

# Healthy Building News

## Analysis

## The Verdict Is In: Vinyl Is Out

*"..the Resilient Floor Covering Institute (RFCI) succeeded in its fight to have New York state recognize that vinyl floor products may be used in green buildings eligible for a green tax credit..."*

*Under the final Green Building tax credit regulations issued in May 2002, the Department of Environmental Conservation stated it was 'maintaining the proposed prohibition on vinyl flooring' in buildings qualifying for a green tax credit..."*

*With this major agreement, look for New York's Green Building tax credit program to become a model for similar programs throughout the United States, thus creating expanded opportunities for vinyl flooring products."*

- Jeff Golden, [ntlfloortrends.com](http://ntlfloortrends.com)

**We here at Healthy Building Network know concerned designers have questions about what this landmark litigation means and we want to help answer them.**

**Q: How did the Resilient Floor Covering Institute get New York State to change its green building tax credit?**

A: New York didn't change anything. The green building tax credit remains as it was written.

**Q: So vinyl flooring does not qualify for a green tax credit?**

A: It does not. New construction or renovations may use any type of flooring – including vinyl – for up to 50 percent of the project qualifying for the tax credit. The other 50 percent of the floor must use a covering from an approved "green" list, a list that does not include vinyl. **CONTINUED ON PAGE 2**

## Vinyl Vendors Drop Suit on 'Green Material' Definition

New York State's green building tax credit law is "solidly in the books" after a court challenge by vinyl flooring makers was decisively turned back earlier this year, said New York Assistant Attorney General John Sipos, who defended the statute.

The green tax credit established a pool of \$25 million in tax incentives for building owners who build or renovate from a list of green building materials – a list that did not include polyvinyl chloride (PVC) flooring. "New York is trying to incentivize building materials that don't have sufficient recognition in the marketplace," Sipos said. "That is a laudable state goal and there is a legitimate state interest in getting the word out."

The list of green flooring materials in the New York statute included cork, concrete, recycled wood and linoleum. Judith Enck, environmental advisor to New

York's Attorney General Eliot Spitzer, said PVC could not be credibly included in the definition because it is made with a number of chemicals, many of which are hazardous or carcinogens. "We call the balls and strikes," she said.

**CONTINUED ON BACK**



DR. JUDITH SCHREIBER, ASSISTANT NEW YORK ATTORNEY GENERAL JOHN SIPOS

## THE HEALTHY BUILDING INSPECTOR

*Naming sinners and winners in the green building sector*



### FAILS INSPECTION:

**Arch Chemicals, Inc.** producers of **Wolmanized** and **Wolmanized Natural Select** treated wood

products: for seeking EPA permission to replace its arsenic-treated wood line with a formula using approximately 65% hexavalent chromium (Cr VI), which is twice as much Cr VI as in the CCA it would replace. "Chrome Six," as it is known, is the human carcinogen made famous by Erin Brockovich. Arch's rival, the Osmose corporation, was about to let its registration of the toxic compound expire when Arch rushed to file a so-called "me too" registration that would permit it to use the chemical without conducting human health testing.



### UP TO CODE:

The **Hermann Miller** company's new **Mirra Chair**: Among its many positive attributes, the Mirra

Chair is PVC-free. Although the volume of vinyl material used in its products is small, the company engaged in constructive dialogue with environmentalists and acknowledged the concern that PVC be excluded from the materials palette of environmental leaders in the manufacturing sector.

## FAST FACT

Most chemicals - in building materials and otherwise - are not tested for human health impacts. People assume chemicals are thoroughly tested for health affects before they are put on the market, an assumption reinforced by manufacturers' argument that no data proves their chemical product causes harm. Unlike drugs, which must be proven safe before marketing, chemicals are deemed "innocent until proven guilty." The absence of data on chemical health impacts signals ignorance, not innocence.

*Got a tip for the Healthy Building Inspector? email [info@healthybuilding.net](mailto:info@healthybuilding.net)*



## From the Coordinator –

The Healthy Building Network (HBN) is the only advocacy group dedicated to shifting market demand from worst-in-

class building materials - such as arsenic-treated wood or PVC plastic (aka vinyl) - to healthier, available alternatives.

Only months after Healthy Building Network initiated a consumer education campaign to convince playground manufacturers to stop using wood treated with the highly toxic chemical arsenic in their structures, the Environmental Protection Agency (EPA) announced a voluntary phase-out of arsenic wood in the entire retail market. That's a \$4 billion annual market, and accounts for 85% of the arsenic used in America today.

Success can be that dramatic, but it does not come easily. Manufacturers - including self-styled environmental leaders - take off the gloves when sales are threatened, even if they themselves manufacture the healthier alternatives we recommend.

Chemical manufacturers and wood treatment companies resisted calls from consumers for arsenic-free products. They attacked Healthy Building Network as a scare-mongering extremist group. They retained Bush 1 White House Counsel C. Boyden Gray to lobby Congress and EPA. They enlisted scientists to tell regulators and the media that arsenic-coated playgrounds were no worse for children than arsenic-free structures. Yes, they really said that.



Resilient flooring manufacturers – including USGBC members Armstrong, Mannington, Domco-Tarkett and Amtico – took a page from the same trade association playbook by suing the state of New York over its decision to exclude vinyl flooring from a green building tax credit. Although some of the same manufacturers that sued offer linoleum and other products that fully comply with the tax credit regulations, they aggressively fought for vinyl flooring's inclusion as a “green” material.

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**HBN is committed to bringing the best information on healthy materials to design and building professionals, because change starts with you.**

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The tactic failed after New York State Attorney General Eliot Spitzer marshaled 30 years of evidence refuting the environmental health and safety claims of the industry. Scientists, under oath, affirmed the link between vinyl, dioxin, and environmental health.

HBN has compiled **Vinyl Under Oath**, a searchable CD ROM containing the publicly-available legal brief and affidavits filed by the New York Attorney General (*visit [www.healthybuilding.net](http://www.healthybuilding.net) to order a CD or to download the documents*)

HBN is committed to bringing the best information on healthy materials to design and building professionals, because change starts with you. It is you who write the specs, shrink the environmental footprints of our buildings and create the market for safer materials. Similarly, it is contributions from professionals in the design and building community that sustain the Healthy Building Network. It is your intellectual, moral and financial support that makes our work possible. Thank you.

Bill Walsh  
Coordinator  
Healthy Building Network

### Analysis

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**Q: Isn't the 50-percent rule a concession by New York?**

A: Negative. The 50-percent rule was written into the original regulation. If you read the materials distributed by the RFCI when it dropped the suit, you'll notice they say the two parties “agree” on what is in the green tax credit, RFCI never overtly claims the tax credit was changed.

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**Q: Then why did RFCI sue?**

A: Who wants half a loaf? The RFCI petitioned the court to specifically force New York to put vinyl flooring on the “green” list. RFCI dropped the suit without gaining concessions from New York; vinyl is still not on the list.

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**Q: Then why did RFCI drop the suit?**

A: RFCI's suit was dropped a week after the New York State attorney general's office filed a series of affidavits explaining why the regulation came to be written as it was. Among them was a 19-pager by toxicologist Judith Schreiber, detailing the adverse environmental and health effects of polyvinyl chloride and its precursor, vinyl chloride monomer. We believe it was the contents of this affidavit that caused the RFCI legal team to abruptly change tactics and run away.

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**Dr. Schreiber directly examined the vinyl industry's “cigarette science” and authoritatively refuted it.**

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**Q: What did the affidavit say?**

A: Dr. Schreiber summarized 30 years of vinyl-damning science, which in its original state, would fill a small library.

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**Q: Why didn't RFCI use the various studies by the Vinyl Institute and others to support their position that vinyl has environmentally-beneficial aspects?**

A: Dr. Schreiber directly examined the vinyl industry's “cigarette science” and authoritatively refuted it. It's important to note her affidavit was a sworn document. If the RFCI wanted to refute it, their scientists would have been forced to do so under oath. In the vernacular, this is called “put up or shut up.”

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**Q: Couldn't RFCI lawyers rely on “dueling briefs”?**

A: Apparently not. While vinyl vendors dicker over every point in forums like the USGBC's Technical Science Advisory Committee, they tend to shy away when it becomes clear there'll be legal consequences if they're caught in a lie. Besides, RFCI attorneys did not want to take the case before a judge and create a legal precedent when their argument got slam-dunked by the AG's office. (*Documents from the case, including the coup-de-grace affidavit by Dr. Schreiber, are available at [healthybuilding.net](http://healthybuilding.net).*)

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**Evolutionary biologist Richard Dawkins could have had the vinyl debate in mind when he said, “when two opposite points of view are expressed with equal intensity, the truth does not necessarily lie halfway between them. It is possible for one side to be simply wrong.”**

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**Q: What's up with that USGBC inquiry on vinyl anyhow?**

A: Who knows? Final briefs were submitted in November 2000 and disappeared into a black box. (The briefs argued the same points as in the NY suit.) The difference between a New York courtroom and TSAC: rules of procedure and burden of proof. Justice delayed is justice denied, so the court imposes deadlines. The burden of proof, or how evidence should be weighed, is clear in court. It is unclear in science. The vinyl industry demands critics present incontrovertible proof, even as they manufacture more “studies” to cloud the air. This exploits people's innate sense of fairness, their willingness to find middle ground. Evolutionary biologist Richard Dawkins could have had the vinyl debate in mind when he said, “when two opposite points of view are expressed with equal intensity, the truth does not necessarily lie halfway between them. It is possible for one side to be simply wrong.” HBN has argued to TSAC that the weight of existing evidence is so ponderous against PVC that precautionary action is justified, as it was in New York.

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**Q: Companies like Armstrong sell both linoleum and vinyl; it was founding member of USGBC and it was a plaintiff in the RCFI case. Couldn't there be some middle ground here?**

A: Middle ground? No. Cognitive dissonance? Yes. Really, it's neither, just bottom-line thinking. It's to Armstrong's advantage to hire idealistic young salespeople to work the floor at GreenBuild, while never letting them know their evil twins at RFCI are making ominous noises (but stopping short of actual legal action) at green building codes like the one in New York.

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**Q: Are you saying vinyl's lawyers won't actually sue?**

A: Anything is possible, but consider these cases where the vinyl industry has *not* brought suit:

- The documentary “*Blue Vinyl*” made clear the connection between and vinyl and deadly health effects, made clear the devastation the vinyl industry has wrought in the poor communities that host PVC facilities, made (hilariously) clear how vinyl's spokesmodels can lie to a camera. It was nominated for an Emmy for “best research.” Hollywood may not be the best arbiter of science, but after essentially screaming “PVC causes cancer!” in a thousand crowded movie houses, Judith Helfand and Daniel Gold have yet to receive so much as an impolite voice mail from a vinyl attorney.

- The environmental group Greenpeace merrily slaps the label “Poison Plastic” on every conspicuous piece of vinyl it can find. It storms up to the gate where Armstrong's vinyl is made and plants a banner reading, “Cancer Starts Here.” Plenty of legal threats, no actual filings.

- MIT Press published a 600-page tome by Joe Thornton of the University of Oregon explaining exactly how vinyl poisons humans and the environment in which they live. A few vinyl PR people wrote some whiny comments at amazon.com, but that was it.

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**As they teach you in law school: if the facts are on your side, pound the facts; if the law is on your side, pound the law; if neither facts nor law are on your side – pound the table.**

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(*We'd mention the HBN report “Environmental Impacts of Polyvinyl Chloride (PVC) Building Materials” - catchy, title, no? – but modesty forbids. If you want a copy, though, it's at [healthybuilding.net](http://healthybuilding.net)*)

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**Q: If the New York green tax credit case represents a decisive defeat, why did RFCI's law firm declare victory?**

A: As they teach you in law school: if the facts are on your side, pound the facts; if the law is on your side, pound the law; if neither facts nor law are on your side – pound the table.

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"The law's the law and this was a fairly straightforward case."

That view was challenged by attorneys for the Resilient Floor Covering Institute (RFCI) – a trade group representing Armstrong Floors, Congoleum, Amtico, and Mannington (who are also members of USGBC) – and Tarkett, Inc. As the final regulations were finished in autumn 2002, the group claimed the green tax credit injured plaintiff companies, alleging it put their products at a competitive disadvantage.

**From cradle to grave, this chemical has had a long history of problems, of carcinogenic and non-carcinogenic effects.**

The vinyl vendors abruptly dropped their suit in late May, a week before the matter was to go to court and a week after Sipos filed a series of affidavits from New York environmental officials, including a 19-page affidavit on environmental and human health effects of PVC and its precursor, vinyl chloride monomer (VCM) by toxicologist Judith Schreiber of the attorney general's office. "The New York State standard has survived the challenge, it's a valid regulation," Sipos said. "It's a potential model other jurisdictions may want to refer to if they're looking at this issue."

Schreiber's research cited a three-decade trail of studies from around the world demonstrating the adverse health effects to workers in VCM and PVC production facilities, residents near those facilities, first-responders at fires involving PVC and consumers living and working in buildings with PVC components.

"It's amazing that with both vinyl chloride monomer and PVC, there's such a substantial body of evidence in terms of exposure to these chemicals," Schreiber said. "It's very well-documented. Vinyl chloride is one of the few chemicals that are confirmed human carcinogens. There's nary a scientist who would argue that. From cradle to grave, this chemical has had a long history of problems, of carcinogenic and non-carcinogenic effects."

"Dr. Schreiber's affidavit, with its 60-plus exhibits, really demonstrated that vinyl chloride monomer is a known human carcinogen,"

Sipos said. "It's not 'maybe,' or 'possibly,' or 'only in extreme theoretical cases' – and many public health organizations have reached that conclusion."

A similar wealth of data exists for PVC, Schreiber said. "There's such an abundance of literature suggesting problems at all stages of its [PVC] use. There are risks associated with PVC production, there are risks associated with additives that are used in the PVC, with the use of the PVC and with its disposal, including incineration and accidental fires," she said.

In what can only be seen as an attempt to salvage something from a clear defeat, the RFCI claimed the suit was dropped because New York had agreed to modify the green tax credit. "There was no settlement at all," Sipos said. "Not one period, not one semi-colon, not one punctuation mark, not one anything - was changed in the regulation."

The New York law passed both houses of the legislature with broad, bi-partisan support, was signed and supported by Gov. George Pataki (R). "Attorney General Spitzer deserves a lot of credit for defending this law, as does the Pataki administration which initiated this rule and worked very closely with our office to defend it," Enck said.



NEW YORK ATTORNEY GENERAL ELIOT SPITZER

"Attorney General Spitzer has made environmental protection and public health a priority since his election five years ago," Enck said. "The attorney general's office pushes hard and gets results and this was the perfect case to do that."

The New York tax credit, as Sipos noted, "gets the word out" about the environmental benefits of building materials such as bamboo, cork and linoleum. The work by the team in the attorney general's office "gets the word out" that challenges by the vinyl industry to green preference standards will not stand up in court, and are in fact, unlikely to come to court at all.

*(The New York environmental officials' affidavits and other documents from this case are available on searchable CD-ROM from Healthy Building Network.)*

## Building a Healthy Environment Together

The Healthy Building Network advocates for the creation of healthy buildings free from the worst environmental health problems facing society today -- cancer, reproductive disorders, and childhood diseases -- that are directly linked to toxic building materials including arsenic-treated wood and PVC plastic (also known as vinyl).

The Healthy Building Network needs your financial support to continue its work to create a world where buildings are safe and healthy places, free from toxic contamination.

**Please make a tax-deductible gift to the Healthy Building Network today**

Enclosed is my contribution:

- \$25     \$50     \$75     \$100  
 \$250     \$500    Other \_\_\_\_\_

Make checks payable to the Healthy Building Network. *(Credit card donations can be accepted through our website: [www.healthybuilding.net](http://www.healthybuilding.net))*

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