GENERAL COUNSEL'S REPORT

TO THE

VINYL INSTITUTE EXECUTIVE BOARD

August 18, 1993

Prepared by Keller and Heckman for the SPI VI Executive Board.

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INTRODUCTION

We are pleased to present this report to you on the status of matters involving our activity on issues which effect the Vinyl Institute. Recent developments on issues covered in our last report for the March 1993 Board Meeting are discussed here, as well as new issues that have come into focus subsequently.[1]

I. ENVIRONMENTAL PROTECTION AGENCY

A. EPA Issues Proposed Great Lakes Water Quality Guidance

In April, the U.S. Environmental Protection Agency (EPA) published proposed water quality guidance for the Great Lakes system. 58 *Fed. Reg.* 20802 (April 16, 1993). When adopted, the Guidance will establish minimum water quality standards, antidegradation policies, and implementation procedures for the eight Great Lakes states.[2] The proposal stems from both the work of the International Joint Commission (IJC) under the Great Lakes Water Quality Agreement and Congressional direction found in the Great Lakes Critical Programs Act of 1990, which amended the Clean Water Act.

The proposed Guidance lists chlorine as one of 16 "excluded pollutants." See, proposed Table 5 to 40 C.F.R. Part 132. EPA notes that the Agency and the states have extensive experience in the control of these pollutants, and all of the Great Lakes States have adopted numeric water quality criteria for these pollutants that EPA has approved. 58 *Fed. Reg.* at 20842-20843. EPA concluded that existing water quality standards are adequate.

The Agency notes that some of these excluded pollutants are identified in the Great Lakes Water Quality Agreement (GLWQA). EPA indicates its intention to seek amendment of the GLWQA when necessary. EPA's implementation of the ICJ recommendations and potential willingness to remove chlorine from certain aspects of the GLWQA are of obvious interest to the Vinyl Institute. While EPA seems to be headed in the right direction, it is important to sustain that course with comments and other communications.

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[1] No report was prepared in conjunction with the May 1993 Annual Meeting.

[2] The states are: New York, Pennsylvania, Ohio, Indiana, Illinois, Minnesota, Wisconsin and Michigan.

B. EPA Issues Proposed Rule to Accelerate the Phaseout of Ozone-Depleting Chemicals

Environmental Protection Agency issued a Notice of Proposed Rulemaking (NPRM) to implement certain amendments, adjustments and decisions adopted by the "Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer" at their November 1992 meeting in Copenhagen (Copenhagen Amendments). 58 *Fed. Reg.* 15014 (March 18, 1993). In brief, EPA is proposing to:

(1) accelerate the phaseout of chlorofluorocarbons (CFCs), halons, carbon tetrachloride, and methyl chloroform in accordance with the Copenhagen Amendments,[3] take action to accelerate the phaseout of certain hydrochlorofluorocarbons (HCFCs), and seek input on exempt "essential uses";

(2) add methyl bromide and hydrobromofluorocarbons (HBFCs) to the list of Class I substances, with specific phaseout dates;

(3) ban specified trade between the U.S. and foreign states not party to the Montreal Protocol;

(4) provide that recycled and used bulk chemicals not be included in calculating consumption of controlled substances;

(5) eliminate the "coincidental unavoidable byproduct" (CUBP) provisions of the Agency's July 30, 1992, Final Rule, and substitute a new regime recognizing that both Resource Conservation and Recovery Act (RCRA) and air Maximum Achievable Control Technology (MACT) standards are appropriate destruction technologies for carbon tetrachloride and methyl chloroform; and

(6) recognize that insignificant quantities generated as inadvertent or coincidental byproducts, trace impurities, and the like, should be exempt.

On May 18, 1993, SPI commented on several aspects of the proposal as it affects the plastics industry. Although generally supportive of the phaseout schedule as it was proposed, SPI did point out an erroneous statement in the proposal that asserted that "substantial emissions of methyl bromide are inadvertently produced during the manufacture of polyethylene." It was determined by SPI that the likely source of methyl bromide emissions is in the production of dimethyl terephthalate, one of two monomers used to make polyethylene terephthalate (PET), and not in the actual production of

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[3] January 1, 1996, is the target date for complete phaseout of fully halogenated substances. The phaseout in production and consumption relates to virgin chemicals. Thus, for the present, users of the regulated substances probably will not have to remove existing CFCs and halons from currently operating systems. However, companies will be required to rely on recycled sources to meet future servicing needs after phaseout is complete.

either polyethylene or PET. Therefore, it was requested that EPA change the wording in its proposal to state the correct source of inadvertent methyl bromide emissions.

A public hearing was held on the proposal on April 2, 1993, and a final decision is expected to be made this fall, with an effective date of January 1, 1994, for all but the Montreal Protocol trade provisions, which, under the treaty, will take effect 30 days after final promulgation.

II. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

A. OSHA Revokes 1989 Exposure Limits to Comply with 1992 Eleventh Circuit Decision

The Occupational Safety and Health Administration (OSHA) issued a final rule on June 30, 1993 (58 *Fed. Reg.* 35338) revoking the permissible exposure limits (PELs) for toxic substances that were established under the 1989 Air Contaminants Rule, thereby reinstating the PELs that existed before 1989. In a case in which the VI was a very active participant, the U.S. Court of Appeals for the Eleventh Circuit ruled on July 7, 1992, that the more protective PELs set in 1989 are invalid since OSHA failed to provide sufficient supporting evidence to justify the new standards. *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992). The Court said that OSHA had not sufficiently explained its required determinations that (1) the then existing PELs were inadequate; (2) compliance with the 1989 standards would eliminate or significantly reduce the risk; and (3) compliance with the 1989 standards was technically and economically feasible. At OSHA's request, however, the Court did not order the Agency to enforce its decision while the case was the subject of a pending petition for rehearing.

On October 23, 1992, OSHA's request for rehearing was denied and the Agency declined to petition the Supreme Court for review. Consequently, the Agency began to comply with the Eleventh Circuit's mandate once the March 22, 1993 deadline for petitioning the Supreme Court passed. Since that time, OSHA has enforced only the air contaminant exposure limits that were in effect prior to the issuance of the more strict 1989 PELs. As outlined in the June 30 *Federal Register* notice, 164 substances not regulated before 1989 will be left unregulated and 212 substances will return to their higher pre-1989 PELs. The PEL for ethylene dichloride will revert from 1 ppm to 50 ppm. The complete list of reinstated PELs is published in the June 30 *Federal Register* final rule. Keller and Heckman prepared a memorandum in question and answer format that addresses the major questions posed by these regulatory developments.

B. SPI Files Brief Supporting Position That OSHA Hazard Communication Standard Does Not Mandate Identifying "Target Organs" on Warning Labels

The U.S. Court of Appeals for the Sixth Circuit granted SPI permission to file an *amicus* brief in support of American Cyanamid's defense of a decision by the OSHA

Review Commission that identification of "target organs" is not mandatory on hazard warning labels. The OSHA Hazard Communications Standard requires "appropriate hazard warnings" on labels of products containing hazardous chemicals. The Review Commission rejected OSHA's interpretation that such labels required identification of specific target organs. OSHA then took the case to the Sixth Circuit.

SPI argued in its *amicus* brief that this was a substantive change in the Hazard Communication Standard from that promulgated and that the Agency had bypassed normal notice and comment procedures. American Cyanamid presented oral argument before the Court on June 7, 1993, but a decision is not likely before the end of the year.

C. SPI Drafts Guidelines to Assist Members in Preparing Material Safety Data Sheets for Plastics

OHEIC's MSDS Task Force has prepared materials to guide members of the Society in drafting material safety data sheets (MSDS) for plastics and plastics products. Although the guidelines were intended to supplement the Chemical Manufacturer Association's (CMA) MSDS Manual and the corresponding American National Standards Institute (ANSI) standard, the Task Force realized that the materials could stand alone and decided to publish it solely as an SPI document. The SPI guidelines provide advice on performing hazard determinations under OSHA's Hazard Communication Standard.

The Task Force delivered its final document to OHEIC at its July meeting; final arrangements are being made to publish it as soon as possible.

D. SPI Prepares Compliance Manual for OSHA's New Rule Limiting Exposure to Cadmium

OSHA has promulgated a regulation limiting exposure to cadmium which applies to cadmium-based products used in plastics, such as colorants and stabilizers. Several members of OHEIC expressed concern initially that labels were required on all products containing cadmium without regard to exposure potential. Upon further investigation, however, it was found that OSHA's cadmium standard is to be interpreted consistent with the Hazard Communication Standard and that products only need to be labeled when they meet certain conditions. A compliance guideline explaining when labeling is required was prepared in coordination with OHEIC's Worker's Safety Committee and was approved at the OHEIC meeting last April.

III. Miscellaneous

A. Supreme Court Relaxes Standards For Admitting Scientific Evidence in Cases Involving Expert Testimony

For the past 70 years, courts have relied on what has come to be known as the "Frye Rule" to determine whether expert opinion based on a scientific technique is admissible as evidence. The rule has come to mean that a technique is not admissible unless it is sufficiently established to be "generally accepted" as reliable in the relevant scientific community. *Frye v. United States*, 293 F. 1013 (1923). On June 28, 1993, the Supreme Court essentially declared the Frye Rule defunct by reversing the U.S. Court of Appeals for the Ninth Circuit's decision in *Daubert v. Merrell Dow Pharmaceuticals*, 1993 U.S. Lexis 4408 (9th Cir.).

A California District Court used Frye's "general acceptance" standard to reject scientific evidence presented by the Plaintiff as "unpublished, not subjected to the normal peer review process and generated solely for use in litigation." On this basis, it granted the respondent, Merrell Dow, summary judgement and the Ninth Circuit affirmed. The evidence presented by the Plaintiff showed that Bendectin, a prescription drug marketed by Merrell Dow, might cause birth defects in children when ingested by the mother during pregnancy; the evidence to the contrary had been subjected to peer review and published so it met the "Frye tests." The Supreme Court, however, held that the Federal Rules of Evidence, adopted in 1975, superseded the Frye test and, therefore, provide the new standard for admitting expert scientific testimony in a federal trial. The legislatively enacted Federal Rules apply much more liberal criteria to determining admissibility of scientific evidence, requiring only that the evidence be reliable and relevant, and not necessarily generally accepted. The Frye Rule's reliance on "general acceptance" as an absolute prerequisite to admissibility is not found anywhere in the text of the Rules and, therefore, it was determined, should not be a consideration in the court.

While the standards of the Federal Rules of Evidence may be more liberal than Frye's, an expert's testimony must still rest on a reliable foundation and have relevance to the case. But, it is the Court's opinion that the validity of that evidence should be challenged through traditional means, such as cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof, and not through outright exclusion based on an uncompromising "general acceptance" standard.

The relaxed standards for admitting scientific evidence put forth in Daubert may have effects outside the courtroom as well. For example, one of the criteria for establishing a food additive as "generally recognized as safe" (GRAS) is to supply FDA with an adequate amount of published research. In fact, the Agency will generally accept a petition seeking an affirmation of GRAS status only if *published* data support it and the substance is "generally accepted" as safe within the scientific community. With the recent Supreme Court decision, however, more weight may be given to unpublished studies. The Court stated in *Daubert* that publication in a peer-reviewed journal is not the sole factor in determining admissibility and does not necessarily demonstrate reliability. The Court noted that in some instances well-grounded but innovative theories will not be published. Thus, publication alone should not be grounds for admitting or disregarding evidence, whether it be by a jury or a government agency; instead, the scientific validity of a study's methodology and the principles underlying the research should be determined without a preconceived bias against the conclusions that are generated.

B. SPI Joins Industry in Opposing California Proposal to Repeal Proposition 65 "Safe Harbor" Exemption

On April 27, 1993, the California Environmental Protection Agency's (Cal-EPA) Office of Environmental Health Hazard Assessment (OEHHA) issued a proposal to repeal its exemption for foods, drugs, cosmetics and medical devices under Proposition 65. As you may recall, the regulation providing for this exemption (§ 12713), known as the "safe harbor" exemption, states that no warning need be given for those products which contain Proposition 65 carcinogens but comply with FDA standards, pending California's adoption of permanent "no significant risk levels" (NSRLs) for the carcinogens. The proposal follows Cal EPA's December 28, 1992, announcement that it would repeal the exemption as of July 1, 1993, pursuant to an agreement to settle a 1988 lawsuit challenging the regulation. *AFL-CIO, et al. v. Deukmejian*, No. 502541 (Sacramento County Super. Ct., filed May 31, 1988) ("*Duke II*"). The primary reasons given to justify repeal of the regulation are highly questionable.

On June 22, 1993, SPI filed comments opposing the repeal since the regulation remains a valuable aid in establishing the satisfactory Proposition 65 status of FDA-regulated packaging materials, and it is the industry's view that the reasons presented by OEHHA for repealing the regulation are not valid. SPI also argued that the State violated due process procedures by failing to inform the public about the real reason behind the repeal, *i.e.*, the State's agreement to settle *Duke II*, and not providing the public with an ample opportunity to comment on the proposal.

At a June 24, 1993 hearing on this subject in Sacramento, Peter Barton Hutt, on behalf of the Grocery Manufacturers of America (GMA) and four other trade associations, also argued against repeal of the safe harbor, noting, as did SPI, that there is no policy reason supporting the repeal and that repeal of a Proposition 65 exemption for FDA-regulated products is "inherently illegal." Mr. Hutt highlighted the weaknesses of OEHHA's reasons for the repeal and stressed the continued need for the exemption which, he duly noted, was never intended to be repealed until NSRLs were set by the state for all Proposition 65 chemicals.

Despite extensive comments protesting the state's cavalier procedure and its failure to even acknowledge in its proposal its commitment to eliminate the regulations made by way of the settlement agreement, the best information we have at the moment is that the state will still kill Section 12713 but probably will not do so until it has gone through the necessary motions of replying to the protesting comments, *i.e.*, approximately 60-90 days. While the above-mentioned industry interests are being given this "dose of due process," the Plaintiffs in *Duke II* could presumably argue in court that the state is in default for not keeping its promise to take final action on the repeal by July 1, 1993. It appears unlikely, however, that they would do so unless it appears that the state is going to abandon its commitment to them altogether, an unlikely event.

OEHHA has meanwhile proposed NSRLs for another 32 listed chemicals in accordance with the *Duke II* settlement (the NSRL listing was dated July 1, the deadline set in *Duke II*, but it was not released until July 8). This is long overdue but will be pushed now as another reaction to the charge that the Agency is abolishing an important provision that prevents suits by bounty-hunters and others until NSRLs are set for all Proposition 65 chemicals. The problem that remains is that there will still be at least 165 chemicals on the Proposition 65 list without established NSRLs, and any new chemicals that are added to the state's list of carcinogens will also have no set levels.

C. SPI Files Comments Opposing Proposal to Make California's Proposition 65 Warnings System Even More Onerous

On February 26, 1993, SPI submitted comments to OEHHA strongly urging the state to abandon its draft proposal to amend Article 6 of the Proposition 65 regulations which governs the provision of "clear and reasonable" warnings under the law. The January 25, 1993, draft proposal would strengthen the wording of the warnings by changing the current "Warning: This product contains a chemical(s) known to the state of California to cause cancer" to "Warning: Use of this product will expose you to a chemical(s) known to cause cancer." The new proposal would also require chemical-specific warnings for consumer products as well as in certain workplace and public area situations (*e.g.*, where emissions exceed limits).

The most controversial aspect of the proposal, which was strongly objected to by SPI in its comments and also drew much criticism at a February 25, 1993, "workshop" on the proposal, is the downstream notice provision. This provision would require a party to give notice to customers or transferees regarding the presence of any "detectable amount" of a listed chemical in a product or good if the product or good will be used in the manufacture of a consumer product, regardless of whether the level of the chemical poses even a conjectural health risk.

In its comments, SPI particularly took issue with (1) the downstream notice provision; (2) the new warning language for consumer products declaring that the consumer is subject to "exposure" to a listed chemical, even though certain product uses may pose no significant exposure or other risk; and (3) the substantial economic burden that the proposal will place on companies doing business in California without any compensatory benefit to public health or safety.

Although OEHHA had been expected to move quickly to issue a formal proposed rulemaking in keeping with the draft proposal, the widespread opposition to the proposal has led Governor Pete Wilson to intercede to urge Cal EPA Administrator James Strock and OEHHA not to issue a formal proposal at this time but rather to hold workshops to explore issues raised by the proposal more fully.

D. SPI Continues Discussions With the National Recycling Coalition on Improving the Effectiveness of Resin Identification Code

SPI has been dealing with questions and criticisms from several sources in recent months regarding its voluntary resin identification code (RIC) which is required by statute in 39 states. In December 1992, SPI received a letter from the New York State Attorney General's office on behalf of nine states' Attorneys General requesting information about the coding system.[4] The letter suggested that the RIC recommended by SPI and required by statute in thirty-nine states may be misleading to consumers, and it asked that SPI provide information and data regarding the use of the RIC. In SPI's response, President Larry Thomas duly noted the RIC is not, nor is it intended to be, misleading in any way when used properly. It was acknowledged, however, that some companies may misuse the code.

Since February, SPI representatives have had a series of meetings with the National Recycling Coalition (NRC) to help make plastics recycling more successful by evaluating the use of the code. On July 28, 1993, a "White Paper to Evaluate Options to Improve the Code's Effectiveness" was issued jointly by SPI and NRC. In this document, the participants agree that the resin code presents two distinct problems with regards to plastics recycling:

- It lacks technical specificity in that all plastic resin grades within a particular number of the code sometimes cannot be recycled together to produce an economically viable material.

- Some consumers see the resin identification code with the chasing arrows symbol and assume that it indicates the material can be recycled, when it may not be accepted in their particular local recycling program.

A great deal of time has been spent attempting to understand the problems that are being created by the code while careful attention is also being paid to the fact that any change will be costly to the industry and can only be implemented over a period of several years. The "White Paper" lists several options for improving the resin code's effectiveness that are currently under consideration; these include (1) conducting research on consumer confusion; (2) developing education programs; (3) limiting use of existing code; (4) revising existing code; (5) developing new code; and (6) revising state laws to reflect recommendations made by SPI/NRC. Three working groups have been formed to study these options and will meet periodically to report on their progress.

The "White Paper" has been broadly distributed to stakeholders in plastics and recycling who will be effected by any potential changes to the code. Comments are due to NRC and SPI by September 8, 1993. It is the intention of the parties that this review process will lead to a consensus on what steps should be taken to improve the code's effectiveness.

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[4] SPI has also received and responded to letters in a similar vein from officials in Vermont and Minnesota.

E. Federal Trade Commission (FTC) Agrees on Consent Orders With Three Companies Charged With Misrepresentation in Environmental Labeling

On March 30, 1993, the Federal Trade Commission (FTC) charged three companies -- Mr. Coffee, Inc., BPI Environmental, Inc., and North American Plastics Corp. -- with making false and unsubstantiated environmental marketing claims. The companies agreed, without admitting violation of the law, to settle the charges under proposed consent orders which have been released for public comment prior to their being finalized.

Mr. Coffee was charged with making false and misleading claims about its coffee filters, including claims that a "chlorine-free process" is used to make the filters, that its filters are made of "recycled paper," and that the paperboard packaging containing the filters is "recyclable." In keeping with the standards set forth in the FTC's "Guides for the Use of Environmental Marketing Claims," the "recyclable" claim was viewed as misleading since the packaging material, although technically capable of being recycled, is allegedly only accepted for recycling at a few facilities across the country. The FTC consent order would allow the "recyclable" claim to remain if it is accompanied by a clear disclosure that only a few facilities exist which accept the material or that only a certain percentage of consumers have access to such facilities.

William A. Sullivan, Jr., Director of Compliance Services at Science Regulatory Services International (SRSI), filed comments in opposition to the consent order, claiming that the Commission's environmental marketing policy discourages environmental claims and has no basis in science. SRSI charged that the FTC's consent order with Mr. Coffee lacked quantitative information on the testing methods used by the Commission to reach its conclusions. According to SRSI, "If [FTC] did not rely on such hard data in making its finding, the commission, itself, is guilty of making a 'claim' without a reasonable basis." SRSI also argued that a company should be permitted to make a "recyclable" claim, so long as the claim is true, regardless of whether recycling facilities for the material exist.

The BPI Environmental and North American Plastics cases involve allegedly unsubstantiated degradability claims on plastic bags which are formulated with cornstarch. In both cases, the FTC criticized the companies for a lack of scientific substantiation for their degradability claims. In addition to barring such claims, the consent order with BPI Environmental would require specificity in asserting environmental benefits and scientific substantiation of <u>all</u> environmental claims. These additional requirements drew a dissenting opinion from FTC Commissioner Deborah K. Owen on the grounds that they are inconsistent with the other two consent orders and too restrictive in calling for "scientific" substantiation of all environmental claims.

These cases follow the principles previously articulated by the FTC in its guidance document on environmental marketing claims (although the additional requirements in the BPI case could be viewed as somewhat more restrictive). Both the FTC and State Attorneys General recommendations in this area (<u>i.e.</u>, the "Green Report II") take the position that an unqualified claim of "recyclable" can only be made for products which actually are included in recycling programs available to many consumers. Similarly, the existing guidelines call for substantiation that a product described as "degradable" will degrade within the period claimed when disposed of according to the method generally used for that product. The consent orders demonstrate that the FTC is actively enforcing the law in accordance with its guidelines.

Further evidence that the FTC is pursuing those who make green claims that the Commission believes violate the letter or spirit of its guidelines surfaced recently. We were advised that the FTC had raised questions with a consumer product company concerning a claim on its pigmented high-density polyethylene (HDPE) cosmetics bottles. The claim states that: "This bottle is recyclable where colored HDPE recycling facilities are available." The FTC apparently questioned, as it did with regard to Mr. Coffee's packaging, the extent to which recycling exists for the smaller HDPE containers used for cosmetics and was of the opinion that only milk and detergent types of HDPE containers are actually processed for recycling in significant numbers.

In its guidelines, the FTC indicated that it would consider the claim "recyclable where facilities exist" deceptive if recycling programs for the product "are not available to a substantial majority of consumers," even if recycling programs for the product "are available in a significant percentage of communities or to a significant percentage of the population."

We understand that the FTC is indicating some flexibility with respect to the requirement for recycling programs to be available to a substantial majority of consumers if there is a significant number of programs in which the product is recycled. At this time, however, the Commission is requiring evidence obtained directly from a sampling of the recycling programs that the particular container is not only collected but is also actually sent on to be recycled rather than disposed of in landfills or by incineration after collection.

F. SPI Joins Lead Plaintiffs in Appealing the U.S. District Court Decision Regarding California's Environmental Advertising Law; New Standard for "Recyclable" Claims Proposed

On April 6, 1993, the Association of National Advertisers (ANA), Grocery Manufacturers of America (GMA), National Food Processors Association (NFPA), and other industry groups filed an appeal of the U.S. District Court decision in *ANA et al. v. Lungren*, No. C-92-0660 (N.D. Cal. Dec. 23, 1992), with the U.S. Court of Appeals for the Ninth Circuit on the primary ground that the District Court erred in not declaring California's environmental advertising law (Cal. Bus. & Prof. Code § 17508.5) unconstitutional in its entirety. The District Court ruled that it is constitutional to apply the California statute to commercial speech, *i.e.*, advertisements for name brands or products.

SPI, which was one of the original plaintiffs in the case, will remain as a member of the appellant coalition even though its purposes were largely met when the Court declared non-commercial speech as exempt from the statute and struck down the term "recyclable" as unconstitutionally vague. At least by implication, the Court decided in *ANA* that it is unconstitutional for "advertorials," "infomercials," or association-sponsored advertisements addressing attributes of general classes of products to be subjected to the California law. This judgment is important since it allows SPI's American Plastics Council to continue its current national advertising campaign in California and on cable programs that might go into the state. The Court also decided that although the law defines a consumer good as "recyclable" if it can be "conveniently recycled" in all California counties with more than 300,000 people, the statute offers no guidance as to what recycling programs satisfy the statutory requirement and, therefore, the statute is unconstitutionally vague.

Although the decision satisfied most of SPI's immediate objectives in the case, the primary appellants remain intent on overturning the California law altogether on grounds of its being unconstitutionally violative of First Amendment rights.

In response to the District Court's ruling that the term "recyclable" is unconstitutionally vague, California Assemblyman Bryon Sher, author of the environmental advertising law, introduced A.B. 1112 on March 2, 1993. The bill would allow an article to be represented as "recyclable" if it is being recovered for use in the manufacture of a new product or package in more than 65% of the curbside collection programs in the state, or if it is accepted for recycling wherever it is sold. The Assembly's Consumer Protection Committee held a hearing on A.B. 1112 on May 19, 1993 at which it was reported out favorably and referred to the Ways and Means Committee unchanged.

More recently, Mr. Sher reportedly has been circulating a separate draft bill which would effectively disarm much of the current California law by providing that any advertising claim complying with the FTC Guidelines would be permissible in California. This bill, has not yet been introduced in the state legislature. If such a bill were passed, it could moot the ANA case and add a great deal of flexibility for those who want to advertise truthfully, but without the present artificial bounds, in California.

G. Discussions are Underway for SPI to Hire Contractor to Assist SRI International in Completing Environmental Report on Use of Plastic Pipe

SPI continues to negotiate with the State of California regarding the completion of an Environmental Impact Report (EIR) on the expanded use of plastic pipe in certain plumbing applications. In August 1989, the state released a highly favorable final draft of the long-awaited EIR. After carefully evaluating the potential impact of the increased use of plastic pipe on public health, worker health and safety, fire safety, economics and the ecology, the report concluded that "[o]verall, no significant environmental impacts are associated with more widespread use of plastic plumbing pipe." If made final in its present form, the report should clear the way for the use of polybutylene, chlorinated polyvinyl chloride, and PVC pipe in water service distribution and acrylonitrile-butadiene-styrene and polyvinyl chloride in drain, waste and vent piping for fire-rated construction.

SRI International, Inc., which developed the final draft EIR under a contract with the California Department of Housing and Community Development (HCD), was charged with reviewing and responding to the over 200 comments submitted by plumbers and others on the final draft EIR. SRI International was also responsible for preparing the final EIR to be submitted to HCD. However, because of cost overruns, SRI International has refused to complete the final EIR unless it receives more money than provided for under its contract with the state. In addition to the contract between SRI International and the state, the state also has a contract with SPI under which the state, in exchange for funding for the EIR, agreed to use its best efforts to ensure that a Final EIR is produced. SPI, therefore, informed state officials that unless they took action to require SRI International to complete the report or find SRI International in default of the contract and take over the project and complete the final EIR (or hire another contractor to do so), SPI would have to consider the other options available to it to bring about the completion of the EIR. The status of the draft EIR prepared by SRI was further confused by an evaluation by the California Attorney General's office, who characterized the draft as legally inadequate.

SRI International subsequently rejected a request from the state to complete the EIR, so SPI has proposed to hire another contractor, called an EIR Packager, which would complete the EIR with some assistance from SRI International. The Packager would cost an additional $80,000, but it is hoped that this move will result in a more quickly completed report which is acceptable to HCD. If the report is accepted, SRI International will receive payment according to its contract with the state.

As of this writing, SPI believes it has reached an agreement with both HCD and SRI. The Agreement provides:

(1) SPI will issue a Letter of Credit to HCD in the amount of $29,986.20;

(2) HCD will pay SRI the amount of the Letter of Credit less 10%;

(3) upon payment SRI will give to SPI and HCD its work product and a copy of a legal opinion letter on the adequacy of the draft final EIR;

(4) SPI will retain an EIR Packager to complete the EIR;

(5) SRI will make relevant personnel available to answer questions from the EIR Packager;

(6) a second Letter of Credit in the amount of $21,211.20 will be made payable to HCD upon receipt of written notice from HCD that a final EIR has been received and is acceptable (we assume HCD will then pay all remaining amount to SRI); and,
(7) SRI waives all claims for additional payments.

SPI believes it has commitments for the additional funds (approximately $80,000) needed to pay the EIR Packager. Once HCD finds the draft EIR to be acceptable, it can publish it as final or recirculate it for additional comment (HCD will not commit itself on this matter). HCD should be responding to SPI in the near future to confirm SPI's above understanding of this Agreement.