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November 12, 1991

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Mr. Robert Burnett
The Vinyl Institute
Wayne Interchange, Plaza II
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Wayne, New Jersey 07470

Re: Asbestos Ban Decision; PVC Implications

Dear Bob:

This letter follows earlier discussions with you and Meredith concerning a recent United States Court of Appeals decision invalidating an Environmental Protection Agency (EPA) rule banning most asbestos products. The Court directed EPA to conduct further proceedings consistent with its opinion. Corrosion Proof Fittings v. Environmental Protection Agency, No. 89-4596 (5th Cir. Oct. 18, 1991) (available on LEXIS Nov. 12, 1991).

Having had time to study the entire opinion, it is now clear that the Vinyl Institute should plan to participate in future EPA rulemakings that will compare the risks presented by asbestos-cement, polyvinyl chloride (PVC), and ductile iron pipe. In addition, it would be prudent for the Vinyl Institute to prepare a response to have ready in the event that the language from the Court's opinion prompts public inquiry.

A. Framework of Decision

To understand the decision's implications, it may be helpful to have a general understanding of the Court's action. In essence, EPA issued a final rule under Section 6 of the Toxic Substances Control Act (TSCA) to prohibit the future manufacture, importation, processing and distribution of

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asbestos in almost all products. In broad terms, the Court found that the rulemaking record did not contain substantial evidence supporting EPA's product bans. The opinion also includes a wealth of guidance on appropriate approaches to risk assessment as well as useful language on the meaning of "unreasonable risk."

Focusing more particularly on the aspects of the opinion pertinent to the Vinyl Institute, TSCA provides EPA with a list of alternative actions ranging from product bans to labeling requirements. The statutory lists goes from the most burdensome to the least burdensome regulatory option. To impose a ban, EPA must show not only that its proposed action reduces the risk of the product to an adequate level, but also that less burdensome options would not do the job. After EPA demonstrates an unreasonable risk, the proper course is for the Agency to consider each regulatory option and evaluate the cost of benefits of regulation under each option.

In its 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." As 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.

In the rulemaking, EPA explicitly rejected considering the harm that may flow from the increased use of products designed to substitute for asbestos. In the Court's view, EPA does not have an obligation to consider the risk of substitute products, 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.

B. Vinyl-Specific Discussion

Asbestos industry petitioners questioned EPA's cost/benefit analysis for asbestos-cement pipe products.

First, the industry petitioners argued that the \$43-\$76 million per life saved failed to justify the ban. Second, industry faulted EPA's data for worker and population exposure because it was not based on actual exposure to asbestos cement pipe but on an "analogous exposure" analysis that EPA adopted subsequent to the public comment period. Finally, the asbestos industry argued that EPA acted unreasonably because the most likely substitutes for asbestos pipe are PVC and ductile iron pipe, which also contain known carcinogens. EPA took the position that the cancer risk from PVC and ductile iron pipe could be comparable to the risk posed by asbestos cement pipe. However, 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" by the Agency was inadequate to refute the earlier studies. Therefore, EPA is to reconsider the risks posed by the three types of pipes.

C. Proceedings on Remand and Recommended VI Actions

At this time, EPA is considering whether to seek Supreme Court review or accept the Court of Appeals' decision. It will likely be 30-60 days before the Agency's final decision is made. If EPA, with Justice Department approval, seeks Supreme Court review, it will be late Spring before we know whether the Court will accept the case and 1993 before the Court issues a decision.

It is probable that EPA will not seek Supreme Court review of the Court of Appeals decision and will conduct additional administrative proceedings. The Vinyl Institute should participate in those proceedings by providing accurate risk assessment information to the Agency. Regardless of the Agency's decision, the Vinyl Institute should identify itself as an interested party to the appropriate EPA offices and monitor the progress of the review decision and potential for future EPA proceedings.

At the present time, I recommend that we review the EPA and Court dockets in this proceeding to identify and review references to the alleged risks posed by PVC pipe production. After reviewing the docket we will have a better basis for preparing a thorough rebuttal to anyone attempting to use the decision to impugn PVC pipe. The Vinyl Institute will likely need a combination of toxicological and economic analysis skills to prepare a solid risk assessment and cost benefit analysis basis. The scope of the project should also be better understood after we complete our review of the docket. Our

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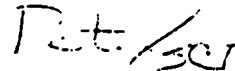
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prior experience with the preparation of a comprehensive risk analysis indicates that substantial time and effort may be required.

While we are necessarily concerned with the potential for adverse publicity based on incorrect and misleading statements, I expect that EPA is anxious to justify its initial decision. This may present an opportunity to educate the Agency on PVC pipe production and the carcinogenic risk posed by vinyl chloride so that the Agency adopts a realistic and scientifically sound position in contrast to the exaggerated risk claims found in earlier materials.

I look forward to working with you on this matter. If you have any comments or questions, please feel free to call.

Cordially yours,



Peter L. de la Cruz

cc: Robert D. Luss, Esq.
Larry Thomas
Robert W. Sherman
Lewis R. Freeman, Jr.

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