GENERAL COUNSEL'S REPORT

TO THE

VINYL INSTITUTE EXECUTIVE BOARD

August 19, 1994

Prepared by Keller and Heckman for the SPI VI Executive Board

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I. *INTRODUCTION*

We are pleased to present this report to you on the status of matters which affect the Vinyl Institute. Recent developments on issues covered in our last report for the March 1994 Board Meeting are discussed here, as well as new issues that have come into focus subsequently.

II. *GENERAL VI SUPPORT FUNCTIONS*

Much of Keller and Heckman's activity for the Vinyl Institute since the March 1994 Executive Board meeting have been in the form of support or assistance for VI working and projects that are reported on elsewhere. We have been particularly engaged in projects for the EDC/VCM/PVC Ad hoc Task Group and the Environmental Issues Task Group. Specific items have included:

- U. S. Environmental Protection Agency's (EPA) dioxin reassessment
- Reporting requirements under section 8(e) and (d) of the Toxic Substances Control Act for information received from European PVC producers.
- Reviewing draft communications prepared by Edward Howard and Nichols Dezenhall, as well as drafting responses to inaccurate statements about vinyl.
- Reviewing a draft report to EPA on the Kansas pipe matter and assisting in preparation for the August 18 meeting with EPA on this issue.
- Contract reviews and bylaws revisions.
- Research and counsel on the Portland Metro Council PVC packaging proposal.

III. *VI-SPECIFIC ACTIVITIES*

A. VI DEFENDS PVC AGAINST GREENPEACE CHARGES THAT RESIN CONTAINS DIOXIN AND SHOULD BE BANNED IN LETTER TO FDA

On June 9, 1994, Greenpeace issued a press release calling for the phase out of polyvinyl chloride (PVC) in food and drug contact applications. Relying on two Swedish extraction studies, which detected low levels of dioxin in two PVC samples, Greenpeace concluded that food and drugs may be contaminated because of dioxin migration from PVC packaging. To buttress its argument, Greenpeace also cited supposed recommendations of the Swedish Ecocycle Commission, a group with no regulatory or other legal authority. In fact, the comments used by Greenpeace were made by a single member of the Commission and not the body as a whole.

In response to an FDA inquiry based on Greenpeace's press release, we assisted the Vinyl Institute in preparing a letter to FDA's Acting Branch Chief of the Ingredient Additives Branch, Thomas Brown, disputing Greenpeace's claims of dioxin contamination and the notion that the Swedish tests raise any safety issue regarding PVC in food and drug contact applications in the United States.

The letter challenged Greenpeace's claims, which were based on two PVC samples which showed dioxin levels of approximately 0.55 parts per trillion (ppt) in one sample and 6.33 ppt in the other. These isolated findings do not appear to support the conclusion that U.S. food-grade PVC poses any dioxin migration risks. Also, the test samples used may not be representative of those food-grade materials used in the United States. Moreover, the maximum residual level of 2,3,7,8-tetrachlorodibenzo-dioxin (TCDD) would still be lower than the 2 ppt level that FDA has recommended as an action level for paper and paperboard in its April 12, 1994 Federal Register notice. Finally, the letter noted that the potential for dioxin migration to food is remote because of the inherent barrier properties of PVC.

B. VI FILES BRIEF IN EPA CASE INTERPRETING DEFINITION OF "FEDERALLY PERMITTED RELEASE" UNDER CERCLA AND EPCRA

On behalf of the Vinyl Institute, we drafted an amicus brief that was filed with the U.S. EPA Environmental Appeals Board in support of the Mobil Oil Corporation. *In the Matter of Mobil Oil Corporation*, Docket No. EPCRA-91-120.

The case will decide the proper interpretation of the "federally permitted release" exception to the emergency reporting requirements under Section 103 of CERCLA and Section 304 of EPCRA for releases regulated under the Clean Air Act. It is believed

that the case will have broad ramifications for the reporting obligations of VI members for releases of chemicals regulated under the Clean Air Act.

Borden Chemical and Plastics is involved in an appeal from an unfavorable decision in a similar enforcement proceeding. *In the Matter of Borden Chemicals & Plastics Company*, Docket No. EPCRA-003-1992. Borden's case involves the reporting under EPCRA of releases regulated by the vinyl chloride NESHAP. A favorable ruling in the *Mobil* appeal could significantly reduce the likelihood of future enforcement proceedings against VI members for alleged EPCRA and CERCLA reporting violations for air releases regulated under the vinyl chloride NESHAP.

The brief contained the following points:

1. The reporting issue before the EPA Board has broad ramifications for industry and is not limited to the company or particular factual situation presented in this case;

2. The absence of a numeric limit in a permit, regulation or state plan does not trigger CERCLA and EPCRA reporting.

3. If EPA wishes to change or clarify reporting obligations, the agency should do so prospectively through a notice and comment rulemaking, not retroactively through enforcement proceedings.

IV. *SPI-RELATED MATTERS*

A. NEW GROUP MEETS TO ADDRESS CONCERNS ABOUT MEDIA ATTENTION ON ESTROGEN-LIKE SUBSTANCES AND ALLEGED LINK TO FILMS, CAN LINERS AND OTHER FOOD CONTACT MATERIALS

A number of SPI members and non-members recently met to discuss the feasibility of forming a group under the Food, Drug and Cosmetics Packaging Materials Committee to address recent allegations in the media about harmful effects of exposure to environmental estrogens, particularly in films, plastics, can liners or other food contact and/or packaging situations. This would supplement activities of the SPI Bisphenol A Task Force and does not duplicate efforts of the Chlorine Chemistry Council.

The group also agreed that present studies might indicate that, in large amounts, environmental estrogens may pose a significant health risk. In the absence of any reliable clinical data to the contrary, however, and given the current level of exposure, the average estimated daily intake of such compounds appears to be minimal

so that, based on current knowledge, it appears these estrogen-like substances do not present health risks.

B. MEDIA NOTES POSSIBLE CONNECTION OF ENVIRONMENTAL ESTROGENS AND ADVERSE EFFECTS ON REPRODUCTIVE SYSTEMS

"Environmental estrogens" and estrogen-like substances have received significant media attention. Most recently, CBS broadcast a report entitled "Low Sperm Counts Reported" on the program *Eye to Eye With Connie Chung*. The report, which aired on July 28, 1994, suggested a link between "environmental estrogens" and male reproductive disorders. The report indicated the potential exposure to environmental estrogens from coatings used on cans for food and beverages. The report conceded, however, that such a connection is only scientific conjecture and that more work needs to be done. At least one infertility specialist interviewed was skeptical of both the methodology and the conclusions reached because of technical problems in the collection of the data that suggest that sperm counts are dramatically down in the last 50 years.

Appropriate industry efforts are currently underway to determine whether there is any exposure of significance attributable to the use of certain monomers and adjuvants in plastic containers, films, or coatings for metal containers.

C. EPA REPROPOSES PROVISIONS OF THE OPERATING PERMIT PROGRAM THAT SET REQUIREMENTS FOR CHANGING OPERATIONS

EPA has reproposed portions of the federal Operating Permit Program in response to lawsuits that were filed by both industry and environmental groups. EPA's new proposal defines the extent to which and the manner in which operating permits must be revised when a permitted source seeks to change its operations, often referred to as "operational flexibility."

The proposal will allow a source to make changes that are neither prohibited nor addressed by the permit to be made without first revising the permit, provided that the source's permit identifies and makes enforceable the applicable requirements with which the source must comply over the foreseeable range of its operations. Consequently, should the proposed rule be adopted, it will be imperative for sources to craft their permit to account for future changes. Changes at a source that require revision of the source's permit are those that could not be operated without violating a term of its existing permit or that trigger an applicable requirement to which the source has not been previously subject.

Under the proposed "four-track" permit revision process minor changes could be processed as "minor modifications" with a 21 day public comment period. Changes not

increasing emissions over certain thresholds could be processed as de minimis changes, with seven days advance notice to the permitting authority. More significant changes would be subject to permit amendments.

Industry groups believed that the proposed changes would ease the burden on sources by expanding the types of changes that would be considered as "minor." Instead, the rules may make it more difficult for facilities to respond to changing conditions by requiring greater opportunity for public comment than the existing rule. Additionally, it is unclear how the permit program revisions will affect permits issued prior to adoption of the new rule. Sources already permitted may be forced to repeat the application process.

States are required to revise their operating permit programs and resubmit them to EPA by 1997.

D. SPI SUBMITS COMMENTS ON EPA'S PROPOSED GUIDELINES FOR PURCHASING PRODUCTS CONTAINING RECYCLED MATERIALS

The Environmental Protection Agency recently (EPA) issued guidelines directing government agencies to purchase and use recycled products. 59 Fed. Reg. 18852. Although intended for federal agencies, it is entirely possible that the final federal guidelines will be adopted by state and local governments.

The guidelines direct "procuring agencies" to purchase designated items, including plastic products, that contain the highest percentage of recycled materials possible, taking into account price, availability, competition and performance. Notably, there is no requirement that the agencies consider the overall quality of the recycled goods. The "procuring agencies" also include state and local agencies that use federally appropriated funds to purchase products. The primary purpose of the guidelines is to create and encourage a market for recycled goods through use of the U.S. Government's considerable purchasing power. Particular plastic items included on the list include: plastic pipe (40-100% recycled material); geotextiles made with polypropylene (20-100%) and polyethylene terephthalate (PET) (50-100%); polyester carpet fiber made with PET (100%); plastic patio blocks and floor tiles (90-100%); rubber or plastic playground surfaces and running tracks (90-100%); plastic recycling containers and waste receptacles (20-100%); polystyrene desktop accessories (25-80%); plastic covered binders (50-60%) and plastic trash bags (30-100%).

In SPI's comments on the proposed guidelines strongly encouraged the EPA to not compromise its existing performance standards in favor of recycled goods, especially in situations that may compromise health, safety, or other environmental, such as in

construction applications. SPI also encouraged EPA to ensure that its procurement policies maximized environmental benefits by considering the life cycle of a product.

E. SPI CONTINUES TO DEVELOP RECOMMENDATIONS FOR THE USE OF THE RESIN IDENTIFICATION CODE

The National Recycling Coalition (NRC) and SPI were working to change the current resin identification code to address concerns of recyclers and to further classify the different grades within a particular resin type by melt flow index or other technical indicators. The initial joint proposal of the NRC/SPI negotiators was rejected by the NRC Board of Directors.

In the wake of NRC's rejection, and in conjunction with instructions from the Board of SPI to see if there was sufficient support with which to move forward with implementation of the modifications, meetings were held with interested parties to discuss possible options. The result of the meetings is a clear lack of support for going forward with modifications outside the context of the negotiated agreement and a cooperative effort with the NRC. As this report was being prepared, SPI was still consulting with interested parties to determine the extent to which the code should be used on plastic articles other than bottles and rigid containers.

The position being developed is expected to be faithful to the initial purpose of the code, i.e., to identify resin content to facilitate sorting for possible recycling. In this context, the use of the code on plastic products other than bottles and rigid containers should be defensible. Significant concerns are raised, however, if the code is used in close proximity to claims regarding a product's recyclability and/or recycled content. It is this latter use of the code in conjunction with the recycling messages that was the subject of a July 12, 1994 complaint from the Take the Wrap Campaign to the Federal Trade Commission (FTC) with copies to several State Attorney Generals.

Take the Wrap Campaign takes umbrage at the use of the chasing arrows symbol and maintains that consumers often mistakenly see the symbol as a representation that the product or package is environmentally friendly or recyclable when in fact, that is not the case. They support replacement of the chasing with a four-sided symbol. Essentially, they are asking the FTC to (1) take action against companies engaging in deceptive use of the chasing arrows symbol on plastic films, durable goods and on nonregulated bottles or containers holding less than eight ounces; and, (2) revise the FTC guidelines to recognize that the SPI code at least implies recyclability and should be regulated accordingly. Their primary concern is with the explicit use of the word "recyclable" in close proximity to the chasing arrows resin identification code.

We will continue to monitor this and other complaints to federal agencies and recommend whatever action is appropriate and consistent with the direction that the Board provides.

F. NEW AMENDMENTS TO CALIFORNIA'S RIGID PLASTIC CONTAINER RECYCLING LAW REVISES REQUIREMENT TO OBTAIN NON-OBJECTION LETTERS FROM FDA

California's Rigid Plastic Packaging Container Act imposes a mandatory recycling rate, post-consumer content requirements, source reduction and reusability/refillability requirements on manufacturers of consumer products and the suppliers of rigid plastic containers sold within the state. Manufacturers of rigid plastic containers used for food and cosmetics were given until January 1, 1997 to comply with the Act's recycling requirements. However, container manufacturers were required to "diligently seek" "non-objection letters" from FDA that would permit the use of recycled plastic in the food and cosmetic containers. Industry representatives met with California legislators to discuss alternative language seeking, in particular, to set reasonable limits on the open-ended requirement to obtain "non-objection" letters.

Industry argued that "non-objection" letters should not be required for containers which already comply with the Act's other provisions. A new proposal, issued on June 10, 1994, exempts rigid plastic food and cosmetic container manufacturers from the "non-objection" requirement if their customers are not subject to the reporting requirements of Section 17948. That section provides that product manufacturers do not need to submit reports if they are in compliance with the regulatory requirements for recycled content, recycling rates, source reduction, or reusability/refillability. Thus, when a manufacturer satisfies one of the other compliance options under the Act, it would not be required to submit a "non-objection" letter from the FDA.

The proposal also addresses concerns that container manufacturers would be required to seek "non-objection" letters even if they used a compliance option other than post-consumer content. As amended, the new proposal would limit the need for container suppliers to obtain FDA approval letters when they intend to comply with the Act under the post-consumer option. The proposed regulations set a January 1, 1995 deadline for product manufacturers to request container suppliers to obtain a "non-objection" letter from FDA in time to meet the January 1, 1996 deadline.

The new regulation still does not relieve product manufacturers of the need to comply with the Act by January 1, 1997. Thus, avoiding the obligation to ask FDA for a "non-objection" letter on the basis that the container is not suitably pure for use in food contact situations will narrow the range of available options for putting the container into compliance with the California law.