

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ENVIRONMENTAL DEFENSE FUND, INC.)

Petitioner,)

v.)

RUSSELL E. TRAIN, ADMINISTRATOR,)
ENVIRONMENTAL PROTECTION AGENCY)

Respondent,)

Docket No. 76-2045

and)

THE SOCIETY OF THE PLASTICS)
INDUSTRY, INC., et al.,)

Intervenors.)

PETITIONER ENVIRONMENTAL DEFENSE FUND'S
REPLY TO "SUGGESTION OF MOOTNESS
AND RESPONSE OF THE SOCIETY OF THE PLASTICS
INDUSTRY, INC. " AND "RESPONSE OF THE GOODYEAR TIRE
AND RUBBER COMPANY" TO PETITIONER'S AND RESPONDENT'S JOINT
MOTION TO DISMISS

On March 24, 1977, Petitioner Environmental Defense Fund (EDF) and Respondent Environmental Protection Agency (EPA) in the above-captioned case filed a Joint Motion to dismiss this case upon specified terms and conditions. On March 31, 1977, Intervenor, Society of the Plastics Industry, Inc., (SPI) filed a response entitled "Suggestion of Mootness and Response of the Society of the Plastics Industry, Inc. to Petitioner's and Respondent's Joint Motion to Dismiss." Thereafter, on April 4, 1977, Intervenor Goodyear

SPI-08037

Tire and Rubber Company (Goodyear) also filed a response to the Joint Motion to Dismiss. Neither Intervenor has nor seriously could have questioned either the right of EDF and EPA to resolve their differences through a settlement, or EPA's statutory authority to propose amendments to hazardous air pollutant emission standards promulgated pursuant to §112 of the Clean Air Act, 42 U.S.C.

§1857c-7. Nevertheless, both SPI and Goodyear have alleged that the terms of the settlement agreement reached between EDF and EPA are somehow improper, "unlawful or unachievable" (Goodyear Response at 4) and will bias any future rulemaking proceedings initiated by EPA in accordance with that agreement. Thus, they have asked this Court to disapprove the settlement and to dismiss EDF's petition for review with prejudice. Not only are these allegations groundless, but certain of the statements made by Intervenor SPI are also seriously misleading. EDF submits that when this Court examines the particulars of the proposed settlement, its validity and propriety will be apparent, and Intervenors' arguments will be shown to be no more substantial than annoyance at the prospect of future proposed amendments to the existing vinyl chloride emissions standard.

I. Intervenors' Rights are Fully Protected by the Proposed Settlement

A. Extensive Judicial Review of the Factual Bases for the Particular Terms of the Settlement Agreement is not Appropriate at this Time.

Intervenors argue that by setting forth the general outline of the settlement agreement, EDF and EPA "are in effect asking this

Court to approve the proposed amendments to the regulations." (Goodyear Response at 3). Implicit in this assertion is the suggestion that approval of the settlement will have some stare decisis effect which would impair the Intervenor's rights to attack the regulations proposed under the agreement in the future. The Joint Motion to Dismiss, however, does not ask this Court to approve the substance and validity under the Clean Air Act of the specific amendments to be proposed pursuant to the agreement. Instead, it sets forth the terms upon which agreement has been reached between EDF and EPA and asks this Court only to approve of the agreement. EDF and EPA are not asking this Court to explore the factual predicate and statutory basis for the settlement outlined in the Joint Motion because such judicial scrutiny is neither necessary nor appropriate at this point. When regulations have been proposed, commented upon, and promulgated, the extent of judicial review sought now by Intervenor, will be available and proper.

The cases cited by Goodyear to support the contention that this Court should scrutinize in detail the terms of the settlement, especially in light of this Circuit's special responsibility for deciding cases under the Clean Air Act, are inapposite. Unlike the instant case, only one of the cited cases, Katopodis v. Liberian S/T Olympic Sun, 282 F.Supp. 369, (E.D.Va. 1968), even involved a settlement, in every case the defendant or appellee opposed the dismissal, and the court's consideration of the terms of a voluntary dismissal was at all times focused upon ensuring that the financial costs incurred by the defendant or appellee in responding

to the suit in question, were reimbursed.

A survey of the cases clearly shows that they are not authority for the arguments advanced by Intervenor. In Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976), the court stated that "the word 'terms' in Rule 42(b) refers to the payment of damages and costs alleged to be payable plus the payment of whatever fees are due." 528 F.2d at 678. The same is true for Blount v. State Bank & Trust Co., 425 F.2d 266 (4th Cir. 1970). Similarly, in Home Owners' Loan Corp. v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943), the court observed:

The rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs and when the defendant will not be subjected thereby to some plain legal prejudice beyond the incidental annoyance (as distinguished from prejudice) of a second litigation upon the same subject matter."

Moreover, "The terms and conditions which the court may impose are for the protection of the rights of the defendant." Id. Since the respondent here, EPA, has agreed to the dismissal, the concerns addressed by the court in these cases are not relevant.

The very same considerations of costs and attorneys' fees were also the major focus in Katopodis v. Liberian S/T Olympic Sun, 282 F.Supp. 369 (E.D.Va. 1968) and American Cyanamid Co. v. McGhee, 317 F.2d 295 (5th Cir. 1963). In no case cited by Goodyear was the court concerned with the substantive provisions of a settlement agreement, or with the rights of intervenors.

The Clean Air Act cases relied upon by Goodyear are no more

supportive of Intervenor's arguments than the cases discussed above. Kennecott Copper Corp. v. EPA, 149 U.S. App. D.C. 231, 462 F.2d 846 (1972) and Portland Cement Ass'n. v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973) involve judicial review of final ambient air quality standards and stationary source emission standards promulgated under the Clean Air Act. In both cases, the lengthy administrative process required for rulemaking had been completed and the court was exercising its proper institutional role of reviewing the stated factual and regulatory basis set forth by EPA in publishing the final standards. Similarly, in International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (1973), the court was examining the factual basis for the EPA Administrator's denial of a petition for suspension of the 1975 stationary source emission standards. These cases cannot properly be read as supporting Intervenor's apparent contention that this Court must refuse to approve the terms of a settlement in the absence of a detailed factual showing that those terms are "reasoned and in conformity with the Act." (Goodyear Response at 6).

Goodyear contends that "there has been no showing in support of the proposed regulations." (Goodyear Response at 7). The Joint Motion to Dismiss, however, does set forth in sufficient detail the basis upon which agreement was reached between EPA and EDF. At this stage, there is no requirement that the factual basis which will support the amendments to be proposed by EPA pursuant to the agreement need to be set forth. The fact is that there are not yet any proposed regulations. It is therefore not

critical that the factual foundation for such future proposed regulations has not been presented in detail in the settlement agreement submitted for the Court's approval. When those regulations are proposed, Intervenorors will have a full and fair opportunity to comment upon those proposals and to challenge the basis advanced by EPA in support of them. Thereafter, if Intervenorors remain dissatisfied with the final regulations, they can seek judicial review under the statute. At that time, full scale judicial scrutiny of the scientific and statutory basis for the regulations will be available and appropriate.

Even though Intervenorors will have an opportunity to comment upon and oppose the proposed regulations prior to promulgation, they insist that because dismissal of this case is contingent upon EPA's agreeing to propose regulations incorporating the settlement which has been reached, any subsequent rulemaking proceedings would necessarily be biased. This argument is simply not meritorious. First, all that EPA has agreed to do is to propose regulations reflecting the settlement. There is no further obligation beyond that point other than to conduct a full and fair rulemaking proceeding. The fact that EDF has reserved the right to challenge the final amendments has no bearing on the fairness of the rulemaking process itself. It should be emphasized that Intervenorors will have exactly the same right, should they be dissatisfied with the final results of that rulemaking. Whether a court reviews the final action taken by the Agency at the request of EDF or Intervenorors, the same standards will be applied regarding the fairness of the rulemaking process. Thus, Intervenorors'

argument is totally without substance. EPA must be equally concerned about the possibility of being sued by the Intervenor or EDF. Furthermore, even if EDF had not reserved the right in the settlement agreement to challenge any final action, it would presumably still have the same right under §307 of the Clean Air Act as is retained by the Intervenor. With regard to subsequent judicial review, EDF has provided for nothing more than it already has a right to under existing law.

B. Judicial Approval of the Settlement Agreement is Warranted

Goodyear's assertion that the Joint Motion contravenes established procedures for modifying existing regulations is unfounded. EDF filed a timely challenge to the final vinyl chloride air pollution emissions standard. In the course of negotiations following the initiation of the lawsuit, EPA agreed to propose amendments that satisfactorily address the deficiencies in the standard which formed the basis of EDF's legal challenge. In return, EDF agreed to waive its statutory right to review of the existing standard. The settlement represents a classic compromise. EPA has obligated itself to propose amendments to the standard, an otherwise discretionary action, and EDF has given up its right to judicial review of the existing standard. There is nothing unlawful or improper in such a result. ^{1/}

^{1/} Goodyear's allegation that EDF may somehow have unduly coerced EPA into settling the litigation is patently absurd. The cases cited in support of this contention deal with flagrant

Settlement agreements such as that submitted for this Court's approval are not unusual. Nor are the arguments raised by SPI and Goodyear unfamiliar. In fact, identical issues were

1/ (Cont'd.) instances of Congressional or White House pressure upon regulatory agencies and are in no way analogous to the instant case. Indeed, the suggestion that the exercise by EDF of its statutory right to obtain judicial review is unduly coercive or otherwise comparable to the strong political pressure discussed in the cases, is wholly without merit. Goodyear has not only overlooked the fact that the purpose of settlement agreements is to "avoid litigation," (Goodyear Response at 8), but their argument also asks this Court to accept the untenable proposition that reaching such an agreement is prima facie evidence of undue coercion.

Goodyear's final suggestion, that EDF improperly persuaded EPA to settle on the basis of new data not in the record, is equally lacking in merit. The case cited as indicative of the proper procedure to achieve modifications of existing regulations is interesting although irrelevant to the instant action. Oljato Chapter of Navajo Tribe v. Train, 169 U.S. App. D.C. 195, 515 F.2d 654 (1975) involves a challenge to EPA's refusal to revise promulgated new source performance standards in response to a letter by plaintiffs. This Court's opinion sets forth the procedure for petitioning for a revision of standards under the Clean Air Act, and for obtaining judicial review of final agency action on the petition. Since EDF's petition for review here was a direct challenge to a promulgated standard, the issues and holding of Oljato are not applicable.

SPI-08044

raised last year by industry intervenors opposing judicial approval of a settlement agreement involving four consolidated cases between EPA and several adverse parties. In that agreement the Agency obligated itself to promulgate according to a strict timetable extensive regulations under the Federal Water Pollution Control Act to control effluent discharges of 65 toxic chemicals by 21 major industries. In the Memorandum Opinion accompanying the final order approving the settlement agreement in Natural Resources Defense Council, et al., v. Train, Civ. No. 2153-73, et al., (D.C.D.C., June 9, 1976) U.S. District Judge Thomas Flannery stated:

Intervenors raise several objections to the agreement. First, they fear that they will not be able to challenge either the content or general legality of regulations issued in accordance with the agreement. It is fairly clear that this fear is groundless. The court certainly cannot be approving the content of regulations which do not yet exist. The intervenors will have opportunity to influence the content of regulations by participating in the rulemaking proceedings the EPA must conduct before promulgation and will have opportunity to attack the final regulations in the Court of Appeals. The intervenors will also be able to question the general legality of the regulations. *** As noted in the memorandum accompanying the order denying intervention, approval of the agreement creates no precedent on the legality of the specific regulations which may emerge. Order of April 29, 1976, accompanying memorandum at 4-5; see S.E.C. v. Canadian Javelin Ltd., 64 F.R.D. 648, 650 (S.D.N.Y. 1974); United States v. Carter Products, Inc., 211 F.Supp. 144, 148 (S.D.N.Y. 1962).

In the April 29, 1976 Order referenced by Judge Flannery, he had held as follows:

Any question as to the content of the regulations, including the adequacy of their factual predicate, can be raised once the regulations are promulgated. The approval of the proposed settlement [which numbered 32 pages and specified the pollutants and industries to be regulated] by the court in no way expresses an opinion as to the regulations' content.

At best, a decision by the court to approve the proposed settlement will express an implicit judgment that the type of regulations the agreement contemplates are not flatly inconsistent with the Act. This is not to say that applicants [for intervention] and other parties subject to the regulations will not, at some time in the future, convince a court that the statute does not mean what it appears to mean on its face. In the case at bar, though, the court need not conduct such an in-depth inquiry to approve the settlement. Indeed, the matter is not ripe for adjudication in the absence of concrete regulations, and it would be error for the court to proceed further at this time. The absence of any res judicata or stare decisis impairment arising from the instant proceeding is reinforced by the proposed agreement itself, which specifically provides that no challenges to the validity of regulations formulated pursuant to it shall be pretermitted. Natural Resources Defense Council, et al., v. Train, Civ. No. 2153-73 et al., Memorandum Opinion (April 29, 1976).

EDF believes that the result reached by Judge Flannery in the consolidated cases discussed above would be equally appropriate here. The rights of the Intervenor are equally well protected, and the terms of the settlement agreement are consistent with the intent and requirements of the Clean Air Act. EDF therefore urges this Court to grant the Joint Motion to Dismiss.

II. SPI's Allegations Concerning the Fairness of
New Rulemaking Proceedings are Seriously Misleading

SPI has questioned the fundamental fairness of any new rulemaking proceedings to review possible amendments to the standard as a result of an EDF news release issued at the time the Motion to Dismiss was filed with this Court. In particular, SPI has cited a number of sentences from that release and concluded that "these comments clearly indicate that EDF, at least, believes the proposed additional rulemaking proceedings to be simply a sham, merely going through the motions of notice and public comment to validate a secret deal." (SPI Response at 5). Because of the seriousness of this allegation, which is totally misleading if not an intentional misrepresentation of the facts to this Court, EDF would like to explore the facts surrounding this issue in some detail.

The press release in question was issued on March 24, 1977 for release the following day. On Friday morning, March 25, counsel for SPI telephoned counsel for EDF and asked whether the language used in the press release reflected EDF's understanding of the Joint Motion to Dismiss which had been submitted to the Court. Specifically, he complained that the language used in the EDF press release could be interpreted to mean that EPA had agreed to promulgate final regulations without considering the comments of his clients.

EDF's counsel immediately assured counsel for SPI that the language used in the press release was designed merely to provide a summary of the steps required to finalize a settlement of this

type and that it was not intended to provide a precise legal description of the rulemaking process. Counsel for EDF apologized for any misunderstanding which may have been created and offered to send SPI's counsel a letter clarifying EDF's interpretation of the Motion which had been submitted to the Court. This offer was accepted and on March 28, 1977 EDF hand-delivered the attached letter to Mr. Gary Baise, Counsel for SPI.

In that letter, counsel for EDF stated that "the purpose of this letter is to clear up any misunderstanding and reassure your clients that the Agency has only made a commitment to propose regulations incorporating the settlement." The letter then reiterated all of the safeguards which have been built into the Motion submitted to this Court including the fact that SPI and Goodyear "will have the right to participate fully in the ensuing rulemaking proceeding and to provide whatever comments they may have on the proposed amendments. The Agency is required by law to consider these comments fully prior to promulgating any final regulations." (EDF Letter at 1). Counsel for EDF concluded by stating:

Nevertheless, we regret any misunderstanding which may have developed in the minds of your clients as a result of the press reports on the proposed settlement. We trust that this letter will clear up any confusion regarding our intentions or understanding of the Motion which has been submitted to the Court. Please do not hesitate to contact me if you have any questions. (EDF Letter at 1-2).

Despite the delivery of the aforementioned letter to Counsel for SPI on March 28, 1977, SPI filed a response with this Court on

SPI-08048

March 31, 1977 which completely failed to mention either the letter or the previous telephone conversation discussed above. Counsel for SPI chose instead to rely on a press release which counsel for EDF had already stated did not represent a correct legal description of EDF's position, and to ignore completely EDF's explanation for the language used in the press release and the subsequent letter which attempted to clarify any misunderstanding. By doing so, counsel for SPI provided this Court with a clear misrepresentation of EDF's interpretation of the proposed additional rulemaking proceedings. Three days prior to the date on which SPI filed its response, it was informed by letter that the Agency "has only made a commitment to us (EDF) to propose regulations incorporating the settlement." Yet SPI informed this Court on March 31 that "EDF, at least, believes the proposed additional rulemaking proceedings to be simply a sham, merely going through the motions of notice and public comment to validate a secret deal." (SPI Motion at 5).

In subsequent telephone conversations, discussed more fully below, counsel for SPI took the position that the letter was merely private correspondence between attorneys and that in any event it still did not adequately clarify EDF's position. Yet, despite an express invitation to contact EDF's counsel if counsel for SPI still had any questions, SPI counsel chose not to do so. Instead, they chose to ignore the letter and the prior telephone conversation and rely on a press release which is not a legal document and which was never intended to provide a precise description of the rulemaking process.

Prior to filing this Reply, EDF's counsel requested that counsel for SPI file an amended Response with this Court stating the facts outlined above. Despite several lengthy conversations and an offer by EDF to reiterate to this Court that the press release did not contain a correct legal description of the procedural safeguards contained in the settlement agreement, SPI's counsel refused to file the requested amended response. Therefore, EDF felt the necessity to make the foregoing facts known to the Court in order to eliminate any question as to EDF's intentions or its understanding of the Joint Motion.

EDF does not now believe, nor did it ever believe, that the proposed additional rulemaking proceedings are intended "to be simply a sham." (SPI Motion at 5). EDF expects only that EPA will propose regulations incorporating the settlement reached in this case and conduct a full and fair rulemaking proceeding on those proposals -- nothing more and nothing less. Nor is EDF attempting to "short circuit the administrative channels normally utilized to decide fairly and objectively to propose amendments if desirable, to evaluate comments on any proposed amendments fairly and to take them into account in finalizing any amendments." (SPI Motion at 6). The amendments which EPA has agreed to propose are a direct consequence of an out-of-court settlement which has been reached in this case. A settlement agreement is a completely legitimate way to end such a case and in no way taints the subsequent rulemaking process.

SPI-08050

III.- This Case Is Not Moot and the Settlement
Reflects the Resolution of an Actual Case
or Controversy

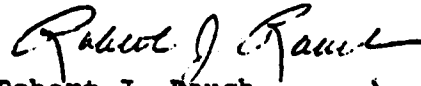
Both Intervenor have asked this Court to dismiss EDF's petition for review with prejudice because "at present, no actual case or controversy exists with respect to the current vinyl chloride standard that is the subject of EDF's petition for review in this case. SPI, therefore, has suggested to the Court that the case should be dismissed for lack of jurisdiction." (SPI Motion at 7; Goodyear Response at 11). This argument completely ignores the fact that the agreement not to request modification of the present standard was an integral part of the compromise reached between the parties. Indeed, counsel for SPI has sought assurances from EDF since the beginning of this case that any settlement which might be reached would not interfere with current investment decisions required to meet the existing standard. EDF's counsel was sensitive to this concern and agreed as part of the compromise with EPA that if future changes in the standard were proposed, EDF would drop its effort in this Court to seek immediate changes in the existing standard. As noted above, this is a perfectly legitimate compromise arising from settlement negotiations. Until the settlement is approved by this Court, however, the case or controversy which led to the filing of this case continues to exist. It is also worth noting that in opposing the Joint Motion to Dismiss, Counsel for Goodyear and SPI are now in the anomalous position of attacking a settlement which was expressly designed to prevent disruption of the current efforts

SPI-08051

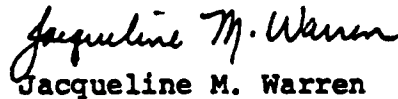
of their clients to meet the existing standard.

This Court can put an end to the controversy between EDF and EPA by approving the settlement and granting the Joint Motion to Dismiss. For the foregoing reasons, EDF urges that this be done.

Respectfully submitted,



Robert J. Rauch


Jacqueline M. Warren

Counsel for Petitioner
Environmental Defense Fund
1525 18th Street, N.W.
Washington, D.C. 20036

(202) 833-1484

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Petitioner Environmental Defense Fund's Reply to "Suggestion of Mootness and Response of the Society of the Plastics Industry, Inc.," and "Response of the Goodyear Tire and Rubber Company" to Petitioner's and Respondent's Joint Motion to Dismiss have been mailed, first class postage prepaid, this 11th day of April, 1977 to the following:

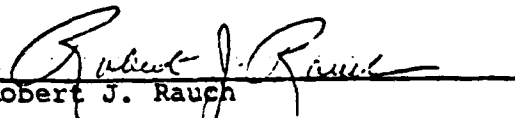
Donald W. Fowler, Esquire
Lands and Natural Resources Division
Pollution Control Section
Department of Justice
Washington, D.C. 20530

Ronald S. Naveen, Esquire
Office of General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Albert J. Beveridge, III, Esquire
Gary H. Baise, Esquire
Beveridge, Fairbanks & Diamond
One Farragut Square South
Washington, D.C. 20006

Jerome H. Heckman, Esquire
Joseph E. Hadley, Jr., Esquire
Keller and Heckman
1150 17th Street, N.W.
Washington, D.C. 20036

Theodore L. Garrett, Esquire
Covington & Burling
888 16th Street, N.W.
Washington, D.C. 20006


Robert J. Rauch

SPI-08053

2000

2001

2002

2003

2004