

THE VINYL INSTITUTE LEGAL COMMITTEE

The Vinyl Institute Offices
155 Route 46 West
Wayne Interchange Plaza II
Wayne, New Jersey 07470

Tuesday
September 9, 1986
9:00 a.m.

Attendees:

Robert D. Luss, Chairman	- Occidental Chemical
Paul Bork	- Dow Chemical
Phil Carey	- Vista Chemical
Sherry Carr	- CertainTeed
Peter de la Cruz	- Keller and Heckman
Greg Rutman	- BFGoodrich
Roy Gottesman	- The Vinyl Institute

I. Introduction and Approval of Minutes

The meeting was opened by Chairman, Robert Luss at 9:05 a.m.. Self-introductions followed in which the participants briefly outlined their experience, backgrounds and current responsibilities in their respective organizations.

The minutes of the committee meeting of May 27th were approved on motion by Phil Carey, seconded by Greg Rutman.

II. Legal Counsel's Report

Peter de la Cruz provided a report by the Institute's legal counsel on the following matters:

1. NRDC vs. EPA - There has not been a lot of change in this matter since the last meeting. The case has been briefed and argued in the D.C. Circuit Court and a decision could be any time between "today" and "next year".
2. NRDC vs. Thomas - This case in the Southern District of New York Court deals with EPA's notice of "intent to list" under Section 112 of the Clean Air Act. The case has been briefed, but proceedings have been delayed by the trial judge due to a crowded court calendar.

3. EPA Proposal To Amend The Vinyl Chloride Standard - Finalization of this is being handled by the EPA staff at Research Triangle Park. According to staff there, the proposal is "in red border review", and publication is expected in the Federal Register in September or October. Mr. de la Cruz indicated that he is skeptical that this time schedule would be met and would more likely expect something by the end of the year. Although Earl Salo in the EPA general counsel's office indicated he saw no reason to delay publishing this proposal pending the decision in the D.C. Circuit Case (NRDC vs. EPA), Mr. de la Cruz feels that EPA may wait until this case is decided as it is under no pressure to push forward on this standard.

Mr. de la Cruz feels that the Vinyl Institute position is good in both NRDC court cases.

4. New York State Toxicity Databank - There was discussion on the most recent developments involving the New York State Code Council on the Toxicity Databank. Roy Gottesman distributed copies of the Keller and Heckman report to the SPI Board dated August 18, 1986, which provided a good chronology of events to this point. Also distributed was a copy of Roger Bernstein's letter of August 21st, which updated the actions of the Code Council including a disclaimer on the toxicity tests, the intention to do categorical testing, and a proposal to eliminate "no more toxic than wood" language. A subcommittee of the Code Council is to meet during September to finalize these changes, and the Code Council itself will meet in October. Mr. de la Cruz indicated that he believes that the Code Council will have to act in October. If it is not acted upon at that time, it will not be possible for the Code Council to meet their statutory requirements of having a regulation in place in December.

In view of the proposed disclaimer, a meeting was held on September 8th involving SPI staff and Keller and Heckman counsel, but a final decision has not been made with regard to a potential law suit. Mr. de la Cruz reviewed the options relating to a law suit. It appears that an Article 78 proceeding may be limited to a review on the record. An administrative review on the record could take as much as a year and the standard would be that the Code Council's actions were "arbitrary and capricious". Also, an argument could be made that the Code Council action is "ultra-vires" in that the legislation directed the Code Council to determine whether there were reasonable toxicity testing procedures and to establish performance standards. We could also seek a "de novo" review.

With regard to the September 8th meeting, Mr. de la Cruz indicated that he learned that there was not much positive response for initiating a suit.

It was agreed that a final decision cannot be made before the October Code Council meeting results in final language.

Mr. de la Cruz will send out the Keller and Heckman analysis which provides a basis for a potential challenge to the New York State Proposal.

When the final language of the Code Council becomes available in October, this will be reviewed by the Legal Committee, which at that time, will make its recommendation to the Vinyl Institute Board. It will get input from other affected committees, viz. the Market Development Committee and the Technical Committee.

5. New York Toxic Tort Reform - Mr. de la Cruz reviewed this recently passed legislation in New York. He has been in contact with three insurance associations, but no cases involving PVC have yet been seen. It is anticipated that there will be some "in-fighting" among the insurance companies as to whose responsibility it is to defend cases which may be brought. None of the insurance company associations are aware of any litigation involving PVC. There have been 7 cases filed (5 new and 2 re-filed) relating to diethylstilbestrol (DES). There are 8 new asbestos cases and 200 pending cases which have been revived that are being handled by the Wellington Group. It is expected the constitutional arguments will be made in these cases involving an "unjust taking" being raised as a defense, but a full legal analysis is not yet available.

At the present time, these cases are moving along slowly, but it was agreed that Mr. de la Cruz should attempt to obtain the legislative history on this bill. Mr. Bork pointed out that the bill relates to "latent effects of PVC" and not to the possible health effects of combustion products from PVC, and as such, this may be an argument to be raised in any legal cases. In addition to obtaining the legislative history on the bill, Mr. de la Cruz is to continue to monitor the activities of the insurance companies.

6. Plastics Pollution In The Environment - There was brief discussion on federal legislation relating to plastics pollution in the environment, including the Plastics Waste Reduction Act of 1986, and the legislative briefing of congressional staff on August 4th in Washington. The need to educate legislative assistants and members of the legislators on the facts concerning degradation of plastics and proper disposal is obvious.

III. Regulatory Agency Matters

Regulatory agency matters were discussed as follows:

1. Food and Drug Administration - Mr. de la Cruz indicated that the comment period on the FDA Proposal relating to PVC packaging closed in June, and Keller and Heckman attorneys have had informal discussions with FDA. They have reached an agreement in principle with the Agency to use a migration-type test where the RVCM test is not applicable. It is expected that a tentative agreement will be reached within the next three or four weeks, and that a finished

proposal might be seen within 4 months. There have been no consumer or environmental group or opposition to this proposal. The Bureau of Alcohol, Tobacco and Firearms (ATF) might not approve PVC for liquor bottles until the FDA approval for packaging is published. However, a letter will be filed shortly with ATF by Keller and Heckman asking them to go forward with such approval. This is being done as a means of continuing the pressure for such approval from ATF.

2. OSHA - There is considerable concern on the OSHA Label and Hazards Communication Standards as there is Agency confusion with regard to labelling requirements on PVC compound and resin. While industry practices are mixed, there does not appear to be any question that PVC compound does not need to be labelled under the Vinyl Chloride Standard and the Hazard Communication Standard.

Mr. de la Cruz reviewed a recent meeting with John Miles and members of his staff at OSHA. Mr. de la Cruz indicated that he understands that the Agency will be drafting an unfavorable response and Mr. de la Cruz was asked to set-up a date for a meeting with the appropriate individuals at OSHA as soon as possible to include appropriate representation from VI companies and the Executive Director.

It was suggested that such a meeting be held in the afternoon with a preliminary meeting at Keller and Heckman of the participants in the morning of the agreed-upon meeting date.

3. Environmental Protection Agency - Mr. de la Cruz reported on recent work by the Health, Safety & Environment Committee to develop comments based on the recent EPA proposal which re-defines toxicity characteristics under RCRA, and which could result in commercial grades of some companies' resins being considered as hazardous materials when disposed of. Joe King of Occidental Chemical was the leader of a Task Force which took the lead in preparation of the draft. The draft document was provided to members of the Legal Committee with the request that they advise Mr. de la Cruz of any additions and/or changes they would like to see incorporated.

IV. Litigation Matters

Mr. Rutman advised the group of a settlement in the Younkers case, details of which were not disclosed.

There was brief discussion on joint defense actions involving worker exposure cases. These included the Denninger Case in Ohio, where the estate of a former Chrysler employee is suing certain companies. Mr. Rutman advised of a recent case involving Celanese workers at Columbus and will send information to Mr. Luss for the establishment of a joint defense group. Mr. Luss agreed to send out information to the Legal Committee concerning criminal liability and worker exposure cases.

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V. Liaison With Other Vinyl Institute Committees

Liaison with other committees was established as follows:

Market Development	- Phil Carey
Health, Safety & Environment	- Bob Luss
Communications Committee	- Sherry Carr
Technical Committee	- Paul Bork

VI. Next Meeting

The next meeting of the Legal Committee was set for November 20th at the offices of Keller and Heckman in Washington. A meeting notice and agenda will be mailed out sufficiently in advance of the meeting to members of the committee.

Respectfully submitted,

Roy T. Gottesman