rulings under section 204.

This section requires that a plaintiff exhaust his remedies before seeking judicial review by seeking a declaratory judgment from the agency, as provided for in section 204; "On petition of any person, an agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it." However, if a state agency has not provided for declaratory rulings pursuant to section 204, the failure to seek such an action will not prevent judicial review under Article 78. New York State Builders Association v. State of New York, 414 N.Y.S. 2d 952 (1979). There is no provision for a declaratory judgment in the Building Code Act, but this will not prevent judicial review. Additionally, an Article 78 proceeding, as opposed to a declaratory judgment, is proper when the claim is that a statute has been unconstitutionally applied by a state officer. Matter of Merced v. Fisher, 381 N.Y.S.2d 817 (1976). Our claim is not against the statute itself, but its application by the Council; thus, an Article 78 collateral attack on the administrative action would be proper, once the Council's action is final. It is improper for a court to consider the merits of a case before a petitioner has exhausted his administrative remedies and the agency has made a final determination. Geherin v. Sylvester, 429 N.Y.S.2d (1980). Accordingly, SPI must wait until the Council has promulgated the regulations before seeking judicial review.

The standard of judicial review is the "arbitrary and capricious" standard. The legislature may establish administrative agencies to accomplish its purposes and such agencies may be given the power to adopt rules and regulations to advance the purposes for which they were created. The regulations so adopted, if reasonable, have the force and effect of law, and the court may not disturb them unless they are so lacking in reason for their promulgation that they are essentially arbitrary. Molina v. Gaines Management Services, 462 N.Y. Supp. 2d 615 (1983). An administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight, and a court should defer to the agency absent an arbitrary and capricious regulation or interpretation of said regulations. Tommy and Tina, Inc. v. Department of Consumer Affairs, 464 N.Y.S. 2d 132 (1983). We can certainly argue that since toxicity performance standards are infeasible, and the state of the art of toxicity testing has not advanced to the point that information generated using toxicity tests will be useful in assessing actual fire hazards, that the Council's action is arbitrary and capricious, particularly in view of the general admonition to avoid unnecessary restrictions, which is found in § 377 of the Act.

E. Standing and the Sufficiency of a Speculative Injury

Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby, and a petitioner can only be aggrieved once the agency has made a final determination. Martin v. Ronan, 405 N.Y. S.2d 671 (1978). It is settled law that a petitioner making a general attack on legislative or administrative action must demonstrate special damages distinct from those suffered from the public at large. Thus, in determining whether there is standing to sue, it must be shown that petitioner's personal or property rights will be directly and specifically affected. People v. Ryals, 420 N.Y.S.2d 257 (1979). Once the combustion toxicity regulations are promulgated by the Council, the agency's action will be final. At this point in time, the regulations will directly affect the property rights of SPI members; thus, SPI would have standing to challenge the administrative action on behalf of its members. As a safeguard, it might be wise to include an SPI member as a named party in the action.

Standing to challenge administrative actions will not be denied absent clear legislative intent to the contrary. The only requirement is a demonstration of injury in fact sustained, and an interest sought to be protected which is arguably within the zone of interest to be protected or regulated by the statute. Oil Heat Institute of Upstate New York v. Public Service Commission, 457 N.Y.S.2d 902 (1982). In Oil Heat, the court held that an oil heat institute, a petroleum association and an oil company had standing to challenge the Public Service Commission's approval of a Utility's Conservation Plan which established technical criteria for oil-heat equipment audits. In order to promote energy conservation, the legislature had directed the PSC to administer a program where utilities would set minimum criteria for energy conservation devices, including oil burners. Petitioners challenged the technical criteria which had been adopted. The Court recognized that the statute enabled the utility to approve or disapprove the various conservation devices, and that this control affected the petitioner's economic gain or loss. Because of this potential harmful effect, the court held that the petitioners had standing to challenge the approval of the utility's plan by the PSC.

Oil Heat appears similar to SPI's situation in that an administrative agency is effectively creating standards which adversely affect members of an industry. In Oil Heat, a conservation device could be disapproved; similarly, toxicity data filings or performance standards could effectively cause some products to drop out of the marketplace. Based upon Oil Heat, it appears that SPI would clearly have standing to challenge the Building Code Council's combustion toxicity regulations. The Building Code Act, although primarily directed at the health and safety of the citizens of New York, is also aimed at protecting members of the industry, because one of its goals is inhibiting increasing the cost of doing business in the state by perpetuating multiple requirem nts (§ 371(e)) and the elimination of restrictive and unnecessary building regulations, and preferential treatment for types or classes of material or products.

The injury in fact/zone of interest test employed by the New York court is the same test applied by the U.S. Supreme Court in judicial review of federal administrative action. Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970). A difficulty in applying this test can arise when a plaintiff asserts a remote or speculative threat of harm to a protected interest. However, the Court has held that standing to challenge an administrative action can be based upon speculative injury. In United States v. Students Challenging Regulatory Agency Proceedings, 412 U.S. 669 (1973), a group of law students challenged the ICC's approval of a freight rate which they claimed would contribute to environmental pollution by discouraging the use of recycled materials. The students established standing by alleging that the ICC's action would lead to increased litter and depletion of minerals and other natural resources in forests or parks where they engaged in recreational activities. The Court accepted this argument, noting that the plaintiffs had to be prepared to prove the allegations of harm in their complaint. (Plaintiffs were subsequently unsuccessful on the merits, 422 U.S. 229 (1975).) Although the damages in SPI's case may be speculative, under Oil Heat and the Scrap case, the standing requirement should not be a difficult hurdle, once the Council's action is final.

F. Constitutionality of the Proposed Regulations

1. Substantive Due Process and Equal Protection

Under the substantive due process and equal protection guarantees of the Fourteenth Amendment of the U. S. Constitution, government regulation must have a rational relation to a legitimate end. Without such a relationship, the law would unconstitutionally deprive those persons affected of liberty. See, Nowak, Constitutional Law, page 404 (1978). Since the New Deal, courts have generally deferred to legislative judgment and refused to actively interfere with economic regulatory measures. Such challenges to legislation are now almost universally unsuccessful.

In Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955), the Court upheld a regulatory system which exempt d sellers of ready-to-wear glasses, but made it unlawful for opticians, who were not licensed optometrists, to fit eyeglasses to a person's face, or to replace lenses in frames. The Court held that even though the Oklahoma law may exact a needless, wasteful requirement in many cases, it is the purview of the legislature, not the courts, to balance the advantages and disadvantages of the requirement. The Court stated that "the day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

In County Board v. Richards, 434 U.S. 5 (1977), the Court upheld a zoning ordinance that allowed residents of certain areas to obtain free parking permits for themselves and their visitors, but prohibited all other persons from weekday parking in those residential areas. The court applied the rational basis test and upheld the ordinance in the face of an equal protection challenge.

In Minnesota v. Cloverleaf Creamery Company, 449 U.S. 456 (1981), the court upheld a Minnesota statute banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but which permitted the sale of milk in other nonreturnable, nonrefillable containers. The court held that whether in fact the Act would promote its stated purpose of providing more environmentally desirable milk packaging is not the issue; rather, if the Legislature could rationally have decided that its ban would reach that goal, the constitutional requirements are satisfied.

Based upon the unwillingness of the Court to scrutinize economic legislation and regulations subject to Fourteenth Amendment challenges, we would not recommend such an action.

2. Fifth Amendment Taking

The proposed combustion toxicity regulations would not constitute a taking of private property under the Fifth Amendment because SPI members would not be deprived of the use of their property and the regulations are being enacted in furtherance of health and safety under the state's police power.

If an ordinance is otherwise a valid exercise of police power, the fact that it deprives property of its most beneficial use does not render it unconstitutional. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590 (1962). If the regulation is a valid exercise of police power, it is not a taking if a reasonable use of the property remains. Agins v. City of Tibum 447 U.S. 255 (1980); American Savings and Loan Association v. County of Marin, 653 F.2d 364 (1981). Nor is the regulation invalid merely because it dramatically reduces the value of the property. American Savings and Loan, citing Hadacheck v. Sebastian, 239 U.S. 394 (1950) (where the value of land was reduced from $800,000 to $60,000).

3. Burden on Interstate Commerce

The best constitutional argument for SPI is that the proposed combustion toxicity regulations place a substantial burden on interstate commerce because products would be subjected to stringent requirements which could prohibit their sale in the State of New York and interfere with nationwid distribution, and that this burden far outweighs the minimal local advantages of the regulations. Strict state requirements for products that move in interstate commerce have been successful on such grounds, and courts are willing to scrutinize such economic legislation, although they back away from similar scrutiny under challenges of substantive due process and equal protection.

In _Dixie Dairy Company v. City of Chicago_, 538 F.2d 1303 (7th Cir. 1976), the court held that a city milk inspection ordinance was unconstitutional, even though the regulation was reported to advance health and safety. The court, citing _Pike v. Bruce Church, Inc._, 397 U.S. 137 (1970), stated:

> although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course, depend on the nature of the local interest involved, and on whether it could promoted as well with a lesser impact on interstate activities.

The court concluded that the burden imposed on interstate commerce was clearly excessive in relation to the local benefits.

In _Raymond Motor Transportation, Inc. v. Rice_, 434 U.S. 429 (1978), and in _Kassel v. Consolidated Freight Ways Corpora-_

tion of Delaware, 450 U.S. 662 (1981), the court invalidated state regulations regarding the length of trucks. In Raymond, the regulatory scheme prohibited vehicles over 55 feet long from operating on highways within the state, and in Kassel, the Iowa law barred the use of trucks longer than 60 feet. The court in Kassel noted that although special deference is usually accorded to state highway safety regulations, less deference to legislative judgement is due where a local regulation bears disproportionately on out-of-state residents and businesses. Because the burden imposed by the regulation did not have any significant countervailing safety interests, it violated the Commerce Clause. Similarly in Raymond, the court held the regulation placed a substantial burden on interstate commerce and there was only a speculative contribution to safety.

G. Limitations on the Use of Discovery Material Outsid the Litigation Process

Generally, discovery rules do not limit a party's right to disseminate information obtained through the discovery process. Without a protective order, then, materials obtained through the discovery process may be used by litigants and their lawyers for any purpose, including dissemination to the public.

There is no New York precedent on the right to disseminate to the press material obtained in the discovery process. There is also no indication that there are any special limitations on the use of discovery material where a declaratory judgment is being sought.

New York's discovery law, which is entitled Disclosure, provides, at section 3103(a):

> Prevention of Abuse. The Court may at any time on its own initiative, or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the Courts.

This provision is similar to Federal Rule 26(c); however, the New York rule does not specifically require "good cause" to be shown before entering such an order.

The type of showing necessary to sustain a protective order under the Federal Rules has been said to depend upon the type of harm being threatened and the type of order being sought. See, Koster v. Chase Manhattan Bank, 8 Media Law Reporter 1155, 1161 (S.D.N.Y. 1982). Once a showing of "good cause" has been made, the court should consider other factors that may militate for and against issuing a protective order. These include whether the order will prevent the threatened harm, whether there are less restrictive means of preventing the threatened harm, the interests of the party opposing the motion, the interests of the public, the interests of the party or the public in disseminating and learning about the information, and a litigant's motives for wishing to disseminate the information.

The United States Supreme Court has determined that parties to civil litigation do not have a First Amendment right to disseminate, in advance of trial, information gained through the pre-trial discovery process, although it has acknowledged the existence of a First Amendment interest in this regard. Seattle Times Co. v. Rhinehart, ____ U.S. _____, 104 S.Ct. 2199 (1984) (upholding validity, under Washington rules of civil procedure, of protective order preventing newspaper, a party to underlying libel suit, from disseminating material obtained through discovery). See also, Tavoulareas v. The Washington Post, 724 F.2d 1010 (D.C. Cir. 1984). Where proprietary or privacy interests are involved, a protective order preventing dissemination of such material will very likely be upheld when challenged on First Amendment grounds. Otherwise, the interest in disseminating to the public material obtained via discovery will not be limited.

Of course, there is a presumption that judicial proceedings and records are open to the public. A right of access to inspect and copy attaches to public records, including court records. See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Thus, material filed with the court, absent a protective order, will be available to the public and the press to inspect and copy. And, material used in open court is generally accessible by the public and the press. See Nixon v. Hainer Communications, Inc., 435 U.S. 589 (1978).

It would appear that a protective order preventing dissemination of material obtained through discovery should be entered in New York only where it appears that dissemination will result in harm to some protected interest of the party seeking to bar dissemination. "While plaintiff is entitled to relevant and necessary information, material confidential in nature, or information which is subject to abuse if widely disseminated, shall be accorded judicial safeguards where possible." McLaughlin v. G. D. Searle, Inc., 328 N.Y.S.2d 899 (1972). In McLaughlin, the court granted a protective order to bar any party from disclosing trade or business secrets, research processes, or any other confidential material to anyone other than counsel working on the case. Should the state of New York or another party seek a protective order preventing dissemination of material obtained through discovery, entry of such order will be at the discretion of the court.

III. CONCLUSION

Initially, it is recommended that SPI preserve its rights in the New York administrative process by participating in the upcoming public hearings. It is obviously difficult to make a decision on the viability of a lawsuit before the proposed regulations are published. At this point we do not know exactly how burdensome the requirements might be, or what type of guidance will be provided for performing the testing. Once the Council promulgates the regulations, the administrative action will be final, and ripe for judicial review. Assuming that the regulations would require a great deal of testing, we will have at least colorable arguments that the Council acted ultra vires by promulgating an unnecessary testing requirement which would inhibit the introduction of new products into the marketplace, as well as increase costs to the industry and the consumer. Ancillary to this argument, we can claim that the Council violated its responsibility by not enacting reasonable regulations. Further, there is a constitutional argument that these regulations impose a burden on interstate commerce, which outweighs the minimal, if any, benefit which might be provided to local safety.