TAB H

KELLER AND HECKMAN

REPORT

TO THE

VINYL INSTITUTE

November 20, 1986

VEV-239676

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This report summarizes Keller and Heckman activities since the preparation of our last report for the August 1986 Executive Board meeting. Of particular interest are the Environmental Protection Agency's (EPA) amendments to the vinyl chloride standard and our victory in litigation brought by the Natural Resources Defense Council (NRDC) challenging EPA's withdrawal of the 1977 proposed amendments to the vinyl chloride standard. Additionally, the Food and Drug Administration (FDA) is raising environmental concerns on disposal of vinyl chloride polymer and copolymer food packaging materials in the context of the PVC rulemaking. In a related area, our efforts to clarify the Occupational Safety and Health Administration's (OSHA) labeling requirements for vinyl chloride polymers under the hazard communication standard led to a meeting with OSHA in October; we are awaiting the Agency's responses. Matters we have pursued specifically for the Vinyl Institute as well as SPI-related actions are discussed below.

A. FOOD AND DRUG ADMINISTRATION

1. Environmental Issues Concerning FDA's PVC Proposal Resurrected

State solid waste officials advised us that FDA has been requesting information on the anticipated environmental impact of the Agency's February proposal confirming the safety of vinyl chloride polymers and copolymers for food contact applications. 51 Fed. Reg. 4,173 (Feb. 3, 1986).*/ This prompted us to contact Dr. Buzz L. Hoffman, Chief, Environmental Impact Section, in FDA's Center for Food Safety and Applied Nutrition. Mr. Hoffman indicated that FDA was evaluating the comments, particularly the Environmental Protection Agency's (EPA) letter suggesting that FDA needed to study the environmental impact issue further, and that FDA's Finding of No Significant Impact (FONSI) needed further support. When asked how we might assist in this evaluation process, Mr. Hoffman suggested that any new or different information available to industry would be helpful.

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*/ Although the comment period in the Docket formally closed in June, 1986, we recently became aware that five comments were filed in late September and early October relating solely to the environmental impact issue. The five commentors are: the Pennsylvania Department of Environmental Resources; the Environmental Defense Fund; the Environmental Action Coalition; Udall's Cove Preservation Committee, Inc.; and Konheim and Ketcham, an environmental consulting firm.

While preparing a draft set of supplemental comments, we became aware of a growing sentiment within FDA that the environmental impact associated with clearance of PVC would not be non-significant. We responded promptly by immediately filing comments that we hope will put the environmental impact issue in a better perspective and stem the tide that seemed to be building in favor of a full-blown Environmental Impact Statement (EIS). Briefly, these stop-gap comments observe that FDA improperly evaluated the magnitude of the impact because the Agency compared a projected food contact market for PVC in 1988 against the total market for all PVC in 1983. When 1983 data and 1988 projections are compared against appropriate reference data, the impact of FDA clearance is much less significant than FDA assumed. We plan to discuss the environmental impact issues with policy-making officials in FDA and file any supplemental comments that will help support a decision against conducting an EIS.

Besides the environmental issue our draft includes suggested regulatory language concerning the basis for calculating residual vinyl chloride monomer levels. In our original comments, we were concerned with proposed language that would require determination of residual vinyl chloride monomer (RVCM) levels according to the percentage of the vinyl chloride polymer component of the food contact article. We argued vigorously that the RVCM level should be determined as a percentage of the entire food contact article rather than as a percent of the vinyl chloride component alone. Based on our assessment of the situation, we now consider it necessary to follow FDA's lead and base the vinyl chloride monomer limitation on the weight of the part of the package (e.g. a layer) that is made from vinyl chloride polymer. However, we are attempting to make clear what we believe to be FDA's intent, that is that the basis for calculating should not be the weight of the vinyl chloride resin contained in such a part but, rather, the weight of the entire part. When the RVCM test cannot be feasibly applied, an extraction test senstitive to 1 part per billion (ppb) is being suggested. We have requested member company comments on our draft langugage.

B. ENVIRONMENTAL PROTECTION AGENCY

1. Court Rules Favorably in Vinyl Chloride Standard Case

The Court of Appeals of the District of Columbia Circuit rejected the Natural Resources Defense Council's (NRDC) challenge to the vinyl chloride Clean Air Act standard and affirmed the Environmental Protection Agency's (EPA) withdrawal of a 1977 proposal to amend the standard by lowering permissible emissions. Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, No. 85-1150 (D.C. Cir. Nov. 4, 1986). Besides this immediate and positive result, the decision is a landmark victory in the interpretation of Section 112 of the Clean Air Act which provides for the regulation of hazardous air pollutants. Specifically, the court held that EPA has discretion to consider economic and technological feasibility in regulating pollutants under Section 112. NRDC had argued that Section 112 does not permit EPA to consider any factor other than health effects in setting regulatory levels.

2. VI To Challenge EPA Revisions to Vinyl Chloride Standard

The Vinyl Institute plans to challenge revisions to the vinyl chloride standard promulgated by EPA on September 30, 1986. 51 Fed. Reg. 34,904 (Sept. 30, 1986). The Vinyl Institute will file a petition for review with the United States Court of Appeals for the District of Columbia Circuit and seek a stay. The offensive provisions include several definitional changes which expand the scope of the standard, impose double or treble penalties for emissions from a single event and create new requirements. EPA also failed to implement the numerical relief valve discharge provision it had proposed in 1985. We also plan to request that EPA stay the revisions and reconsider its determinations before filing with the Court of Appeals in late November. We are coordinating our efforts with the Legal Committee and the Health, Safety and Environment Committee.

3. EPA Hazardous Waste Proposal Draws Comments

Working with both the Vinyl Institute and the SPI Phenolic Molders Division, in August, we submitted comments in response to an EPA proposal to amend the manner in which certain wastes are characterized as hazardous. Under the Resource Conservation and Recovery Act (RCRA), waste is hazardous if it is specifically listed or if it exhibits one of four characteristics. The characteristics are ignitability, corrosivity, reactivity and toxicity. Toxicity had been defined as the detection of certain amounts of heavy metals or pesticides when the waste is subjected to an extraction procedure (EP) toxicity test. In June 1986, EPA proposed to substitute a new toxicity characteristic leaching procedure (TCLP) for the EP toxicity test and to expand the number of substances whose presence in the extraction solvent would cause the waste to be deemed hazardous.

The comments that were submitted to EPA in August, 1986 addressed the toxicity leaching characteristic procedure itself. That was issued in final form on November 7, 1986. 51 Fed. Reg. 40,572. Additional comments were filed on EPA's other proposals relating to the proposed listing of other substances such as vinyl chloride and the assumptions on which wastes are characterized as hazardous due to toxicity. Among other things, these comments indicated that the proposed rules lack a firm basis in statutory or scientific authority. The comments were submitted on September 26, 1986 and an addendum providing more technical data was submitted on October 20, 1986.

EPA is currently evaluating comments submitted on the proposal. A final rule is not expected until the Fall of 1987.

4. Land Ban Disposal Rule Issued

On November 7, 1986, the EPA published a final rule implementing congressionally mandated prohibitions on land disposal of certain hazardous waste. 51 Fed. Reg. 40,572. In its notice, EPA established, among other things, procedures for setting treatment standards for hazardous wastes, for granting nationwide variances from statutory effective dates as well as evaluating petitions for a variance from the treatment standard.

Specifically, EPA has promulgated treatment standards and effective dates for hazardous wastes included in the first phase of land disposal prohibitions under the Resource Conservation and Recovery Act (RCRA). These include certain dioxin and solvent-containing hazardous wastes. This is the same document in which EPA published the Toxicity Characteristic Leaching Procedures (TCLP) for use in determining whether these wastes meet applicable treatment standards. The rule became effective on November 8th.

C. OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

1. PVC Labeling Dispute Leads to Meeting With OSHA

As part of its implementation of the Hazard Communication Standard, OSHA has been conducting compliance inspections and reviewing product labeling and material safety data sheets (MSDS). As a result of these inspections, some polyvinyl chloride (PVC) producers and compounders have received citations for failure to label PVC resin or compound as a carcinogen under OSHA's vinyl chloride and hazard communication standards or for failure to indicate PVC's carcinogenicity in MSDSs. We have been attempting to obtain a letter from OSHA confirming that: (1) PVC itself is not a hazardous chemical under the hazard communication standard and (2) vinyl chloride homopolymer and copolymer resins and compounds do not trigger the labeling and training provisions of the OSHA vinyl chlroide standard when no exposure to vinyl chloride monomer at or above the action level of 0.5 ppm is anticipated.

In a meeting on October 23rd with Frank A. White, Deputy Assistant Secretary for Occupational Health, and other OSHA staff members,we again

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presented our views on this issue. At the meeting, staff member Dave Smith suggested that we forward to him copies of any recent citations issued by OSHA inspectors relating to this matter for his coordinated handling. We agreed to provide the Agency with the information and are requesting that any pertinent OSHA citations be forwarded to us. We are awaiting the Agency's response on our request.

* * *

In October, we met with the National Paint and Coatings Association (NPCA) to discuss OSHA's May directive requiring "target organ effect labeling" for hazardous materials. Apparently, in the May directive OSHA has elected to view labeling requirements under the HCS as the primary, if not the sole source of hazard information. In so doing, the Agency has moved significantly from a performance-oriented standard that incorporates all aspects of the hazard communication program to a comprehensive labeling standard. NPCA subsequently met with OSHA. The Agency was sufficiently receptive to NPCA's concerns so that the association has decided to work with OSHA to try to reach agreement.

2. Court Upholds Federal Law Over Right-To-Know Law in Akron, Ohio, But Not in Pennsylvania

The extent to which the Hazard Communication Standard, 29 C.F.R. § 1910.1200 (HCS or the Standard), promulgated by the Occupational Safety and Health Administration (OSHA), preempts, inconsistent state "right-to-know" laws has previously been the subject of several court rulings. Earlier this year, however, those segments of industry which produce and utilize hazardous chemicals were startled by a federal court ruling which held that local "right-to-know" laws are not displaced by the Federal Standard. Due to the serious consequences of this ruling, which involved the City of Akron's right-to-know law, SPI joined other industry groups in filing a brief in the appeal of that decision.

As the result of these efforts, the lower court decision has been reversed. In a ruling issued on September 17, 1986, Ohio Manufacturers Association v. City of Akron, No. 86-3191 (6th Cir. 1986), the U.S. Court of Appeals for the Sixth Circuit reversed the decision of U.S. District Judge Ann Aldrich, and held that the Akron ordinance is preempted to the extent that it attempts to regulate employee safety in the manufacturing sector.

Nevertheless, a judicial decision on this issue in Pennsylvania threatens to make right-to-know compliance substantially more difficult for chemical manufacturers and suppliers doing business in that state. On December 12, 1985, the U.S. District Court for the Middle District of Pennsylvania held that

Pennsylvania's Worker and Community Right-to-Know Act (Act), 35 P.S. § 7301.1, et seq, is preempted by federal law to the extent that it requires employers in the manufacturing sector to identify and disclose information concerning workplace hazards. Manufacturers' Association of Tri-County, et. al. v. Knepper, 623 F. Supp. 1066 (M.D. Pa. 1985). The court ruled that the Act, however, is not preempted as it applies to employers in the non-manufacturing sector, or to the disclosing of information regarding environmental hazards, except for labeling requirements in the manufacturing sector. This decision was then appealed and partially reversed in a recent ruling. Manufacturers Association of Tri-County v. Knepper, Nos. 86-5032, 86-5066 (3d Cir. 1986). But, the U.S. Court of Appeals for the Third Circuit held that significant portions of the Pennsylvania right-to-know law -- which features burdensome "universal labeling" provisions -- are not preempted by OSHA's Hazard Communication Standard.

D. FLAMMABILITY AND COMBUSTIBILITY ISSUES

1. New York Council Adopts a Proposal Requiring Filing of Combustion Toxicity Data

On October 23, 1986, in Albany, New York, the New York State Uniform Fire Prevention and Building Code Council (Council) voted affirmatively on the toxicity data filing proposal which has been the subject of much heated controversy. The newly adopted regulation includes a disclaimer provision, language allowing representative testing and the deletion of the "no more toxic than wood" provision in the current code. The regulations are now being sent to the Secretary of State whose approval is expected in late November. We have been working with the VI in evaluating the potential of a judicial challenge and the substitution of a less offensive testing requirement.

E. MISCELLANEOUS

1. Hearings Held on Proposed Sacramento Pipe Ban

On November 17, 1986, the Toxic Substances Commission of the Sacramento City Council initiated a hearing on a proposed amendment to the City Building Code to ban plastic pipe for installation in potable water distribution systems; drain, waste and vent systems; building sewers; and plastic conduit in electrical installations in buildings. Councilman Joe Serna introduced the proposal on behalf of the plumbers' and firefighters' unions. The Ad Hoc Pipe Resin Producers Committee coordinated witnesses who testified on behalf of industry. Topics that were covered include leaching, permeation, worker health and fire issues. Additional hearings are scheduled for December 1, 1986, at which builders, realtors and others opposed to the proposed ban are expected to testify.

SPI submitted comments on September 19, 1986 and reply comments on October 13, 1986 in this proceeding. In our reply comments, we indicated that the unions have presented biased versions of scientific studies on the safety of plastic pipe. Further, the evidence they submitted does not justify the ban, including data on projected job dislocations stemming from the introduction of this new and innovative product.