

THE VINYL INSTITUTE LEGAL COMMITTEE

Keller and Heckman
Conference Room
1150 17th Street, N.W.
Washington, D.C. 20036

Wednesday
November 19, 1986
10:30 a.m.

Attendees:

Robert D. Luss, Chairman	- Occidental Chemical
Paul Bork	- Dow Chemical
Phil Carey	- Vista Chemical
Gail Cudak	- BFGoodrich
Peter de la Cruz	- Keller and Heckman
John Demeester	- Dow Chemical (In part)
Beverly Gholson	- Georgia Gulf
Roy Gottesman	- Vinyl Institute

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Sherry M. Carr

I. Introduction and Approval of Minutes

The meeting was opened by Chairman Robert Luss at 10:35 a.m.. Following self-introductions, the minutes of the last Legal Committee meeting held September 9, 1986 were approved on motion of Paul Bork, seconded by Gail Cudak.

II. Regulatory Agency Matters

A. EPA

1. D.C. Circuit Appeals Court Decision In NRDC v. EPA.

Peter de la Cruz reported on the recent D.C. Circuit Court decision in the NRDC v. EPA suit in which the court ruled that the Agency can consider cost and technical feasibility in setting standards under Section 112 of the Clean Air Act. Judge Bork had researched both the legislative history and case law and the decision was circulated to the panels on the benzene and radionuclides cases before it was issued. Oral arguments in these latter two cases were postponed and supplemental briefs have been submitted in these cases. The decision is a major statement on standards under Section 112 and could be helpful in a number of cases.

As of the date of this meeting, NRDC had not asked for a re-hearing, but the 14-day period for filing of an appeal for re-hearing ended only the prior day. Peter de la Cruz noted that the Court had not bought our argument that NRDC did not have standing in this case, and he offered the opinion that this might be useful in the future in getting standing in an action where we have not been a party in a lower court action.

The D.C. Circuit Court of Appeals decision has been sent out with a cover letter to members of the Legal Committee by Peter de la Cruz.

2. NRDC v. Thomas Suit

This case in the Southern District of New York has been briefed but has been delayed due to trial judge's schedule. NRDC has challenged EPA's notice of its "intent to list" several chemicals under Section 112 of the Clean Air Act. NRDC has taken the position that since EPA's Scientific Advisory Board and its Carcinogen Assessment Group have found these materials to be carcinogens, the Agency must regulate them under Section 112. There is no incentive for the Vinyl Institute to push for expediting a decision in this case.

3. Legal Challenge To Final EPA Regulations on VCM Issued September 30, 1986.

On September 30, 1986, a new final rule for regulating VCM emissions under NESHAPS was issued by EPA. Bob Luss reported that at its October 8th meeting, the Health, Safety and Environment Committee had met and a task force was formed to develop technical input for use in framing arguments for a legal challenge. In a letter ballot, all seven Executive Board members (out of nine members polled) responding for their companies voted in favor of such a challenge. This task force met on November 4th and have provided Peter de la Cruz with their input.

Peter de la Cruz reviewed the items at issue which are contained in his draft sent out on November 17th. Included was a discussion of the following:

- a. Relief Valve Discharges - The Agency has decided not to include a numerical limitation and its proposed rule suffers from vagueness. We must get EPA to use numerical limits or define what constitutes compliance.

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- b. Leak Detection and Compliance Program - In compliance with the 1976 standard, all companies developed their own leak detection plans. The 1985 EPA proposal contained a benzene-type leak detection program and our comments on the proposal complained about the breath of the program which could result in considerable expense to comply with the administrative requirements. Ms. Gholson pointed out that some states have programs that are more extensive than required by this EPA regulation and these states may not go along with the Federal regulation. She noted that in the case of Georgia Gulf, they have worked out a plan with state authorities which is more stringent than EPA's requirements.

If the 2% test is passed, plants could keep their current leak detection program. On the other hand, if this test is failed, a company would have to convert to a leak detection program under Subpart V. The regulation does not provide an opportunity to make a correction and retest if the 2% test is failed.

c. Definitional Issues

- i. EDC Purification - Final language fails to exclude intermediate or interim storage.
- ii. Three-Hour Period Definition - The final regulation definition would make it possible for a single excursion to result in three separate violations of the three-hour standard. Thus a single excursion could result in three financial penalties as it appears that the Agency may be trying to increase the maximum penalty. In this regard, Paul Bork suggested that it be recommended to EPA that a single relief valve discharge be considered as one incident.
- iii. Exhaust Gas - The September 30th definitions for "leak", "exhaust gas", and "relief valve discharge" do not result in clarification and, in fact, lead to confusion as to whether an emission is a leak or an exhaust gas. The 1985 EPA proposal clearly stated "a leak...is not an exhaust gas" (50FR 1182) and we believe the original proposed definition of "exhaust gas" should be retained.

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- iv. Leak - EPA has confused the "potential for leaks" with actual leaks by expanding the definition to include work practices. Thus a dripping liquid from a compressor could be considered a leak, even though it is not a product, but could be water or a fluid that is dripping to show the need for maintenance.

It was recommended that Peter de la Cruz change the argument regarding relief valve discharges to a flare, so that EPA does not consider flares to be a "control device". Further, it was suggested that the redrafting include a comment that if a discharge is captured and reduced to below 10 ppm before final discharge to the atmosphere, such a discharge would not be considered a violation of the standard.

Peter de la Cruz notified Earl Salo of EPA General Counsel's Office that we would be filing for a stay and a petition for review. Earl Salo advised Peter that Patricia Embry and Charles Carter would be handling this matter. Subsequently, Peter talked with Patricia Embry and advised her of some of our concerns with the September 30th final rule and that a number of items need changing. She suggested that Peter come over for a discussion. He was also contacted by Elliott Gilberg for information on what problems we saw with the regulation.

After the meeting, Peter, Bob Luss, Paul Bork and Phil Carey discussed details on the filings which will be made by November 26th. EPA will be asked to consider all our concerns and to stay the effectiveness of the regulation. EPA itself can grant a stay pending the appeal.

Peter de la Cruz will meet with Elliott Gilberg after the filing of the motion for a stay and the petition for review and reconsiderations. Rob Brager of Beveridge and Diamond will accompany him. If we enter into negotiations with the Agency, Roy Gottesman and Vinyl Institute Legal Committee or company representatives would get involved.

As regards to costs for this action, Beveridge and Diamond will be used as consultants and as a back-up to minimize the costs. Keller and Heckman will do all drafting in-house, and Peter de la Cruz estimated that costs would be between \$20,000 and \$30,000.

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4. Enforcement Actions

Bob Luss reported on a recent enforcement action involving Oxychem in Louisiana in which the Agency has sued for a \$15 million penalty for reactor opening losses that occurred several years ago and which have since been corrected. He suggested that industry might want to consider a meeting with EPA similar to our meeting with OSHA on hazard communication. Before doing so, it will be necessary to obtain information from the Vinyl Institute member companies on NESHAPS compliance, costs, discharges and enforcement complaints. Bob Luss agreed to talk with W.C. Holbrook, Chairman of the Health, Safety & Environment Committee to have this information developed.

When this information is available, we will ask for a meeting with high level EPA officials, possibly the Assistant Administrators for Air and Enforcement.

B. OSHA

Bob Luss reported on the meeting with OSHA officials held on October 23rd in which he, Peter de la Cruz, Roy Gottesman, and two toxicologists, Dr. Robert Hinderer of BFGoodrich and Dr. Paul Gurba of Occidental Chemical, participated. He felt the meeting was an excellent one in making the OSHA officials aware of the problems regarding labeling of PVC resins and compounds. It is our position that these should come under the OSHA carcinogen standard and not under the Hazards Communications Standard.

We have been asked to supply the Agency with copies of citations issued which we consider to be improper. A letter was sent out on October 24th by Roy Gottesman requesting such citations but none were received. Bob Luss will now send out a letter marked "Urgent - Requires Immediate Attention" to all Board Members requesting copies of OSHA labeling citations, so we can respond to the Agency's request. OSHA has agreed to review this entire situation and will advise us of their opinion.

Peter de la Cruz will attempt to get the RTECS citation of PVC as a human carcinogen corrected. After clearing a draft letter with Chairman Luss, he will promptly send a letter to RTECS so that its review committee can evaluate our information. They may want to have an industry group appear before the RTECS review committee.

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C. Food and Drug Administration

Peter de la Cruz reported on recent developments. While it was believed that issuance of the final rule would be forthcoming after agreement was reached on analytical methods for determination of RVCM, he noted that Dr. Buzz Hoffman of FDA has solicited comments from various environmental organizations and state and municipal agencies regarding the need for an Environmental Impact Report (EIR). Late filings in the docket were noted. Further, Roy Gottesman reported on his meeting with representatives from Environmental Action Coalition on November 14th in which he became aware of a submission from Brendon Sexton, Commissioner of the New York City Department of Sanitation, dated October 9th to Dr. Buzz Hoffman in which Sexton wrote that his department "has found the FDA's Finding of No Significant Environment Impact to be deficient". Peter de la Cruz is obtaining a copy of this letter from Dr. Hoffman as it was not in the official docket.

It was agreed that it is necessary to arrange for a meeting with FDA officials at the highest level to protest the acceptance of these late-filed comments and to try to avoid having FDA require the development of an EIR which could delay the issuance of a final regulation. Peter de la Cruz agreed to discuss this entire matter with Jerry Heckman on Jerry's return on November 20th. If additional information is required on incineration, Roy Gottesman indicated that this is available based on Phase I of the NYSERDA project at Pittsfield, Massachusetts.

This subject will also be in the agenda of the Executive Board at its December 10th meeting.

Roy Gottesman provided the copy of the publication developed by our public relations consultant, Edward Howard and Company, on "The Solid Waste Dilemma" to Bob Luss and Peter de la Cruz for legal review and approval.

III. Old Business

A. New York Toxicity Regulation

A letter ballot of the Vinyl Institute Executive Board indicated that 6 of 7 responding companies favored a legal challenge of the New York State Toxicity Regulation. A group has been set-up by NIBS to develop a consensus-type test and it is believed that this could be forthcoming by the Spring of 1987. Roy Gottesman reported on a recent meeting of CCPS which voted to recommend that SPI not challenge this regulation. He noted that he will present the Vinyl Institute position at a meeting of the SPI Issues Management Committee (IMC) on November 20th. If IMC does not recommend to the SPI Executive Board that it go forward with a legal challenge, the Vinyl Institute could present its position directly to the SPI Executive Board at its December 8th meeting.

Gail Cudak presented the BFGoodrich position which is that it is in favor of legal action and would be interested in seeing a group get together to institute such an action.

Sheila Millar of Keller and Heckman joined the meeting briefly at this point. She indicated that she had talked with some trade association groups include the Carpet and Rug Institute and the Polyurethane Manufacturer's Association but these trade groups appear to be waiting to see what SPI will do. Bob Luss asked Sheila Millar to try to determine what other groups might want to participate in a lawsuit and what small New York State manufacturer might be the lead plaintiff in such a suit.

It was agreed that after Roy Gottesman advises Bob Luss of the outcome of the IMC meeting, we will determine what our next action should be. These regulations do not become effective until they are signed by the Secretary of State, Gail Schaffer, and there is then four months in which to file suit.

B. New York Toxic Tort Reform

While Peter de la Cruz has been in touch with the insurance consortium in New York, none of the attendees was aware of any legal actions involving PVC-related cases having been filed. Cases involving other named materials such as asbestos and DES continue to wind their way through the system.

IV. Litigation

There have been no new toxic tort type cases since the last Legal Committee Meeting. Beverly Gholson noted two recent cases that Georgia Pacific (as Georgia Gulf's predecessor) is involved in and will provide information on these to Bob Luss. There has also been settlement in a NESHAPS violation by Georgia Gulf involving benzene emissions in Texas.

V. New Business

Bob Luss advised committee members of the importance of properly maintaining OSHA logs. There appears to be new emphasis on the part of the Agency in doing an in-depth study of all OSHA recordables and work-day losses.

During the luncheon break, the group viewed two video tapes provided by Phil Carey. The first was the Union Carbide promotional video on Ucarsil Flame Retardant additive for polyethylene in which comparison is made with PVC-jacketed cable. The second was a segment from

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the McNeil-Lehrer report broadcast on November 11th dealing with lead in drinking water by leaching from solder. It was noted that states are to enforce bans on lead within two years. Mortgage monies under FHA and VA auspices cannot be given for homes in violation of this ban, i.e., sanctions are immediate. This may be useful in promoting plastic piping systems.

VI. Liaison With Other Vinyl Institute Committees

Bob Luss reported on his attendance at the October 8th Health, Safety, & Environment Committee Meeting noting it is a very active committee. The next Technical Committee meeting is scheduled for December 3rd in Cleveland, and Paul Bork is the liaison with this committee. Phil Carey will try to attend the next meeting of the Market Development Committee at the Newark Airport Marriott on December 9th.

VII. Next Meeting

The next meeting will be held at the offices of Keller and Heckman in Washington, D.C. on January 27, 1987, at 10:30 a.m.

The meeting was adjourned at 2:30 p.m..

Respectfully submitted,



Roy T. Gottesman

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