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

March 23, 1992

TO: VI Legal Committee
VI Health, Safety and Environment Committee
VI EDC Task Force

RE: Oral Arguments

I thought you would be interested in the attached letter from Peter de la Cruz that summarizes the several hours of oral argument involving challenges to OSHA's 1989 air contaminants rule (including the petition filed by The Society of the Plastics Industry/Vinyl Institute relative to EDC.) If Peter or I can answer any questions on the memo, please let me know.

Meredith

Meredith N. Scheck
Assistant Director

MNS/pmb
cc: R. Burnett-w/o att.
P. de la Cruz-w/o att.

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LAW OFFICES

KELLER AND HECKMAN

1001 G STREET, N.W.

SUITE 500 WEST

WASHINGTON, D.C. 20001

(202) 434-4100

TELEX 49 95551 "KELMAN"

TELECOPIER (202) 434-4646

February 28, 1992

WRITER'S DIRECT DIAL NUMBER

(202) 434-4141

Mr. Robert Burnett
The Vinyl Institute
Wayne Interchange Plaza
155 Route 46 West
Wayne, New Jersey 07470

Re: OSHA PEL Oral Argument

Dear Bob:

On February 19, 1992, the United States Court of Appeals for the Eleventh Circuit, which sits in Atlanta, heard about 2 1/2 hours of oral argument involving challenges to the Occupational Safety and Health Administration's (OSHA) 1989 air contaminants rule. We participated as part of our challenge to the ethylene dichloride (EDC) portion of the rule.

A summary of the arguments presented and the court's questions follows. It is difficult, if not impossible, to predict what action the court will take. A decision is not expected for some months.

A. Administrative Proceedings

In June 1988, OSHA published a proposal to amend its air contaminants rule, which lists permissible exposure limits (PELs). 53 Fed. Reg. 20960 (June 7, 1988). This proceeding is frequently referred to as the "PEL rulemaking." A hearing was held before an administrative law judge in August 1988 and the final rule was issued in January 1989. 54 Fed. Reg. 2332 (Jan. 19, 1989).

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Many petitions challenging the rule were filed and consolidated for hearing before the Eleventh Circuit. During the pendency of the appeal, many of the challenges were settled by OSHA. For example, SPI's petition initially addressed both styrene and EDC. We settled the styrene issues and dropped that portion from our case. For EDC, we reached a partial settlement clarifying what types of respirators can be used. In exchange, we did not pursue a challenge based on economic and technological infeasibility. Rather, we focused on the lack of support in the record for OSHA's health-based decision.

The true nature of our challenge is a disagreement with OSHA's interpretation or misapplication of the various scientific data used to promulgate the PELs. Since courts are particularly disinclined to scrutinize an agency's scientific decisions, we try to restate the objection in more traditional legal terms, such as lack of substantial evidence or failure to make or adequately support statutorily required findings. In many ways, this is the primary weakness in the judicial review of this type of rulemaking.

B. Summary of Arguments

The three-judge panel consisted of Judges Fay, Cox, and Johnson, who were appointed by Presidents Ford, Reagan and Carter, respectively. The Court began by hearing industry challenges to the rule.

1. <u>Generic Challenges</u>

Challenges to the rule as a whole focused on the lack of support in the record for the statutory findings OSHA is obligated to make. OSHA must examine the presence of significant risk which is reduced or eliminated by the new standard, together with a demonstration of the standard's economic and technological feasibility. Industry also noted that the seven month timeframe for this rulemaking did not provide an adequate opportunity to assess and comment on the data for all 428 substances. Judge Fay remarked that this was the first time in his 21 years on the bench that petitioners had complained about the government working too fast.

The panel seemed to have little problem with OSHA relying on either the American Conference of Governmental Industrial Hygienist (ACGIH) or National Institute for Occupational Safety and Health (NIOSH) recommendations, despite the fact that neither of these organizations are required to make the same factual determinations as OSHA to support their standards.

2. Substance - Specific Challenges

After the generic challenge, arguments relating to six substances were presented. These were: sulfur dioxide, nitrogen dioxide, welding fumes, ethylene dichloride, perchlorethylene, and nickel carbonyl. In general, the arguments on individual substances detailed specific instances where OSHA ignored or was unaware of relevant data, failed to use the latest available evidence, or used conclusory language without describing how the agency reached its decisions. Counsel for each of these substances argued that the levels had been inpermissibly reduced. Petitioners for nickel carbonyl, however, maintained that the PEL should have been raised for that substance.

3. EDC

My oral argument addressing the ethylene dichloride standard focused on the two NIOSH documents on which OSHA heavily relied in reducing the PEL from 50 to 1 part per million (ppm). The NIOSH documents were issued in 1976 and 1978. The 1976 document focused on liver, kidney and other non-carcinogenic effects. That document recommended an exposure limit of 5 ppm.

While OSHA regulated EDC on the basis of its non-carcinogenic effect in 1989, it obviously cannot rely on the 1976 NIOSH document to support the 1 ppm final rule. That support, if any, must come from the 1978 NIOSH document which lowered the recommended exposure limit from 5 to 1 ppm based on an animal forced-feeding study. In three or four double-spaced pages, NIOSH concluded that EDC was a carcinogen and recommended 1 ppm as the lowest level of detection. That type of analysis is facially inadequate for an OSHA standard under the U.S. Supreme Court's decision in the 1980 Benzene case. Industrial Union Depart., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980). Thus, OSHA cannot rely on the 1978 NIOSH document to support a 1 ppm PEL. Rather, OSHA is obligated, as a matter of law, to analyze the risk and demonstrate that the reduction in the PEL would eliminate or reduce that risk. For EDC, OSHA gave no explanation for its assumption that a lower limit was better.

4. OSHA Response to Industry Challenges

After the industry petitioners finished, OSHA responded. Somewhat surprisingly, OSHA initially argued that only seven specific substances had been challenged and that the petitioners lacked standing to challenge the rule as a whole. (During rebuttal, counsel for the American Iron and Steel Institute (AISI) clearly stated that they were challenging the standard as a whole and referred to specific passages in their brief listing many of the substances subject to the rule.)

Turning to the substance-specific challenges, OSHA maintained that risk analyses were not needed for non-carcinogens when studies showed effects at or near the level of regulation. Responding to the EDC claims, OSHA maintained that the cumulative effect of human and animal studies supported its conclusions. OSHA indicated that there was no lack of specific data because they had surveyed 5,700 companies and had four digit SIC code data available.

While not stating so explicitly, OSHA's position was that its interpretation is the correct one, and that the Court must defer to OSHA's scientific expertise in these matters. This court seemed particularly disinclined to scrutinize OSHA's health conclusions.

5. Union Challenges

After taking a brief recess, the court reconvened to hear the AFL-CIO and other labor challenges to the standard. Counsel for the AFL-CIO said that OSHA's evidentiary and factual findings were sound but that those findings supported establishing PELs at lower limits than those actually adopted. Reiterating a message raised in industry's generic challenge to the standard, union counsel also accused OSHA of charging ahead and claiming that time didn't permit a more careful analysis despite the lack of any legal deadlines. The Union also objected to the lack of specific monitoring and medical surveillance provisions in the air contaminants rule.

Union counsel complained about OSHA's permitting the use of respiratory protection to comply with the reduced PELs, in lieu of engineering controls, for several years after the standard was finalized. Under OSHA's existing hierarchy of controls, employers must first seek to attain the permissible exposure limits through engineering and work practice controls. Respirators are permissible only when feasible engineering and work practice controls will not reduce worker exposure below the PEL. When the standard was promulgated in 1989, OSHA indicated that respirators could be used generally until December 1992. Because of OSHA's failure to make certain findings by December 31, 1991, the date for compliance though engineering controls was automatically extended until December 31, 1993.

During this second round of arguments, the judges seemed more alert and had additional questions. Some of the questions seemed to indicate that they were still thinking about the arguments presented earlier by industry petitioners.

6. OSHA's Response to the Union Challenges

When OSHA rose to respond to the union challenges, OSHA's counsel was greeted with a stream of questions. Both Judge Fay and Judge Cox focused on OSHA's decision to set the revised PEL above the significant risk level for a few substances. OSHA based its action on economic or technological feasibility grounds. However, the court seemed dissatisfied with the lack of record evidence supporting OSHA's infeasibility conclusions.

When the final rule was issued in 1989, OSHA indicated that it would proceed to reexamine the four substances for which the PEL did not eliminate significant risk. Counsel for OSHA indicated that the Agency had been working in-house to reexamine the substances. Judge Cox commented that, if the rule making procedure is simple enough to act on 428 substances in seven months, he could not understand why there was no visible action on four substances after three years. Some of the judges' questions also suggested lack of consistency in OSHA's response to industry and labor challenges.

7. Industry Intervenors

After counsel for OSHA concluded, industry intervenors presented short statements in support of the new PELs for several substances. These included: trichlorethylene (TCE), carbon tetrachloride, chloroform, wood dust, silica (crystalline quartz), mineral fibers, methylchloride, toluene diisocyanate (TDI), and perchlorethylene. (If you are paying close attention, you will note that one industry group argued that the PEL for perchlorethylene was too high, while another industry group argued in support of the new PEL. Indeed, much of the discussion focused on perchlorethylene.)

C. Anticipated Court Action

Hopefully, the Court will be more expeditious in rendering an opinion then it has been in managing the case, which has now been pending about two years. While purely a guess, we might anticipate a decision by late this year.

There are three basic options open to the court:

(a) Invalidate the entire standard and remand it to OSHA for reconsideration;

(b) Affirm the entire standard;

(c) Vacate the PELs for some of the specific substances challenged on appeal while leaving the overall rule intact.

Based on the argument, my best guess is that the Court will affirm the standard generally while remanding a few substances to OSHA for reconsideration.

* * * *

I trust that this will provide an adequate report on the oral argument. Members of the EDC Task Group as well as the Health Safety and Environment Committee and Legal Committee may be interested in these developments.

If you have any comments or questions or if I can be of any additional assistance, please let me know.

Cordially yours,

Peter

Peter L. de la Cruz

cc: Larry Thomas
Lewis R. Freeman, Jr.
H. Patrick Toner