

W. A. K.

DEC 23 1974

JOSEPH E. KELLER  
JEROME H. HECKMAN  
CHARLES M. MEEHAN  
WILLIAM H. BORGHESE, JR.  
ROBERT R. TIERNAN  
WAYNE V. BLACK  
DAVID L. HILL  
MARTIN W. BERCOVICI  
PETER M. NEMKOV  
JOSEPH E. HADLEY  
CAROLE C. HARRIS  
WILLIAM W. PUGH  
PETER THOMAS SMITH

LAW OFFICES  
KELLER AND HECKMAN  
1150 17TH STREET, N. W.  
SUITE 1000  
WASHINGTON, D. C. 20036

TELEPHONE  
202 896-2700  
CABLE ADDRESS "KELMAN"

December 17, 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 Friday, December 13, 1974 the United States Court of Appeals for the Second Circuit heard Oral Arguments on the Petitions for Review of the Occupational Safety and Health Administration's Standard for Exposure to Vinyl Chloride, all Briefs having been filed as of December 11. At the end of the Argument, the Court granted the Petitioners' Motions for a Stay until such time as it renders a decision on the merits of the case.

Obviously, the Court's action on the Stay constitutes something of a victory but it should in no way be taken as a true indicator vis-a-vis the ultimate resolution of the case. On the basis of what has happened to date, we are making no predictions in this regard and will continue to refuse to do so. In some respects, it would seem reasonable to assume that one major reason for the Court's granting the Stay was the fact that this is a complicated case and there had not been adequate time for the three judge panel, including Mr. Justice Clark, to study the Briefs and voluminous Record.

The Court's formal written order granting the Stay has just been filed with the Clerk so we will have to send you a copy in a future mailing. In the hope that

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they may give you a little more of the flavor of the situation, as well as what we consider to be reasonably accurate and informative reports on the Oral Argument, we have reproduced and are enclosing herewith copies of a Wall Street Journal article and a Journal of Commerce article from the December 16 editions of these publications.

In our last letter we enclosed a copy of that portion of the Brief for Respondents which detailed the OSHA plan to consider temporary variance orders if complete applications therefore were received at OSHA by December 23, 1974. Shortly after the letter was sent, we received a letter from Secretary Stender formally denying our request for a Stay and repeating the "offer" of expedited action on variances in lieu thereof.

In response to arguments raised in our Reply Brief designed to counter the Department of Labor's "offer," Government Counsel presented this letter--which, incidentally, we consider wholly unresponsive to our November 5 Petition for a Stay filed with OSHA, and to the similar requests filed by other Petitioners subsequently--to the Court during Oral Argument. Fortunately, the Court did grant our Motion for a Stay, however, so we now consider the Stender letter moot, as well as somewhat inscrutable. A copy of the letter from Secretary Stender is enclosed as a matter of interest.

As a follow-up, we promised in our last letter to send you a copy of the Federal Register Notice announcing the Secretary's "offer" to consider temporary variances. As of this writing, that document has not yet appeared in the Federal Register. If it does appear, it, too, would seem moot now, in light of the Stay granted by the Court.

On a related matter, you will recall that the Coast Guard is working on final regulations pertaining to shipments of vinyl chloride monomer on tankers or other vessels under Coast Guard jurisdiction. These regulations were expected to mandate the same limits that OSHA set. We notified the Coast Guard of the Stay

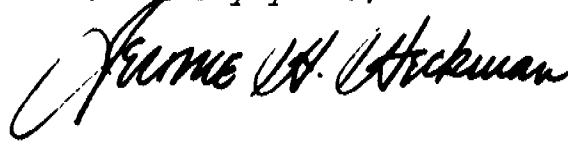
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this week, and we believe that it will now hold up any final regulation, at least in the form originally anticipated, until the U.S. Court of Appeals has ruled upon OSHA's Standard.

There is nothing definitively new to report on the FDA front except that some of you have informed us of letters that you have been sending to the agency. We cannot yet predict with certainty what effect they are having, but we now have reason to be hopeful that FDA may be shifting its ground again, this time in more reasonable directions.

As we have been doing, we shall continue to attempt to keep you informed on all aspects of the vinyl chloride monomer problem. It is highly unlikely that there will be occasion for another letter from us before December 25, however, so please let us take this opportunity to wish you and yours the merriest of Christmases and the happiest of New Years.

Cordially yours,

A handwritten signature in cursive script, reading "Jerome H. Hickman". The signature is written in dark ink and is positioned below the typed name "Jerome H. Hickman".

Enclosures

U.S. DEPARTMENT OF LABOR  
Occupational Safety and Health Administration  
WASHINGTON, D.C. 20210



Office of the Assistant Secretary

DEC 10 1974

Jerome H. Heckman, Esq.  
Keller and Heckman  
1150-17th Street, N.W.  
Suite 1000  
Washington, D.C. 20036

Dear Mr. Heckman:

This letter will respond to your November 5 petition to stay the Department's permanent standard regulating worker exposure to vinyl chloride which becomes effective January 1, 1975. Your petition contends that the standard should be stayed because vinyl chloride monomer and polymer producers cannot comply with its respirator requirements for the following reasons: (1) respirators permitted by the permanent standard are not available in sufficient quantities; (2) no air-purifying respirators have yet been approved by NIOSH; and (3) even if approved, a sufficient supply of air-purifying respirators will not be available by January 1.

I initially note that the grounds asserted in your petition would justify only a stay of the standard's respirator provision rather than a stay of the entire standard, since these grounds address only an alleged difficulty of compliance with the permanent standard's respirator requirements. Your petition is accordingly treated as a request that the permanent standard's respirator requirements be stayed.

After carefully reviewing your petition and supporting affidavit I reaffirm my previous conclusion, 39 Fed. Reg. 35890, that the permanent standard's respirator requirements are proper. In the first place, neither SPI nor any other interested party had contended that the respirators permitted by the emergency temporary standard or the first stage of the permanent standard for exposures above 50 ppm were unavailable. The permanent standard's January 1 requirements permit use of more respirators and should generally facilitate compliance.

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Second, an inadvertent error in the permanent standard has been corrected to permit continued utilization of the respirator most widely used under the emergency temporary standard. 39 Fed. Reg. 41848. This correction was apparently not contemplated by your petition.

Third, numerous respirators have already been approved by NIOSH, are being commercially manufactured, and are being used by the thousands. Moreover, NIOSH has recently reaffirmed -- in a communication received after the filing of your petition -- its willingness to test air-purifying respirators on an expedited basis, and to approve them for use until December 31, 1975 without a service-life indicator. Attachment A.

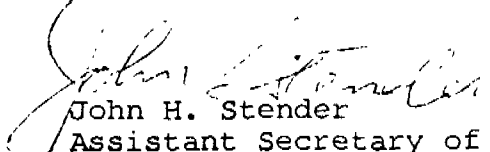
Finally, the entire worker population covered by your petition numbers only 6500 individuals (J.A. 3463-75) -- a group whose small size militates against any general and semi-permanent suspension of the permanent standard's respirator requirements.

For the above reasons your petition generally to stay the permanent standard's respirator requirements, as a petition to stay, is denied. However, your papers and those of other parties filed as stay applications before the Second Circuit do suggest that because of the necessary speed with which regulation has proceeded some employers may experience difficulty in obtaining sufficient quantities of permitted respirators by January 1. The Act expressly provides a route, via procedures looking towards issuance of a temporary variance order, by which such employers may obtain relief prior to incurring any enforcement obligations if they inter alia show that they are unable to comply "because of unavailability \* \* \* of materials or equipment." 29 U.S.C. 655(b)(6)(A); see 29 CFR 1905.1 et seq. (1974). These temporary variance procedures also contemplate the issuance of interim orders suspending such employers' obligations under the relevant parts of the general standard until the requested temporary variance is granted or denied. See 29 CFR 1905.10 (c). This temporary variance procedure is especially appropriate where, as here, any unavailability of respirators is likely to be temporary as the permanent standard creates a market for the equipment required.

Your stay petition and the substantially identical petitions of other rulemaking parties now pending before the Second Circuit are accordingly treated as incomplete applications for interim and temporary variance orders pursuant to 29 U.S.C. 655(b)(6)(A) and implementing regulations. Further information bringing these applications into full compliance with 29 U.S.C. 655(b)(6)(B) (iii) through (v) and 29 CFR 1905.10 (1974) must be received by this Department no later than December 23, 1974 to enable the formal statutory variance procedure expeditiously to begin. Upon timely receipt of this information the Department will consider it on an expedited basis in conjunction with other current evidence and will grant or deny interim orders to applying employers in the shortest time consistent with reasoned decision. 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; and that the few weeks' delay occasioned by this procedure will not significantly affect worker protection under the permanent standard.

Nothing in this response is intended to preclude any applying employer from showing, pursuant to the above statutory provisions and regulations, that a supply of permissible respirators adequate to insure full compliance with the permanent standard's respirator requirements will not be available to him by January 1, 1975. Nor is anything in this response to be construed as a representation that interim or temporary variance orders will be granted to any applying employer.

Sincerely,

  
John H. Stender  
Assistant Secretary of Labor

Enclosure

cc: All parties

# MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE  
PUBLIC HEALTH SERVICE  
CENTER FOR DISEASE CONTROL  
NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

TO : Mr. Al Reis  
Occupational Safety and Health  
Administration, DOL

DATE: November 26, 1974

FROM : Acting Director, NIOSH

SUBJECT: NIOSH Testing and Certification of Respirators for Protection from  
Exposure to Vinyl Chloride

This will confirm our telephone conversation this morning regarding the above subject.

NIOSH has set up a special room at its Morgantown, West Virginia, facility to handle the gas so that NIOSH personnel will not be exposed. NIOSH personnel who will be involved in testing have undergone or will undergo physical examinations. This has been done in accordance with DHEW procedures for handling carcinogenic substances.

The system is now in place and ready to function as soon as manufacturers submit their respirators to us. A draft protocol was prepared, and an information copy was delivered to you last Friday. The protocol will be reviewed by the Department of the Interior and DHEW and will be published in the Federal Register.

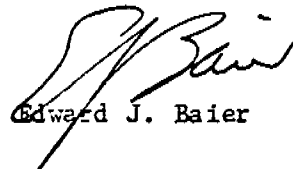
The requirement for an end of service life indicator is not now required, however, the section of the protocol was drafted to read:

"After June 30, 1975, each canister or cartridge submitted for approval and testing in accordance with Sections 11.202, 11.203, and 11.204 shall be equipped with a canister or cartridge end of service life indicator which shows a satisfactory indicator change or other obvious warning before 1 ppm vinyl chloride penetration occurs. The indicator shall show such change or afford such warning at 80  $\pm$  10 percent of the total service life to 1 ppm leakage, as determined by continuing each test described in subparagraphs (b) of each of Sections 11.202, 11.203, and 11.204 of this subpart until a 1 ppm leakage of vinyl chloride occurs. After December 31, 1975, a cartridge or canister without a service life indicator shall not be considered approved for use by employees exposed to vinyl chloride."

Page 2 - Mr. Al Reis

Also, as you requested we have changed the draft to include testing of canisters for longer than 4-hours. Assuming these canisters will not distort the face piece, which would immediately disqualify them, I want you to know that longer than 4-hour approval testing will delay our output. We cannot test for all periods of time in the same amount of time available for 4-hour approval tests. Since you asked for this and we can accommodate your request, we want you to know of the ramifications. We had set up our protocol initially on a 4-hour basis, because this was arrived at by you and Dan Boyd during a previous meeting here at Rockville on the subject of respirators for VC.

If there's anything further on the subject, please let me know.



Edward J. Baier

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## *Strict Vinyl Chloride Limits, Due Jan. 1, May Be Delayed by Federal Court Ruling*

*By a WALL STREET JOURNAL Staff Reporter*

NEW YORK — Imposition of Labor Department standards to severely limit exposure of workers to vinyl chloride, a gas linked with more than two dozen cases of a rare liver cancer, might be delayed by a federal appeals panel's decision.

Permanent standards developed by the Labor Department's Occupational Safety and Health Administration, which would require companies to hold vinyl chloride levels in the air workers breath to one part vinyl chloride per million parts of air, averaged over an eight-hour period, are scheduled to go into effect Jan. 1. But a special three-judge panel of the Second Circuit Court of Appeals here granted a stay until it could decide the merits of an appeal by the Society of the Plastics Industry and eight companies that oppose the new standards.

The judges, retired U.S. Supreme Court Justice Tom O. Clark and Judges Frederick van Pelt Bryan and Kevin T. Duffy of the U.S. District Court of the Southern District of New York, have heard all the arguments presented by the companies and by the Justice Department, representing the Labor Department, and could conceivably rule on the merits of the appeal by Jan. 1. In the event they don't, however, standards in effect since last April that permit 50 parts per million vinyl chloride would remain in force, the panel ruled.

The 50-parts-per-million limit was issued by the labor agency unit as a temporary emergency standard last March, within weeks of the first reports that workers exposed for several years to high concentrations of vinyl chloride gas had died of liver angiosarcoma, a rare but invariably fatal cancer. The emergency standard went into effect last April.

Prior to the 50-parts-per-million limit, levels of vinyl chloride in factory air were generally considerably higher, often reaching several thousand parts per million.

The temporary emergency level became the first stage of permanent standards invoked by the Labor Department last Octo-

ber, after more than 28 cases of angiosarcoma had been reported world-wide. But industry challenged the second stage a one-part-per-million limit, due to begin Jan. 1, as unnecessarily strict and impossible to meet.

In addition to the Society of the Plastics Industry, the concerns participating in the appeal of the permanent standards are the Hooker Chemical Corp., a subsidiary of Occidental Petroleum Corp.; Union Carbide Corp.; Air Products & Chemicals Inc.; B. F. Goodrich Co.; Uniroyal Inc.; Dow Chemical Co.; Firestone Tire & Rubber Co. and Tenneco Inc.

Vinyl chloride is a widely used industrial gas used mainly to make polyvinyl chloride, or PVC, a plastic with many applications. Use of the gas as a propellant in aerosol products has been banned.

About 6,000 workers are employed in plants that make vinyl chloride gas and/or polyvinyl chloride, but the permanent standards would also affect workers who fabricate PVC into a wide variety of finished products. The number of workers in the PVC fabrication industry has been variously estimated at 350,000 to 700,000.

## Plastics Corner

### Court of Appeals Stays Vinyl Chloride Order Pending Ruling on Case

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Monday  
December 16, 1974

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BY WILLIAM H. LANDER

The plastics industry has obtained a stay of the new standard on vinyl chloride exposure pending a judicial review of the order of the Secretary of Labor of October 1.

The three judge panel of the U. S. Court of Appeals for the Second Circuit Friday heard two hours of arguments on the case itself, and then a brief debate on the request for a stay of the order. The judges, after a brief deliberation, decided that the case was too complex for immediate decision, so a stay was granted in the meantime.

In other words, the order bringing the exposure limit down to 1 part per million will not be effective on Jan. 1, 1975, unless the judges rule in favor of the government between now and Dec. 31.

If the judges accept the industry petition, the standard will be sent back to the Department of Labor for restudy and re-issuance.

The judges who heard the case in Foley Square, New York City, were Tom Clark, former justice of the United States Supreme Court; retired judge Frederick Van Pelt Bryan, and Judge Kevan T. Duffy. From the questions they asked, it was impossible to detect the way their inclinations might be leaning.

The case was presented for The Society of the Plastics Industry and its PVC and VCM Committee, and also in behalf of Firestone Plastics, Air Products, Diamond Shamrock, Hooker Chemical & Plastics, Uniroyal, and Union Carbide by a battery of lawyers including Jerome H. Heckman, Allen J. Topol, Walter B. Connolly, Jr., and John J. Cassidy, Jr. The Department of Labor was defended by a lawyer from the Justice Department, Stephen F. Elpe-run; and George H. Cohen and Lawrence Gold represented the AFL-CIO.

The industry argued that the Secretary of Labor did not issue the order on the basis of evidence brought out in the hearings; that the standard of 1 part per million is not feasible, and furthermore that the OSHA regulations are

vague, and can cause an undue economic burden to many small plants.

Judge Clark pointed out that the government's brief contended that a plant built in 1969 has brought the exposure level down to 1.2 ppm. The SPI said this was a Dow Chemical monomer plant, and that it is much harder to get exposures down in PVC plants. The SPI said that even the government's consultant — Foster Snell — reported after inspecting 26 PVC plants that 1 ppm cannot now be attained.

"The case should be remanded to the Secretary of Labor who should issue a new standard as soon as possible," Mr. Heckman said. "OSHA cannot raise the cancer spectre on industry and set up regulations which constitute burdens that cannot be met." He urged that fabricators, who constitute 95 per cent of the vinyl industry, be exempted from the standard.

"The standard is void because it is so vague," Mr. Connolly intoned for Firestone at one point. He contended that the government and the courts had handled the asbestos dust situation in a much more intelligent manner.

"The vinyl plants are subject to the whim and caprice of OSHA inspectors all over the country," he added. "We are willing to spend money to reduce levels on a reasonable basis." He said the 13 recorded deaths in the U. S. had occurred over a period of 40 years and involved workers who were exposed to very high levels of vinyl chloride.

The government contended that there is nothing in the standard that is not feasible, and that it was promulgated by the Secretary of Labor to protect workers not only from cancer, but from other possible infections also. The argument was made that various industries use respirators, and it is not an excessive burden for the vinyl workers also to do so.

"Vinyl chloride is carcinogenic. There is no known safe level of exposure," Mr. Cohen said, in contending that Con-

gress had properly delegated the legislative function of issuing the standard to the Secretary of Labor.

The motion for a stay was presented by Mr. Cassidy, for Union Carbide. He said that Union Carbide supplied vinyl to 1,500 customers from 41 warehouses. "The carriers and terminals have told Union Carbide that they will refuse to handle this after January 1," he said. The government contended that the standard was based on a law passed in 1971 which has not been changed, and that anybody adversely affected by it can present his case in writing to the Secretary of Labor.

The judges retired, then came back and said that due to the complexity of the case, they would not render a decision at this time, but would stay the order until they do so.