File VC - Relief Valve

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cc. Henrick, Wetzel, Jeffrey, Jennett

December 1, 1978

Joseph E. Hadley, Esquire
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Suite 1000
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Dear Joe:

With respect to the possibility of filing an action for declaratory judgment and injunctive relief based upon the alleged invalidity of the regulation, 40 C.F.R. 61.65(a), and/or its interpretation as manifested through recent memos from the Director of the Division of Stationary Source Enforcement to Regional Enforcement Officers dated February 23, February 28, May 18, and October 26, 1978, our views, in brief, follow:

The regulation prohibits all but an emergency relief discharge which is "a discharge which could not have been avoided by taking measures to prevent the discharge." The regulation was processed through the normal rule making procedures and the time for judicial review has expired, 42 U.S.C. 7607. The EPA memos in substance declare that emergency discharges from relief valves are those which are due to Acts of God or to nonpreventable discharges. Preventable discharges are defined as those due to power outages, operator errors (due to lack of training or negligence), preventable equipment failures, malfunctions, or which could have been prevented through the use of back-up equipment.

One SPI member has received a letter dated November 7, 1978 in which EPA recites its interpretation of the regulations and of its "commitment to strict enforcement of future violations . . ."

The issue is whether on such a fact predicate a complaint could be drafted which would withstand a motion to dismiss. A complaint would have to allege that the interpretation of the statute is arbitrary and capricious or in violation of law. It would be further subject to attack on several grounds: (1) lack

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of immediate and irreparable injury since EPA has not at this date undertaken to enforce the regulation as interpreted against anyone in the industry, and (2) lack of ripeness for judicial review.

The applicable principles are:

1. The action has to be a final agency action, 5 U.S.C. 704. In the lead case of Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the court said that there was no hint that the regulation was "only the ruling of a subordinate official" (page 151), and further stated "these regulations purport to give an authoritative interpretation of a statutory provision (page 152). In National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C.A., 1971), an opinion that employees of coin operated laundries were subject to the Fair Labor Standards Act, was held reviewable, the court stating that it will accept a decision of a board, commission or head of an agency interpreting a statute as presumptively final. But a harsh result was reached in Helco Products Co. v. McNutt, 137 F.2d 681 (D.C.A., 1943), a case in which the court ruled that a decision of the Commissioner of the Food & Drug Administration was not final since the opinion had not been issued by his superior, the Federal Security Administrator, and since there had not been a decision by the Department of Justice to prosecute. This opinion has not found much favor in later cases and we think can safely be disregarded.

2. The label attached to the action is not of vital significance. Opinion letters, if formal enunciations, are final and reviewable. 1/ The court in Independent Broker-Deal. T. Assn. v. SEC, 442 F.2d 132 (D.C.A., 1971), cert. den., 404 U.S. 828, undertook to review a request by SEC to stock exchanges to abolish customer directed giveups. The court said (page 139-140):

> The fact that an agency has not issued a command does not mean that the step by which it initiated a procedure, or informal activity, leading up to the

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1/ It may be of interest to note that the Chrysler Corporation has recently filed a suit in the D.C. District Court, against EPA, No. 78-2152, attacking "advisory circulars", and thus by-passing the rule making procedures.

> exercise of its powers may be relegated to the area of mere unreviewable "suggestion."
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> In considering the need for or propriety of judicial review in a particular case, we must recognize that terms like "order" or "request" may be terms of conclusion rather than analysis. "Whether or not the statutory requirements of finality are satisfied in any given case depend not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action."

In Continental Air Lines, Inc. v. CAB, 522 F.2d 107 (D.C.A., 1975), the announcement by CAB setting a configuration policy was held to be reviewable. The court said, at page 148:

> The label an agency attaches to its action is not determinative. The action may be reviewable even though it is merely an announcement of a rule or policy that the agency has not yet put into effect. Indeed, agency action may be reviewable even though it is never to have any formal, legal effect. What is required is that the interests of the court and agency in postponing review until the question arises in some more concrete and final form, be outweighed by the interest of those who seek relief from the challenged action's "immediate and practical impact" upon them . . . .

In the case of Atlantic Richfield Co. v. FEA, 556 F.2d 542 (Temp. Emerg. Ct. of App., 1977), petitioners requested judicial review of "interpretations" and "decisions and orders" issued by the agency pursuant to the Economic Stabilization Act. The court said, at page 552:

> Aside from their merely advisory or persuasive effects, the interpretations may have extremely important consequences with respect to the issue of good faith reliance

for future acts and the question of interim penalties referred to in the FEA regulations.

On the other hand, if the decision is informal and subject to change, it is not reviewable. New York Stock Exchange, Inc. v. Bloom, 562 F.2d 736 (D.C.A., 1977). There, although the opinion letter was sent out by the Comptroller of the Currency the court regarded it as tentative and subject to change and accordingly held that the opinion was not ripe for judicial review.

3. The basic consideration is the practical effect of the agency action. In A. O. Smith Corp. v. FTC, 530 F.2d 515 (3rd Cir., 1976), FTC ordered companies to file "annual line of business reports", and warned of applicable civil fines. The court in concluding that the order was subject to judicial review stated:

> Thus, it appears from the Abbott Laboratories trilogy that one seeking discretionary relief may not obtain pre-enforcement judicial review of agency action if there is no immediate threat of sanctions for noncompliance, or if the potential sanction is de minimis. Conversely, the court should find agency action ripe for judicial review if the action is final and clear-cut, and if it puts the complaining party on the horns of a dilemma: if he complies and awaits ultimate judicial determination of the action's validity, he must change his course of day-to-day conduct, for example, by undertaking substantial preliminary paper work, scientific testing and record-keeping, or by destroying stock; alternatively, if he does not comply, he risks sanctions or injuries including, for example, civil and criminal penalties, or loss of public confidence.

To the same effect see Continental Air Lines v. CAB, supra, and Frozen Food Express v. United States, 351 U.S. 40 (1955).

However, in the lead case concerning the lack of immediate impact, Toilet Goods Assn. v. Gardner, 387 U.S. 158 (1967), the regulations authorized the Food and Drug Administration to suspend certificates of companies refusing entry to Food and Drug employees. Suit was brought to enjoin enforcement of the regulations. The court held the case was not ripe for review, and said, at page 163:

> The regulation only serves notice that the Commissioner may under certain circumstances order inspection of certain facilities and data and that further certification may be refused . . . .

The court went on to say:

> At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order.

The court also notes the lack of real damage to the plaintiff since on suspension of certificate such a determination could be promptly challenged through the administrative procedures. With respect to the application of the above principles to the instant situation, it is our opinion:

1. Interpretations have been ruled to be subject to judicial review in the district courts. Utah Power and Light Co. v. EPA, 553 F.2d 215 (D.C.A., 1977), Amoro Oil Co. v. United States, 450 F.Supp. 185, 187 (W.D. Mo., 1978).

2. The fact that the interpretations were not issued by the Administrator may not be decisive. It is certainly arguable that they were issued over a period of months by the official in charge and that it can be reasonably assumed the Administrator was informed, and approved.

3. The interpretations by agencies authorized to administer a statute are upheld unless a persuasive showing is made that they are arbitrary and capricious. Further, in an action involving the public health the courts will unquestionably weigh the public interest against the private interest, and will likely reject injunctive relief unless persuaded that the interpretation is without any credible support.

4. With affidavits showing tremendous financial impact of the regulations, as interpreted by EPA, upon the industry there would be a chance of securing judicial review, provided it could be demonstrated that a legal, not a factual issue is presented. For, if it can be argued that the interpretations or parts thereof, on their face, are in violation of the regulations then it is possible that the courts would review the matter.

5. If, as we suspect, more than a legal issue is presented, then the courts will be most reluctant to review until presented with a concrete fact situation. For example, if the company does not install back-up equipment, or has limited back-up equipment, and discharges pollutants which could have been contained in some or better equipment, and if EPA then takes an enforcement action against Diamond Shamrock the courts would probably review the interpretation.

Although this memorandum has been concerned with the possibility of filing an action in the district court for review of the agency interpretations, we have given some thought to other possibilities, but feel they do not offer any genuine chance of success.

1. Review of the regulations rather than the interpretations under 42 U.S.C 7607 could be attempted by fashioning an argument out of the fact that it was not until October 1978 that the work practice section of the statute was placed under the penalty provision in Section 7413, and was therefore not enforceable under that section, and that hence the 60 day time period did not commence to run until Congress acted in October. The problem is that the section and the regulations probably were enforceable under the general equity powers of the court, upon their first promulgation.

Further, Congress' belated action in placing the work practice regulations under the penalty provisions of Section 7413 strengthens the argument that Congress was plainly correcting a legislative oversight. There are many cases where the courts have judicially read words into a statute in order to achieve legislative intent.

2. The private citizens section of the statute (42 U.S.C. 7604) authorizes filing of suits to enforce the Administrator to comply with the mandatory provisions of the Clean Air Act. We could conceivably argue that the memorandums are not interpretations but additional rules which must go through the rule making procedures, and ask the court to so order. Such an action would be filed in the district court. It is our present

opinion that there would be very little chance that a court would accept this proposition. For the agency seems to have attempted to more clearly define the meaning of the word "prevent," and if so this would seem to fall within the confines of the interpretative power.

In conclusion, we cannot make a final judgment on this matter without further research. As you can see we have some hope and it is possible that a district court would agree to review the interpretation of EPA. We will discuss these issues and others on December 7, 1978.

Sincerely yours,

Gary

Gary H. Baise

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