

**KELLER AND HECKMAN'S REPORT
TO THE
VINYL INSTITUTE**

November 18, 1991

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We are pleased to present this report to you on the status of matters involving our activity on behalf of the SPI and Vinyl Institute. Recent developments on issues covered in our report for the May meeting of the Institute are discussed here, as well as new issues that have come into focus subsequently.

A. ENVIRONMENTAL PROTECTION AGENCY

1. Asbestos Decision

On October 18, 1991, the United States Court of Appeals for the Fifth Judicial Circuit issued a decision invalidating an Environmental Protection Agency (EPA) rule which banned most asbestos products. Corrosion Proof Fittings v. Environmental Protection Agency, No. 89-4596 (5th Cir. Oct. 18, 1991) (available on LEXIS Nov. 12, 1991). The decision should be of interest to Vinyl Institute members for a number of reasons, particularly since the Court rejected some of EPA's earlier approaches to risk assessment and product bans.

In broad terms, the Court found that EPA's rulemaking record did not contain substantial evidence to support its asbestos product bans. Under the Toxic Substances Control Act (TSCA), EPA must show that a proposed product ban will substantially reduce an identifiable health risk in a given population *and* that less burdensome restrictions would not do the job. According to the Court, after EPA demonstrates that a product poses an unreasonable risk, it must consider each regulatory option available to it and evaluate the costs and benefits of each option.

In its asbestos risk assessment, EPA made only two comparisons: "a world with no regulation under TSCA, and a world in which no manufacture of asbestos takes place." The Court noted:

Thus, it was not enough for EPA to show, as it did in this case, that banning some asbestos products might reduce the harm that could occur from the use of these products. If that were the standard, there would be no standard at all for few indeed are the products that are so safe that a complete ban of them would not make the world still safer.

VI members may be particularly interested to note that the asbestos industry argued that EPA's ban was unreasonable because it did not evaluate the risks posed by the most likely substitutes for asbestos pipe, PVC and ductile iron pipe, which also contain known

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carcinogens. The Court held that EPA does not have an obligation to consider the risk of substitute products when evaluating the benefits of a potential product ban, but:

Once an interested party brings forth credible evidence suggesting that toxicity of the probable or only alternatives to a substance, the EPA must consider the comparative costs of each.

According to the Court, EPA had not done this. While EPA presented several "plausible, albeit untested reasons why PVC and ductile iron pipe might be less of a health risk than asbestos pipe," the Court found that this "speculation" was inadequate to refute the studies presented by the asbestos industry. The Court, therefore, ordered EPA to reconsider the risks posed by all three types of pipes.

If EPA does not appeal the decision, the Agency will probably reopen the asbestos ban proceedings in the Spring. Because EPA has been ordered to reconsider the risks posed by PVC pipe, the VI should consider becoming actively involved in the proceeding.

2. Clean Air Act

SPI has submitted comments on various Environmental Protection Agency (EPA) proposals to implement the Clean Air Act (CAA) Amendments signed into law last November.

Volatile Organic Compounds

On May 13, 1991, we filed comments on behalf of the Society's Occupational Health and Environmental Issues Committee (OHEIC) regarding 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 the exclusion of negligibly reactive compounds and (2) allowing the use of vapor pressure and boiling point as criteria to determine volatility. At this time, EPA is still considering the proposed rule and the OHEIC comments.

Operating Permits

On July 9, 1991, we filed comments for SPI regarding EPA's May 10, 1991 proposed rule to commence an 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 would have to obtain operating permits.

In the comments, we underscored the following points: (1) the importance of operational flexibility and the granting of 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.

3. General Accounting Office Questions Adequacy of Federal Regulation of Reproductive and Developmental Toxicants

In testimony before Congress in October, the General Accounting Office (GAO) criticized federal regulation of reproductive and developmental toxicants as providing "uncertain protection." GAO challenged the assumption of EPA and other federal agencies that regulating a substance to minimize the risk of cancer assures that exposure will be too low to pose a reproductive or developmental hazard. GAO's testimony before the Senate Committee on Government Affairs was based on the findings of the Office's investigation of federal regulation^{1/} of 30 reproductive toxicants, including vinyl chloride, lead, cadmium and toluene. According to GAO, the full report will be available in a few weeks.

GAO criticized the fact that one-quarter of the "major regulatory decisions" on the 30 chemicals investigated pre-dated 1980 and that "a dozen standards adopted from non-federal authorities are still the effective regulation or standard." GAO suggested, among other things, that Congress "consider revising the laws to allow the agencies to demand reproductive toxicity testing by the entities manufacturing, importing (including food imports), selling, emitting, or discarding products containing chemicals."

B. FOOD AND DRUG ADMINISTRATION

1. FDA Progress Slowed on Draft Environmental Impact Statement for PVC

We periodically speak 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). When we last reported, Dr. Hoffman told us that his Section was still working on a draft of the EIS for internal Agency review and that its goal was to complete the draft by the end of this year. Unfortunately, Dr. Hoffman recently suffered a heart attack and is on medical leave from the Agency. Due to general staffing problems and Dr. Hoffman's leave, we do not anticipate that a draft will be issued before the middle of next year.

^{1/} GAO examined regulation of reproductive or developmental hazards by the Consumer Product Safety Commission, the Environmental Protection Agency, FDA, and the Occupational Safety and Health Administration.

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

As reported in September, 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 relating to developing the guidelines.

The goals of the project are to educate industry on applications where recycled food packaging can be used with little or no additional testing and to have a positive impact on FDA's development of recycling guidelines by submitting timely information to the Agency that offers a scientifically sound, reasonable approach to encourage greater recycling of food packaging without causing any detrimental effects on the safety of food.

For recycling applications where testing is advisable, the Task Force is working on a "chemical cocktail" consisting of seven representative substances intended to reflect the universe of potential contaminants and adjuvants that might be present as contaminants in post-consumer resin. This cocktail is intended to serve as a means of testing the ability of a given recycling process to remove contaminants. It will also be suitable for testing recycled resins in particular applications to demonstrate that there will be no migration of potential contaminants from the package to food under the intended conditions of use.

The draft guidelines have undergone several revisions and the Task Force members are hopeful that the next revision will be suitable for submission to FDA in draft form for the Agency's review and comment. In addition to the guidelines, the Task Force will formally comment on any guidelines FDA ultimately issues. However, at this time, there is no firm schedule for the release of FDA guidelines on this complex issue. The next meeting of the Task Force is scheduled for next week.

C. CALIFORNIA

1. Governor's Plan for Cal EPA Avoids Veto by Legislature.

With the passing of the July 16 deadline for a legislative veto, Governor Wilson's plan to establish a California Environmental Protection Agency (Cal EPA) has gone into effect. The new agency includes the Air Resources Board, the Integrated Waste Management Board, the Department of Toxic Substances Control, and the Office of Environmental Health Hazard Assessment.

With the establishment of Cal EPA, the California Health and Welfare Agency's Proposition 65 Office becomes part of the Office of Environmental Health Hazard Assessment within the new Agency. It is still unclear, however, what role Cal EPA will play on a policy level with regard to the implementation of Proposition 65. James Strock, the former head of enforcement at the federal EPA who is the new Secretary of Cal EPA, has thus far avoided taking a clear position on Proposition 65. For example, according to

a July 30, 1991 story in the *Washington Post*, when asked how the Wilson Administration plans to treat Proposition 65, Strock "called for a careful examination of its past and future' with the cooperation of environmental and business interests." How this will be done is not yet clear as the new Secretary has not yet spelled out any specifics on the subject.

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 microgram/day permissible exposure limit (PEL) 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.

As we reported in September, at its April 26 meeting, the California Scientific Advisory Panel reviewed and accepted the State's risk assessments recommending a 3 μ g 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 μ g/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. Proposition 65-Style Initiative Proposed in Ohio.

The Ohio Citizen Action consumer group is promoting a new proposal modeled on California's Proposition 65. The group plans to qualify the proposal (via the collection of signatures) for consideration by the state legislature during the current session and, assuming, as is likely, that the measure is not passed within the required time, to mount a campaign to place it on the November 1992 state ballot as an initiative.^{2/}

Under the Ohio measure, any person living or working within two miles of a business could ask the Ohio Environmental Protection Agency to require the business to conduct an elaborate assessment of whether it may be causing a significant exposure. The only prerequisite for such a request is that the business use more than the threshold amount of a designated chemical (the proposal would apply to all chemicals subject to Proposition 65). The state would provide grants of up to \$50,000 to local citizen groups

^{2/} Citizen Action can have the proposal submitted to the General Assembly for consideration as legislation if it can collect signatures totaling 3% of the number of voters who voted in the last gubernatorial election (104,326 signatures). If the legislature does not pass the measure, as submitted, within four months, the group then has 90 days to gather another 104,326 signatures to qualify the proposal for placement on the November 1992 ballot as an initiative.

to help them determine whether a company's assessment discloses a significant exposure violating the law. In most other respects the Ohio proposal is identical to Proposition 65.

On May 29, 1991, Citizen Action announced the launching of the drive to get the signatures to put the proposal before the legislature. At the time, the Executive Director of the group indicated that he does not expect the legislature to pass the proposal but believes the measure will easily get the signatures to qualify for the 1992 ballot. The United Auto Workers and the Sierra Club are backing the proposal. Groups opposed include the Ohio AFL-CIO, Council of Merchants and Chamber of Commerce and the Ohio Manufacturers Association. The opposition of the AFL-CIO is notable since the union was a major backer of Proposition 65.

D. SOLID WASTE

1. MassPIRG Renews Push for Antiplastics Packaging Initiative.

The Massachusetts Public Interest Research Group (MassPIRG) is continuing its efforts to ban packaging that does not meet stringent recycling, reusability or source reduction standards. As you may recall, MassPIRG came very close to getting a similar antiplastics packaging initiative on the ballot for the November 1990 state elections, but was unable to do so due to the Massachusetts Supreme Judicial Court's ruling that it had failed to observe the procedural requirements for qualifying an initiative for the ballot. After unsuccessfully fighting the disqualification of the 1990 initiative through the state courts and the federal system up to the Supreme Court, MassPIRG is now promoting a new anti-plastics packaging measure which it hopes to see passed by the legislature or else put before the Massachusetts voters in November 1992.

The MassPIRG proposal would require all packaging used after July 1, 1996 to be (1) reusable five times, (2) composed of 25% recycled material by weight, (3) made of materials that are themselves recycled at a 25% rate, or (4) use 25% less material than the packaging now being used. Packaging that fails to meet one of these standards would be banned as "wasteful packaging." The required recycling rates for options (2) and (3) would increase to 35% by 1999 and 50% by 2002.

The proposal defines "recycling" as the diversion of materials that would have been discarded for reuse or for employment as an ingredient or a feed stock in an industrial or manufacturing process to make a commercial product. The proposal provides an exemption for packaging "which comes into direct contact with perishables." The proposal expressly permits local governments to adopt stricter standards.

At the same that it is gathering signatures to place the petition on a November 1992 ballot as an initiative, MassPIRG has also had a version of its measure introduced in the legislature. Because its previous initiative drive foundered due to MassPIRG's failure to get the initial ten signatures required to be submitted to the Secretary of the State before the general signature drive is begun, this time, the group got 18 prominent citizens of Massachusetts to sign its initiative petition, including Governor William Weld, the Lieutenant Governor, and the State's Secretary of the Environment. The petition with the

signatures was submitted to the Secretary of State on August 7, 1991 thus beginning the general signature gathering phase of the initiative petition process.

SPI's Council for Solid Waste Solutions is playing a leading role in industry's efforts to defeat the initiative.

E. ENVIRONMENTAL LABELING

1. Indiana Adopts Environmental Advertising Law; Amendments to Similar California Law Rejected by State Senate.

Indiana recently enacted a statute modeled on California's law governing environmental marketing claims. Like California's statute, the Indiana law requires advertisers to conform their environmental marketing claims regarding degradability, recyclability and other "environmental" characteristics to the state's definition of these terms. It also requires specific documentation of general claims that a product or package is not harmful to or is beneficial to the environment.

The Indiana law differs from California's in several significant respects. First, it defines "recyclable" as meaning that a material or product can be redeemed or returned "at an identifiable recycling location" in contrast to California's requirement that a material be capable of being "conveniently recycled" in all counties with more than 300,000 people. "Recycled" is defined by Indiana as "contains at least 10% by weight of post-consumer or post-manufacture material." Finally, the Indiana measure provides that the statute is satisfied not only if a product or package meets definitions established by the FTC in a trade regulation rule (an unlikely prospect), but also if it complies with definitions in "guides adopted by the Federal Trade Commission." California's law does not recognize FTC guides as a potential alternative means of compliance.

2. EPA Proposes Guidance on Recycling Claims; FTC Chairman Janet Steiger Says She Favors FTC "Green Claim" Guidelines.

On October 2, 1991, the Environmental Protection Agency (EPA) published a notice seeking comments on proposed "voluntary guidance" for recycling claims. 56 *Fed. Reg.* 49992. To summarize the major recommendations in the proposal, EPA calls for marketers claiming that a product is "recycled" or contains recycled material to disclose the percentage of recycled content in the product. The Agency recommends disclosure of the national recycling rate for any product or material claimed to be "recyclable" and says that such claims should be carefully qualified to reflect the availability of suitable recycling facilities.

Under EPA's proposal, both pre- and post-consumer materials would qualify as sources for recycled material. However, the Agency's definition of pre-consumer material would exclude plant scrap, or as EPA terms it, "home scrap," which is defined as scrap, virgin material or by-products "generated from, and commonly reused within, an original manufacturing process." Finally, EPA recommends restricting the use of the triangular chasing-arrows recycling symbol to situations where a product may, based on EPA's

definitions, properly be described as "recycled" or "recyclable." EPA says that this recommendation would not apply to use of The Society of the Plastics Industry, Inc.'s (SPI) resin identification code, unless the code symbol is displayed prominently elsewhere than merely on the bottom of a container.

Comments on the above described "preferred options" and alternative "options" set forth in the notice are due by December 31, 1991. Larry Thomas presented testimony on behalf of SPI at a public meeting in Arlington, Virginia, earlier this month.

According to the notice, the proposed guidance is intended for submission to the Federal Trade Commission (FTC) as recommendations to assist the Commission in developing guidelines on environmental marketing claims, should the FTC elect to issue such guidelines. If the FTC chooses not to pursue guidelines, EPA will "publish the recommendations as its guidance to industry and consumers," and, according to the EPA staff, issue additional guidelines for a variety of other environmental terms, including "biodegradable" and "photodegradable." As discussed earlier, based on a recent speech by FTC Chairman Janet Steiger, it now appears that the Commission probably will issue guidelines on "green claims."

However, even if the FTC does publish guidelines, a broader EPA role in regulating "green claims," and possibly further EPA guidance on particular terms, appear to be mandated by a provision in an appropriations bill recently passed by Congress that calls for EPA to work with "a nonprofit independent standards testing organization, as well as with other Federal agencies," to develop a "comprehensive, uniform, and national environmental (ecological) labeling strategy that is consistent with international standards."

3. European Trademark Issues Involving Recycling Identification Code Still Unresolved

We are continuing to closely monitor efforts to resolve the use of the resin identification code and the chasing arrow symbol in Europe. Recent personnel changes in Europe may facilitate the resolution of this issue.

The Associated Plastic Manufacturers of Europe (APME) have indicated that their primary goal is to resolve the trademark situation amicably. APME maintains that the marking is a material identification code, not an indication that the product contains recycled material or is itself recyclable. Thus, the marking serves a different purpose than the one use by the Benelux trademark holder and APME's use of the code should not be viewed as an infringement on the trademark.

F. FLAMMABILITY/COMBUSTIBILITY

- 1. New York City Fire Department Proposed Rule to Ban Use of Plastic Containers in Holding Flammable and Combustible Liquids May Be Subject to Federal Preemption.**

The New York City Fire Department (NYFD) has proposed rules that would significantly restrict the use of plastic containers for the storage, sale, use, or transportation of flammable and combustible liquids. These rules were proposed in response to hearings held during September 1990, during which PBI and The Plastic Drum Institute testified. The language of the proposal which governs the construction, capacity and testing of plastic containers, is broad enough to encompass a wide variety of containers, including one-gallon antifreeze and windshield wiper fluid containers as well as motor oil containers.

Earlier this summer, the author of the proposed rules informed us that the City had determined that the proposed rules were preempted to some extent by the federal Hazardous Materials Transportation Uniform Safety Act of 1990 (HMTUSA). He indicated that the City would file a waiver petition (from federal preemption) with the Department of Transportation (DOT) pursuant to HMTUSA, seeking to ensure the enforceability of the Department's rulemaking, if it is finalized.

If and when filed, the preemption waiver petition must "acknowledge" that the rules for which the waiver is sought are, indeed, preempted. Once such a document is filed, it would make it virtually impossible for the city to enforce its existing rules prohibiting the use of plastic containers for flammable liquids (absent the existence of a current variance). For now, despite the pending proposal, use of new plastic containers for flammables and combustibles in the City remains permissible.

G. TRANSPORTATION

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

As reported in September, 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. Final versions of the VCNet Agreement and Operating Rules are presently being circulated for signature.

The group plans to begin hosting emergency response training sessions at various points throughout the United States in the Spring of 1992. The training sessions are intended to educate response teams and public safety officials on the hazards and procedures for handling incidents involving vinyl chloride.