



A Division of The Society of The Plastics Industry, Inc.

May 30, 1989

TO: The VI Legal Committee
The VI Health, Safety & Environment Committee

RE: PEL

The attached letter from Mark Sievers of Keller and Heckman relative to motions filed by OSHA in the litigation challenging OSHA's air contaminants rule is self-explanatory.

If you have any questions, please call Mark or me.

Meredith N. Scheck
Assistant Director

MNS/pmb
enclosure

CTL018395

U.S. Department of Labor

Office of the Solicitor
Washington, D.C. 20210



EXPRESS MAIL

May 19, 1989

Ms. Linda Pritt
Case Manager
U.S. Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Courtaulds Fibers, Inc. v. United States
Department of Labor, Occupational Safety
and Health Administration, No. 89-7073

Dear Ms. Pritt:

Please file the enclosed original and three copies of the Secretary of Labor's Motion for Order Setting Schedule for Administrative and Judicial Stay Requests. As noted in the certificate of service, we have served copies of the motion on counsel of record.

Sincerely yours,

Charles I. Hadden

cc: counsel of record

CTL018398

COURTAULDS FIBERS, INC.,	)	No. 89-7073 consolidated
	)	with Nos. 89-7184,
	)	89-7185, 89-7187,
	)	89-7217, 89-7247,
	)	89-7248, 89-7249,
Petitioner	)	89-7250, 89-7251,
	)	89-7252, 89-7253,
v.	)	89-7254, 89-7255,
	)	89-7256, 89-7274,
UNITED STATES DEPARTMENT OF LABOR,	)	89-7276, 89-7298,
OCCUPATIONAL SAFETY AND	)	89-7301, and 89-
HEALTH ADMINISTRATION,	)	
	)	
	)	
Respondent	)	

The Secretary of Labor, respondent in these consolidated cases, moves the Court to issue an order setting a time schedule to govern any applications for administrative or judicial stays that petitioners may file. The proposed order would also direct the Secretary to respond to any stay requests by a date certain. We suggest that the order incorporate these dates: June 19 for the filing of administrative stay requests, July 17 for the Secretary's response to such requests, July 31 for the filing of judicial stay requests, and August 21 for the Secretary's and other parties' responses to the Court. The purpose of this motion is to provide for an orderly and expeditious process for the administrative handling of stay requests, and to assure that in the event that any of the parties seek a judicial stay pending review, this Court will have adequate opportunity to consider the

request and responses thereto before the challenged standard's September 1 implementation date.

In support of this motion, the Secretary states as follows:

1. On January 19, 1989, the Secretary published an occupational safety and health standard governing air contaminants, which was issued pursuant to Section 6(b)(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655(b)(5). 54 Fed. Reg. 2332-2983, to be codified at 29 C.F.R. 1910.1000. The standard, which represents the most broad-ranging regulatory initiative ever undertaken by the agency, sets exposure limits for general industry for 164 previously unregulated substances, provides more protective limits for 212 currently regulated substances, sets a higher limit for 1 substance, and maintains the existing limits for 51 substances that were considered in the rulemaking. The standard became effective on March 1, 1989. However, it establishes September 1, 1989 as the date by which employers must be in compliance with the new exposure limits through any reasonable combination of engineering controls, work practices and personal protective equipment (e.g., respirators) and, in most instances, December 31, 1992 as the date by which employers must, whenever feasible, achieve compliance exclusively through the use of engineering and administrative controls. 45 Fed. Reg. 2921; 29 C.F.R. 1910.1000(e),(f).

2. Pursuant to Section 6(f) of the OSH Act, 29 U.S.C. 655(f), numerous parties challenged the air contaminants standard in various courts of appeals. There are now a total of 28

separate petitions for review (one petition has been voluntarily dismissed), all of which have been or shortly will be transferred to and consolidated in this Court under the procedures established in 28 U.S.C. (Supp. V) 2112.

3. Pursuant to Fed. R. App. P. 18, an application for a stay of an agency rule pending review in the court of appeals ordinarily must be made in the first instance to the agency. While the Occupational Safety and Health Administration has no regulations governing administrative stays, the agency duly considers such requests following promulgation of a standard. To respond appropriately, the agency typically reviews the relevant record evidence in light of the legal requirements for a stay, considers any additional information or arguments provided by the applicant and, in some instances, conducts site visits. Responding to a stay request with respect to even a single-substance standard can be a time-consuming process. Obviously, the necessary commitment of staff and resources is compounded to the extent that multiple parties interested in many substances request stays.

4. The purpose of this motion is have the court prescribe, at the outset, a fair, orderly and expeditious procedure for the administrative and judicial processing of stay requests relating to this important standard. Because of the singular scope of this rulemaking and the unprecedented number of petitioners, it is essential, in our view, for the Court to establish a schedule that allows adequate time for those parties seeking stays to file

their requests to the agency and the Court, while assuring that first the Secretary and then the Court have a reasonable opportunity fully to consider the requests before the September 1, 1989 implementation date. What we hope to avoid by this motion are any last-minute requests for stays that, by virtue of the impending implementation date, would unfairly deprive the Secretary of a chance to consider the matter at the administrative level, limit the parties' occasion to respond to such requests before the Court, and ultimately inhibit this Court's ability to rule on stay motions in a timely and informed manner.

5. As indicated in our introductory paragraph, we suggest the following time schedule:

Monday, June 19	---	all administrative stay requests hand-delivered or served by overnight mail
Monday, July 17	---	Secretary's response to all administrative stay requests hand-delivered or served by overnight mail
Monday, July 31	---	all judicial stay requests hand-delivered or served by overnight mail
Monday, August 21	---	oppositions to judicial stay requests hand-delivered or served by overnight mail.

It is unclear at this point how many parties are anticipating filing stay requests. Three parties have already filed such requests with the agency, and there are indications that other requests are likely. We believe that our proposed schedule

affords each party sufficient time to prepare its stay papers, particularly considering that the air contaminants standard was issued on January 19, 1989. At the same time, it grants a reasonable amount of time to the Secretary who, of course, has the responsibility to respond to all the requests.

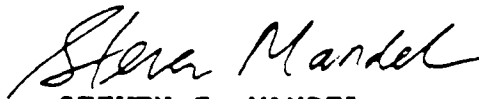
WHEREFORE, the Secretary of Labor respectfully requests this Court to adopt the time schedule described above to govern any applications for administrative or judicial stays in this multi-party proceeding.

Respectfully submitted.

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
CYTHNIA ATTWOOD
Associate Solicitors

CHARLES I. HADDEN
Deputy Associate Solicitor



STEVEN J. MANDEL
BARBARA WERTHMANN
Counsels for Appellate Litigation

NATHANIEL I. SPILLER
Attorney

U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2700
Washington, D.C. 20210
(202) 523-8247

CTL018403

EXPRESS MAIL

May 24, 1989

Ms. Linda Pritt
Case Manager
U.S. Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Courtaulds Fibers, Inc. v. United States
Department of Labor, Occupational Safety
and Health Administration, No. 89-7073

Dear Ms. Pritt:

Please file the enclosed original and three copies of the Secretary of Labor's Motion for Order Requiring Petitioners to File Docketing Statements. As noted in the certificate of service, we have served copies of the motion on counsel of record.

Sincerely yours,



Charles I. Hadden

cc: counsel of record

CTL018404

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COURTAULDS FIBERS, INC.,	)	No. 89-7073, consolidated
	)	with Nos. 89-7184,
	)	89-7185, 89-7187,
	)	89-7217, 89-7247,
Petitioner	)	89-7248, 89-7249,
	)	89-7250, 89-7251,
v.	)	89-7252, 89-7253,
	)	89-7254, 89-7255,
	)	89-7256, 89-7274,
UNITED STATES DEPARTMENT OF LABOR,	)	89-7276, 89-7298,
OCCUPATIONAL SAFETY AND	)	89-7301, and 89-
HEALTH ADMINISTRATION,	)	
	)	
Respondent	)	

SECRETARY OF LABOR'S MOTION FOR ORDER REQUIRING
PETITIONERS TO FILE DOCKETING STATEMENTS

The Secretary of Labor, respondent in these consolidated cases, moves the Court to require each petitioner to file within 10 days of the Court's order a docketing statement enumerating the issues it intends to raise in the case. The purpose of this motion is to facilitate effective case management of this multi-party, multi-issue proceeding by assuring that the parties have sufficient knowledge about the issues at an early date to permit (1) the Secretary to commence preparation of her positions in the litigation, (2) the petitioners to avoid duplicative briefing, and (3) the parties to propose appropriate briefing schedules to the Court.

In support of this motion, the Secretary states as follows:

1. On January 19, 1989, the Secretary published an occupational safety and health standard governing air contaminants, which was issued pursuant to Section 6(b)(5) of the

CTL018405

Occupational Safety and Health Act of 1970, 29 U.S.C. 655(b)(5). 54 Fed. Reg. 2332-2983, to be codified at 29 C.F.R. 1910.1000. The standard, which represents the most broad-ranging regulatory initiative ever undertaken by the agency, sets exposure limits for general industry for 164 previously unregulated substances, provides more protective limits for 212 currently regulated substances, sets a higher limit for 1 substance, and maintains the existing limits for 51 substances that were considered in the rulemaking. The standard became effective on March 1, 1989. However, it establishes September 1, 1989, as the date by which employers must be in compliance through any reasonable combination of engineering controls, work practices, and personal protective equipment (e.g., respirators), and, in most instances, December 31, 1992, as the date by which employers must, whenever feasible, achieve compliance exclusively through the use of engineering and administrative controls. 54 Fed. Reg. 2921; 29 C.F.R. 1910.1000 (e), (f).

2. Pursuant to Section 6(f) of the OSH Act, 29 C.F.R. 655(f), numerous parties challenged the air contaminants standard in various courts of appeals. There are now a total of 28 separate petitions for review (one petition has been voluntarily dismissed), all of which have been or shortly will be transferred to and consolidated in this Court under the procedures established in 28 U.S.C. (Supp. V) 2112 .

3. Both the unprecedented scope of the challenged standard and the extraordinary number of petitioners create the potential

for this to be an unusually difficult case for the parties, especially the Secretary, to litigate and the Court to manage. Assuming no page extensions, each petitioner will be entitled under the rules to file a 55 page brief, for a total of approximately 1500 pages. Local Rule 28-1. Unless the Court requires the parties to file docketing statements setting forth the issues to be raised, the Secretary will have no way of knowing what aspects of the air contaminants standard are being challenged or on what legal basis until served with this massive set of briefs. For instance, the Secretary can only guess at which of the 428 substances regulated by the standard are the subject of challenges, particularly since many of the parties represent numbers of employers whose employees are exposed to more than one covered substance. This is obviously critical information that the Secretary needs to be able to litigate this case. Requiring proper docketing statements should decrease the undue surprise that otherwise would result and should increase the Secretary's ability to respond to the merits of petitioners' multiple arguments. Moreover, docketing statements, by apprising the petitioners of each others' issues, should promote non-duplicative briefing and even joint briefing by two or more parties. See Fed. R. App. P. 28(i). Furthermore, docketing statements should provide a rational basis for petitioners and the Secretary to propose and the Court to set a briefing schedule that establishes reasonable time and page limits in light of the numbers and complexities of the issues to be addressed.

4. The Secretary is aware that this Court does not routinely require parties to file docketing statements. We note, however, that the Court does mandate them in proceedings for review of orders of the Federal Energy Regulatory Commission. Local Rules, Addendum II, ¶(d). FERC proceedings are typified by an extensive administrative record and multiple parties and issues. Because this case also fits that mold, requiring docketing statements here is highly appropriate.

5. To serve its purpose, however, a docketing statement must contain useful information. Accordingly, the Secretary asks the Court to order the parties to state their issues with reasonable particularity and generally to describe the legal bases for each challenge, including:

(a) the portion(s) of the standard being challenged on substantive grounds (e.g., the permissible exposure limit and/or short term exposure limit for a particular chemical);

(b) the bases for the substantive challenge (e.g., lack of significant risk; technological infeasibility) and some supporting explanation;

(c) any procedural challenge to the standard as a whole or in part; and

(d) whether the party intends to seek an administrative or judicial stay.

Presumably, the petitioners possessed this type of factual and legal information at the time they filed their challenges to the air contaminants standard, and it should not be burdensome to

include it in a docketing statement. We therefore suggest that the Court should require the filing of docketing statements 10 days after issuance of its order, with copies to be served on each of the other parties.

WHEREFORE, the Secretary of Labor requests this Court to order each party to file a docketing statement listing with reasonable particularity the issues it intends to raise in its challenge to the Secretary's air contaminants standard within 10 days of the Court's order.

Respectfully submitted.

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
CYTHNIA ATTWOOD
Associate Solicitors

CHARLES I. HADDEN
Deputy Associate Solicitor

STEVEN J. MANDEL
BARBARA WERTHMANN
Counsels for Appellate Litigation

Nathaniel I. Spiller
NATHANIEL I. SPILLER
Attorney

U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2700
Washington, D.C. 20210
(202) 523-8247