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December 11, 1974

W. A. K.

DEC 13 1974

TO: All Members of:

SPI Food, Drug and Cosmetic
Packaging Materials Committee;
General Polyvinyl Chloride Interest
Mailing List;
Ad Hoc Liquor Bottle Committee;
Plastic Pipe Institute
(Executive Board);
SPI Executive Committee;
SPI Public Affairs Committee;
VC and PVC Producers Committee

Ladies and Gentlemen:

On December 9, 1974 the Department of Justice, on behalf of the Occupational Safety and Health Administration, filed a Brief for the Respondents in connection with the case before the United States Court of Appeals for the Second Circuit. Contained in that Brief was a section arguing as to why the "Motion for a Stay Pendente Lite" we filed on behalf of SPI on December 3, 1974 should be denied. We are enclosing a copy of that portion of the Brief for Respondents because it announces the Secretary's "offer" to consider variance applications on an expedited basis.

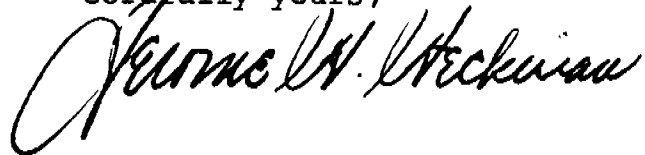
In our Reply Brief filed today we have attempted to counter the Department of Labor's argument and reaffirm our request that the stay be granted. We are also enclosing a copy of the portion of our Brief that deals with this subject. On the possibility that some of you may wish to consider using the variance procedure, we wanted to bring it to your attention as rapidly as possible in light of the December 23 cut-off date.

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We shall send you a copy of the Federal Register document mentioned in the Brief for the Respondents. In the meantime, we suggest that each of you consider your particular situation and decide, preferably in consultation with your own counsel, whether filing a variance application for your company would be a sound way to proceed.

Cordially yours,

A handwritten signature in dark ink, appearing to read "Jerome W. Heckman". The signature is written in a cursive style with a large, looping initial "J".

Enclosures

From The Brief for The Respondent
every person who submits a written comment at a rule-making hearing. The area covered by Drs. Wegman and Standaert, and the Snell Report, had previously been covered at the hearing itself, and Firestone suffered no prejudice.

IV. The Stay Motions Should be Denied.

Within the last week, SPI, Firestone, Tenneco, and Union Carbide, have moved this Court for a stay of the Secretary's standard or a stay pendente lite. Those motions should be denied.

This brief has demonstrated that vinyl chloride is a proven human carcinogen which has caused the deaths of 13 workers, and that the Secretary's standard regulating worker exposure to it is in all respects reasonable, proper, supported by the evidence, and sensible. Petitioners are unlikely to prevail on the merits, the public interest counsels against a stay, and if there is to be irreparable injury then that will flow from continued worker exposure to vinyl chloride, not from industry's obligations to effectuate the standard. The stay motions should therefore be denied. Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921, 925 (C.A.D.C. 1958); Eastern Air Lines, Inc. v. CAB, 261 F. 2d 830 (C.A. 2, 1958).

Beyond this, the Occupational Safety and Health Act contains an explicit provision which industry can avail itself of to free it from its professed dilemma. Section

6(b)(6)(A) of the Act, 29 U.S.C. 655(b)(6)(A), provides in pertinent part:

Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of the unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as practicable.

These temporary variance procedures also contemplate the issuance of interim orders suspending an employer's obligation to comply with a provision of a standard until the requested temporary variance is granted or denied. See 29 C.F.R. 1905.10(c); see generally, 29 C.F.R. 1905.1, et seq.

Despite the three months lead time which the Secretary provided, from October 1, 1974, to January 1, 1975, it may be that some in the vinyl chloride industry will nevertheless be unable to meet each provision of the standard by January 1, 1975. They should apply for a variance so the Secretary can fully investigate and examine their difficulties.

applications for a temporary variance order on an expedited basis and will grant or deny interim orders to those who apply in the shortest time consistent with reasoned decision. I am further authorized to state that:

Until such interim orders are granted or denied no applying employer will be cited for failing to comply with the permanent standard's respirator requirements unless exposure levels are above 50 ppm. It is expressly contemplated that these interim orders will be decided with rapidity; that any applicant's failure to comply with 29 U.S.C. 655(b)(6)(B) and implementing regulations by December 23, 1974 will result in dismissal of his application.

The Assistant Secretary of Labor for Occupational Safety and Health, will issue a document to this effect, with copies to all petitioners, and publish that document in the Federal Register. Copies of the document will also be delivered to this Court no later than December 13, 1974.

There is therefore no valid reason for this Court to grant a stay of any part of the Secretary's standard. Should the Secretary deny an application for a variance order, then at that point petitioners can renew their stay motions before this Court. A stay should not now be issued.

V

RESPONDENTS' BELATED REACTION TO PETITIONERS' STAY REQUEST AND SUBSEQUENT MOTION IS INADEQUATE TO PROTECT THE SUBSTANTIAL RIGHTS OF INDUSTRY AND THE PUBLIC; THE "MOTION FOR STAY PENDENTE LITE" SHOULD BE GRANTED

After receiving absolutely no response to a stay petition filed with the Secretary on November 5, 1974, on December 3, 1974, Petitioner, The Society of the Plastics Industry, among others, filed a Stay Motion with this Court. The SPI Motion was based primarily on the fact that it had determined the industry would not be able to comply with the terms of the vinyl chloride Standard because an inadequate supply of approved respiratory protective devices is available, if for no other reason. In the Brief, Respondents countered the industry stay requests on the basis that there is an adequate statutory remedy available, that is, the Petitioners should simply apply to the Secretary for temporary variance orders.^{5/}

In order to make this appear an even more appealing remedy for Petitioners' dilemma, Counsel for the Government has now informed the Court that he is "authorized to state" that, under a new document yet to be published in the Federal Register, applications for temporary variances submitted

^{5/} Brief for Respondents at 1 and 106-108.

before December 23, 1974 will be considered on an expedited basis.^{6/}

The fact is that the Secretary's commitment to receive and act upon variance applications gives little reason for industry to move with any sense of security. Even the peculiar way in which what appears to be a completely unique procedure has been communicated creates difficult problems. For example, it is hard to see how the tremendous number of companies that might require variances under the government plan can possibly receive word about the availability of a special procedure for this purpose in time to avoid their being foreclosed by the arbitrary December 23 deadline incorporated in the authorized announcement.

Even more significantly, the Secretary's proposal to handle this situation by the variance process presents the following complications or potential complications which industry, and particularly the fabricators (of which there are about 1000 which might have to file), should not have to face one by one while this appeal is pending:

1. The filing of any request for a variance is by no means a pro forma matter, nor is there any pre-assurance of such a

^{6/} Id. at 108-109.

request being acted upon in a timely or favorable fashion. This is especially the case when so many companies are facing a January 1 deadline.

2. It is impossible to understand what useful purpose would really be served in either the public or private interest by the handling of the stay problem on a piecemeal basis--applications by one company at a time, and case-by-case action on each application. The only conceivable reason for dealing with the matter in this way is presumably so that OSHA can make value determinations and reject some applications. Rejection would then cast the burden on the applicant to move for relief in the Courts, further complicating the entire situation unnecessarily.

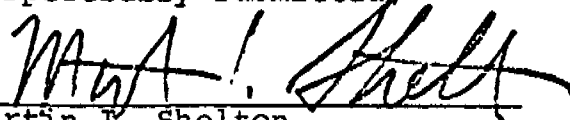
3. Particularly as regards the fabricators, the procedure the Secretary has proposed would be wasteful of scarce resources and leave many small companies in a position where they would be unable to determine what will ultimately be required of them.

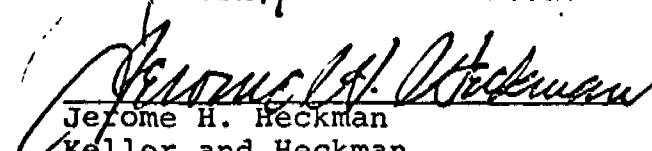
In short, the "new" proposal of the Secretary offers nothing in the way of a palatable substitute for a stay which, it is respectfully submitted, should be granted for all of the reasons outlined (and still pertinent) in the Motion for a Stay Pendente Lite filed with this Court on December 3, 1974.

VI
CONCLUSION

For the foregoing reasons, in addition to those stated in Petitioners' main Brief, the Occupational Safety and Health Administration's Occupational Exposure Standard for Vinyl Chloride which is the subject matter of the instant Petitions for Review, should be reversed and remanded. In the meantime, Petitioners' pending "Motion for a Stay Pendente Lite" should be granted forthwith.

Respectfully submitted,


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