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"INDLAW"

July 18, 1978

Joseph E. Hadley, Jr., Esquire
Keller & Heckman
Suite 1000
1150 17th Street, N. W.
Washington, DC 20036

Dear Joe:

Re: California's 0.010 ppm Ambient
Vinyl Chloride Standard.

We have been asked (1) to provide the PVC Safety Group with our preliminary thoughts relating to the possible effects on the vinyl chloride industry as a whole resulting from the 0.010 ppm ambient standard for vinyl chloride recently adopted by the California Air Resources Board, and (2) to report on a June 28 meeting between Goodrich and Stauffer, which we attended, concerning the present status of and possible challenges to the California standard.

Our review of the California standard and our involvement in the proceedings that led to its adoption have been limited. We initially reviewed the hearing notices and some of the staff documentation, to assist in drafting SPI's statement that was presented by John Barr at the April 27 hearing. We also have reviewed correspondence from Mr. John Stohlton, SPI's associate counsel in California, and a June 2, 1978 opinion letter by Mr. Jack Swafford, who represented Goodrich and Stauffer in the administrative proceedings. We have not been asked to conduct, and have not yet undertaken, a complete review of the administrative record compiled to date, nor have we yet undertaken legal research and analysis on the validity of the California standard. Accordingly, we do not have sufficient information on which to base an opinion concerning the standard or the chances of overturning it.

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This letter will review (1) the California standard and our understanding of the present status of efforts to challenge it, (2) some possible dangers of the California standard for the industry as a whole, (3) possible grounds for challenging the standard which could be researched and analyzed if desired, (4) considerations for administrative reconsideration or judicial review of the standard, and (5) recommendations for action by the PVC Safety Group.

I. Background

Enclosed is a copy of resolution 78-30 of the California Air Resources Board, dated May 24, 1978, that previously was circulated to the PVC Safety Group by Joe Hadley's June 14 letter. That resolution purports:

- to adopt "an ambient air quality standard for vinyl chloride, of 0.010 ppm, twenty-four hour average";
- to adopt the standard "to implement and interpret" Section 41700 of the Health and Safety Code (a nuisance-type general emission limitation quoted below) and "to establish a basis for immediate enforcement action if warranted"; and
- to specify a measurement method that, we are informed, does not expressly require ambient measurements to be made at or beyond the fence line.

The resolution also adds the standard to its regulations, with comments stating that the 0.010 ppm standard "is not a threshold level and does not necessarily protect against harm," and that "[a]mbient concentrations at or above the standard constitute an endangerment to the health of the public."

The preamble to the resolution states, among other things, that:

- "the Board has received and reviewed a substantial body of evidence and testimony . . . relating to the adverse health effects including carcinogenic, mutagenic and teratogenic effects, of vinyl chloride";

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- scientists do not agree whether threshold levels exist or can be specified for chemical carcinogens;
- "[t]here is no known level of ambient concentration of vinyl chloride below which an endangerment of the public health and welfare does not occur";
- 0.010 ppm is the lowest ambient concentration at which reliable measurements can be made; and
- EPA's vinyl chloride standard "does not assure that community exposure to vinyl chloride will be limited to any specified level."

With respect to the prospects for overturning the standard, the opinions we have received to date have not been optimistic. SPI's California counsel concluded in his May 25 letter:

"There is probably sufficient evidence in the record to support the need for a standard and the pegging of the standard at .01 parts per million."

Counsel for Goodrich and Stauffer in the administrative proceedings, in his June 2 letter, concluded:

"We assess the chances of invalidating the standard of .01 ppm as slight, the chances of invalidating the 24-hour averaging period as fair, and the chances are good for obtaining a declaration that the standard is neither self-executing as a standard that can be violated, nor self-executing in the sense that it can be made the basis for a prosecution for violation of Section 41700 of the Health and Safety Code [the nuisance-type general emission limitation]."

He further concluded that "the chances appear to be good" for restraining the state board from directly enforcing the standard, but that the South Coast Air Quality Management District (the "South Coast District"), in which the Goodrich and Stauffer vinyl chloride plants are located, could adopt and enforce implementing rules and regulations.

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II. The June 28, 1978 Meeting

The June 28 meeting to discuss the status of and possible challenges to the California Standard was attended by representatives of Goodrich and Stauffer and by counsel who represented the companies in the agency proceedings. We were asked to attend the meeting to obtain information, to comment on strategy issues that might affect the entire vinyl chloride industry, and to report to the PVC Safety Group on how the California standard might affect the industry and on the status of current efforts to comply with it or to overturn it.

We were informed at the meeting that the South Coast District is preparing to draft regulations to tighten its emissions standard, which we understand now is essentially identical to EPA's existing standard. The District's staff has indicated concern over leak detection programs, the timing of maintenance and repairs, stripping levels, and emissions that the staff views as "fugitive." The companies involved may meet with the staff to discuss the existing EPA standard and, possibly, additional emissions controls that the staff may be interested in exploring.

The discussions at the June 28 meeting covered some possible substantive and procedural challenges to the California Air Resources Board resolution; the necessity for and advisability of seeking administrative reconsideration and the procedures for doing so; whether to try to obtain immediate judicial review or to await enforcement proceedings; and the type and extent of possible SPI participation. Some of these issues are outlined below, along with the primary issues that could have a national impact on the vinyl chloride industry. The companies decided to formulate their individual plans for challenging the standard and for possible discussions with the South Coast District, and to advise SPI of the nature of the participation they would like from the PVC Safety Group. The companies' requests are discussed in Section VI, below.

III. Possible National Implications
of the California Standard.

The California ambient standard raises at least three major issues that may pose a danger for the whole vinyl chloride industry.

- A. Whether there is sufficient evidence in the record to demonstrate a relationship between undesirable effects and 0.010 ppm ambient vinyl chloride concentrations.

A primary threat of the California standard to the vinyl chloride industry is that, because of the California statutory language, federal agencies, other states and environmental groups could view or cite the standard as a determination that undesirable health effects result from exposure to 0.010 ambient vinyl chloride concentrations, thereby increasing pressure on EPA to lower its standard or on other states to adopt their own standards.

Section 39606 of the Health and Safety Code requires the California Air Resources Board to "[a]dopt standards of ambient air quality" which must be adopted "in consideration of . . . effects on the economy", among other factors. (See BNA Env. Rep., State Air Laws at 321:0106). The 0.010 ppm vinyl chloride standard purports to be such "an ambient air quality standard."

The California statutes define "ambient air quality standards" in the following terms:

"Ambient air quality standards" mean specified concentrations and durations of air pollutants which reflect the relationship between the intensity and composition of air pollution to undesirable effects established by the state board or, where applicable, by the federal government. (Health and Safety Code §39014; BNA State Air Laws at 321:0103).

Ambient air quality standards are specific concentrations and durations of air pollutants which reflect

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the relationship between the intensity and composition of pollution to undesirable effects." (California Admin. Code, Title 17, §70100(a); BNA State Air Laws at 321:0506).¹

These statutory definitions appear to establish stricter requirements than the requirements EPA must meet in establishing a national emission standard for a hazardous air pollutant under Section 112 of the Clean Air Act. Section 112 permits the Administrator to establish a standard "at the level which in his judgment provides an ample margin of safety to protect the public health from such hazardous air pollutant."

The California definitions of "ambient air quality standards", by contrast, appear to require that a relationship be established between 0.010 ppm (the intensity and composition of pollution) and "undesirable effects". Because of this definition, if the California standard is not overturned, it could be viewed as an official determination that such a relationship exists. This could affect attempts to lower EPA's existing standard or attempts to set ambient standards or lower emission standards in other states.

Although we have not reviewed the record of the California proceedings, we are not aware of any information from the Health Committee of the PVC Safety Group that would indicate any direct relationship whatsoever between 0.010 ppm vinyl chloride concentrations and any undesirable health effects. Our lack of evidence supporting such a relationship raises the questions whether the California record contains evidence of such a relationship and whether the standard meets the statutory requirements. We have not yet reviewed the California cases, but the definitional language indicates that the Board may have the burden of establishing a relationship. The Board's resolution cites a lack of scientific agreement over whether a threshold level can be specified,

¹ Although the Air Resources Board may adopt rules and regulations revising these definitions to conform with federal laws or regulations, we are not aware that any such changes have been adopted. (See Health and Safety Code, §39601(b); BNA State Air Laws at 321:0105).

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and it is not clear whether the Board would attempt to uphold the standard as reflecting such a relationship or would argue that the statute permits it to establish standards even where a relationship cannot be demonstrated.

The Board's resolution also purported to adopt the standard "to implement and interpret" Section 41700 of the Health and Safety Code, which provides:

"Except as otherwise provided in Section 41705 [not applicable here], no person shall discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or which endanger the comfort repose, health or safety of any such persons or the public, or which cause, or have a natural tendency to cause injury to business or property." (BNA State Air Laws at 321:0124).

Meeting the causation or endangerment requirements of this language would be easier for the Board, of course, than showing that the 0.010 ppm standard "reflect[s] a relationship between the intensity and composition of air pollution to undesirable effects", but arguably still could require some relationship between the quantities involved and the alleged effect.

- B. Whether the existence in California of separate ambient and emission standards could lead to ambient standards in other states or could affect EPA's action on the proposed amendments to EPA's existing standard.

If the California standard is not overturned, the vinyl chloride plants located there would be subject both to the 0.010 ppm ambient standard and to EPA's existing standard and the similar local district's rules. The PVC Safety Group's concern over having to meet both emission standards and ambient-type requirements was reflected in SPI's comments on the emissions offset provisions of the proposed

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amendments to EPA's existing National Emission Standard for Vinyl Chloride.

Ambient standards pose potential problems to the industry beyond those resulting from emission standards. Ambient levels depend on a number of factors outside the control of a company or plant manager, such as particular weather conditions, or the emissions of other vinyl chloride plants. Ambient standards therefore would raise difficult questions over the extent to which each of the nearby plants would have to reduce emissions to achieve a reduction in ambient levels. Dual standards, of course, would pose additional risks of non-compliance.

- C. Whether local emission standards, tightened in attempting to obtain compliance with the 0.010 ppm ambient standard, eventually would be reflected in EPA's national emission standard.

Specific emissions controls incorporated into the South Coast District's rules could focus attention on aspects of EPA's existing standard that might then be perceived as inadequate, possibly leading to additional controls in other states or to amendments in EPA's standard.

The South Coast District already has evidenced interest in additional controls on what the staff considers "fugitive" emissions from dryer stacks, in lower stripping limits for some types of resins, and in gas holders for relief valve discharges. The Manufacturing Technology Committee's discussions on possible SPI responses to the proposed amendments to EPA's existing standard demonstrated that some companies would strenuously object to further resin categorization and lower stripping limits.

IV. Possible Grounds for Challenging the California Standard.

There appear to be several possible grounds for challenging the ambient standard. We have not researched these arguments, and therefore have no basis at present for

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judging the chances for success. Accordingly, we will list some of the potential arguments, some of which were raised by counsel who represented Goodrich and Stauffer at the hearing, and some of which we believe merit further legal research and additional review of the record.

- (1) Whether the Air Resources Board's resolution adopted an "ambient air quality standard" which reflects a relationship between 0.010 ambient vinyl chloride concentrations and undesirable health effects.
- (2) Whether there was sufficient evidence in the record to support, separately and in combination:
 - (a) the 0.010 ppm standard;
 - (b) the twenty-four hour averaging period;
 - (c) the apparent absence of express requirements that measurements be taken at or beyond the fence line.
- (3) Whether the State Department of Health's recommendations were properly arrived at and are supportable.
- (4) Whether the Board has authority to adopt a resolution incorporating an ambient standard to "implement and interpret" Health and Safety Code Section 41700, the nuisance-type general emission limitation. If so, whether there was sufficient evidence to support the necessary determinations.
- (5) Whether the Board has other general or implied authority to adopt the standard.
- (6) Whether the agency considered all relevant evidence concerning the effect on the economy of the 0.010 ppm standard, the 24 hour averaging period and the measurement methods.

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(7) Whether the Board's procedures failed to provide adequate opportunity for meaningful participation.

(8) Whether the Board was illegally constituted.

If SPI were to become involved in challenging the standard, we believe that its efforts should be focused on the particular statutory provisions relating to health effects and economic impact, and on whether there is adequate support in the record to support the necessary findings.

V. Procedures and Timing.

SPI's California counsel's June 8 letter referred to Sections 11426 and 11427 of the Government Code which permit petitions "requesting the adoption, amendment, or repeal of a regulation"; and permit "[a]ny interested person . . . [to] request reconsideration of any part or all of a decision of any agency on any petition submitted." Such reconsideration requests must be filed not later than 60 days after the date of the decision.

At the June 28 meeting, counsel who represented companies in the agency proceedings indicated that this administrative review route is not necessary, but that if it were chosen, it would involve filing an initial petition requesting repeal of the standard followed by a later petition for reconsideration.

We have not researched the issue to determine whether these provisions would apply to the instant proceedings. At the June 28 meeting, the companies discussed the options of filing a petition to repeal the standard, followed by a petition for reconsideration and possible judicial review; direct judicial review challenging the standard; awaiting possible enforcement action and challenging the validity of the standard at that time.

We understand that the companies have undertaken to investigate further the advisability of by-passing reconsideration or review by the Air Resources Board. If the 60 day limit on reconsideration petitions is applicable here,

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however, action may have to be taken in the near future. Sixty days from May 24, the date of the resolution, would be Sunday, July 23. Sixty days from May 30, indicated on the resolution "approved for final May 30, 1978" would be Saturday, July 29. We were informed at the June 28 meeting that the California standard was to become effective on July 14, 30 days after the resolution was filed with the California Secretary of State. Sixty days after that filing date would be Sunday, August 13. California counsel should be able to advise us just which date applies.

VI. Present Status and Recommendations for PVC
Safety Group Action.

California's 0.010 ppm ambient standard ultimately may impact the entire vinyl chloride industry by directly stimulating other state control programs or efforts to lower EPA's existing standard, or by demonstrating the ability of the California plants to meet both tighter emission controls and a strict ambient standard. To the extent that the members of the PVC Safety Group are presently concerned over these possible effects, SPI should participate, to some extent, in efforts to challenge the California standard.

In a July 11 letter to the Chairman with copies to the Steering Committee, Goodrich asked the PVC Safety Group to continue its involvement in this matter, and suggested that the Group ask SPI's counsel to define potential courses of action for challenging the standard and to prepare an opinion letter for circulation. Stauffer has advised us that they would like the PVC Safety Group to join in a court action challenging the California standard and that they have forwarded a draft complaint for SPI's review.

Although California counsel have assessed pessimistically the chances of overturning the standard, we do not think that efforts before the June 28 meeting had focused in sufficient detail on whether California law requires a specific relationship between the 0.010 ppm ambient standard and alleged adverse health effects, or on the evidence in the record concerning the effects of exposure to low ambient

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vinyl chloride concentrations. Accordingly, we believe this aspect of California law should be researched and that the administrative record should be reviewed to identify and summarize the parts of the record relating to alleged health effects from exposure to low ambient levels.

The decision now facing the PVC Safety Group is whether the Group or the companies should perform this initial legal and factual analysis. This decision is a business decision, not a legal one.

Our recommendations are as follows:

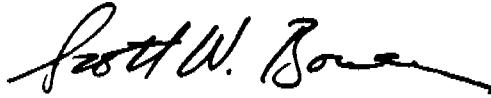
- (1) California counsel should research and analyze whether California law requires a specific, demonstrated relationship between the 0.010 ppm ambient standard and alleged adverse health effects.
- (2) California counsel should identify and summarize the parts of the agency record relating to alleged health effects from exposure to low concentrations of vinyl chloride monomer.
- (3) The PVC Safety Group should decide in the near future whether the Group will undertake to perform these initial tasks or whether they should be addressed by the individual companies.
- (4) After the initial analysis and review has been completed the Group should decide the extent to which it will participate in a court action challenging the standard. Whether we would recommend that SPI participate directly in challenging the standard to protect the industry's interests will depend on the results of the initial analyses, information on the specific courses of action that the individual companies intend to follow, and review of the draft pleadings and other material that the companies have forwarded to SPI.

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- (5) The PVC Safety Group should request Goodrich and Stauffer to keep us advised of any discussions with the South Coast District, or to invite a representative of the Manufacturing Technology Committee to attend and report to the Group on the meetings.

Cordially,

A handwritten signature in cursive script, appearing to read "Scott W. Bowen".

Scott W. Bowen

Enclosure

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