

SPI

THE SOCIETY OF THE PLASTICS INDUSTRY, INC.

250 PARK AVENUE NEW YORK, NEW YORK 10017 212/573-9400

Contact: E. S. Nuspliger
(212) 573-9400

M. M. Swetonic
(212) 697-5600

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PVC Industry "Shocked" At Court of Appeals

Decision Upholding OSHA Vinyl Chloride Standard

New York, N. Y. -- The Society of the Plastics Industry (SPI) today expressed "shock" at the decision announced Friday by the U.S. Court of Appeals for the Second Circuit (New York) upholding the standards promulgated in October by the U.S. Occupational Safety and Health Administration (OSHA) on employee exposure to vinyl chloride monomer (VCM), an industrial chemical.

"We are shocked at the news and its implications for the entire industry," said Ralph L. Harding, President of SPI. VCM gas is used primarily to produce polyvinyl chloride (PVC), a widely used plastic resin.

"Not having thoroughly reviewed the decision," Mr. Harding continued, "we cannot comment on the reasons for the Court's action. Our subsequent course of action has not yet been determined."

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In its appeal to the Court, SPI had argued that the one part per million (ppm) standard promulgated by OSHA was technologically infeasible; that the existing medical evidence did not necessitate a reduction to one ppm in order to protect worker health; that the standard would force nearly all employees in the PVC resin industry to wear cumbersome, uncomfortable respirators nearly all of the time; and that the application of the full standard to the PVC fabricating industry was unjustified.

SPI was joined in its appeal to the Court by nine VCM or PVC resin manufacturers.

Because of the delay caused by the appeal proceedings, the Court ruled that the standards, which were scheduled to go into effect January 1, 1975, would now become effective 60 days after the date the decision was handed down. The standard will thus go into effect April 1, 1975.

(A summary report of the Court's decision is attached)

SUMMARY OF COURT OF APPEALS DECISION ON VINYL CHLORIDE STANDARDS

On Friday, January 31, 1975, a three-judge panel of the U.S. Court of Appeals for the Second Circuit (New York) unanimously upheld the standards on vinyl chloride monomer (VCM) promulgated October 4, 1974, by the U.S. Occupational Safety and Health Administration (OSHA).

The standards had been challenged by The Society of the Plastics Industry, Inc. (SPI) and by nine manufacturers of VCM or polyvinyl chloride (PVC) resin. The nine companies were: Hooker Chemicals and Plastics Corporation, Air Products and Chemicals, Inc., Tenneco Chemicals, Inc., Union Carbide Corporation, Firestone Plastics Company, The B. F. Goodrich Company, Uniroyal, Inc., The Diamond Shamrock Chemical Company, Inc., and General Dynamic Chemical Co., Inc.

The government was joined in its defense of the standards by the AFL-CIO and by the Industrial Union Department of the AFL-CIO, a separate organization. Both participated in the case as intervenors.

The appeals panel consisted of retired U.S. Supreme Court Justice Tom C. Clark and District Judges Frederick van Pelt Bryan and Kevin T. Duffy. Mr. Justice Clark wrote the 22-page decision.

The following is a summary of the basic arguments advanced by SPI and the VCM-PVC industry in opposition to the standards and excerpts from the Court's reply to those arguments as contained in the written decision:

1. Petitioners' Argument: The standards are technologically infeasible with known methods of control, and thus violate the basic OSHA law.

The Court's Reply: "We cannot agree with petitioners that the standard is so

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clearly impossible of attainment. It appears that they simply need more faith in their own technological potentialities, since the record reveals that, despite similar predictions of impossibility regarding the emergency 50 ppm standard, vast improvements were made in a matter of weeks, and a variety of useful engineering and work practice controls have yet to be instituted. In the area of safety, we wish to emphasize, the Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology, and he is not limited to issuing standards based solely on devices already fully developed."

2. Petitioners' Argument: Available scientific and medical evidence does not necessitate the establishment of a one part per million (ppm) standard in order to protect worker health.

The Court's Reply: "...the ultimate facts here in dispute are 'on the frontiers of scientific knowledge,' and, though the factual finger points, it does not conclude. Under the command of OSHA, it remains the duty of the Secretary (of Labor) to act to protect the workingman, and to act even in circumstances where existing methodology or research is deficient. The Secretary, in extrapolating the MCA (Manufacturing Chemists Association) study's finding from mouse to man, has chosen to reduce the permissible level to the lowest detectable one. We find no error in this respect."

3. Petitioners' Argument: The standard would force nearly all employees in the PVC resin industry to wear cumbersome, uncomfortable, potentially unsafe respirators nearly all of the time.

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The Court's Reply: "To be sure, respirators have their drawbacks. These problems were detailed at the hearings and recognized by the Assistant Secretary (for OSHA). Self-contained and air-hose type breathing equipment is bulky, expensive, and infeasible for full-time use, as well as potentially hazardous in terms of tripping, restricted mobility, and over exhaustion of workers. But the fact remains that they effectively eliminate exposure to VCM, and they are already being used by some PVC companies in the cleaning process and at other points in production with good success.

"Like the industry's claims about the impossibility of achieving compliance through technological means, petitioners' claims of dire consequences from the requirement of respiratory protection are exaggerated. It does not appear that full-time use of respirators is necessary..."

4. Petitioners' Argument: Because exposures in the PVC fabricating industry are already extremely low, the application of all aspects of the standard to this segment of the industry is unjustified.

The Court's Reply: "If, in the future, the monitoring under the standard indicates that the VCM level among fabricators is sufficiently low and that the sporadic, unpredictable exposure of these workers to residual VCM has been controlled, the fabricators might well be excluded or included in a separate, less rigorous standard. Certainly if PVC producers were able to eliminate all residual VCM from the resin before it is delivered to the fabricator, there would seem to be no reason for their inclusion. But this would be for the Secretary to decide on

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appropriate application or on his own motion, and, as the record presently stands, their inclusion is amply justified."

5. Petitioners' Argument: That section of the standard requiring a "cancer suspect agent" warning label on all containers of PVC resin is unjustified and unnecessarily alarming and exceeds the Secretary's statutory authority.

The Court's Reply: "...compliance is time-phased and, if the petitioners find that they cannot comply for reasons beyond their control, OSHA permits the amendment of standards. Upon application and sufficient proof of such a situation, we feel certain that the petitioners would obtain relief at the hands of the Secretary. This is especially true of the 'cancer suspect agent' labelling requirements which petitioners urge are beyond statutory contemplation. We think that the Secretary is simply 'fighting fire with fire' and using the labels to bring the danger of vinyl chloride forcibly to the attention of the workers."

In the concluding paragraph of the decision, the Court stated: "It is our conclusion that the challenged aspects of the Secretary's vinyl chloride standard are supported by substantial evidence in the record and that the petition for review must be denied."

The Court added, however: "Taking into account the delay occasioned by these petitions, we think that a reasonable 'lead time' is appropriate and therefore order that the Secretary's regulations, rather than being effective January 1, 1975, shall become effective sixty days after the date of this order and that the time requirement as to respiratory protection contained in (the standard) is re-scheduled accordingly."

The standard will thus go into effect April 1, 1975