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June 8, 1984

Peter de la Cruz, Esquire
Keller & Heckman
1150 17th Street, N.W.
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Dear Peter:

Enclosed is a copy of Judge Vernon's opinion in United States v. Conoco, Inc., No. 83-2518 (W.D. La. June 1, 1984). The Court stayed 18 claims involving the relief valve regulation--40 C.F.R. § 61.65(a)--pending a decision by the Fifth Circuit in United States v. Ethyl Corporation, No. 83-3537. The Court also addressed the application of 40 C.F.R. §§ 61.62 and 61.63 to spills and leaks, and its interpretation of the regulations was favorable to industry.

Specifically, the opinion held that an inadvertent spill of VCM and a leak from a rupture disc in the incinerator bypass system were fugitive emissions. The Court continued that fugitive emissions were not regulated by 40 C.F.R. §§ 61.62 or 61.63, but were governed by 40 C.F.R. § 61.65(b). The Court found that inadvertent spills and leaks needed to be remedied quickly, but were not prohibited by the standard. The Court concluded that application of Sections 61.62 and 61.63 to spills and leaks would in effect prohibit fugitive emissions, because uncontrolled discharges of VCM would by their very nature exceed 10 ppm. The Court therefore granted Conoco's motion for summary judgment for both the spill and the leak.

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Peter de la Cruz, Esquire
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Based on my discussions with Estela, it appears that oral argument, for a change, was quite important. Rob presented the Court with visual aids to show how the spill and leak occurred. He also presented the Court with several flow charts, taken from the EPA Standard Support Document, which indicated which specific regulations applied to specific processes. While in most cases oral argument is merely a recitation of the briefs, in this case the visual aids certainly contributed to the Court's understanding of the issues.

Cordially,


Gary H. Baise

GHB/tlc

Enclosure

VEV-239993

✓ JUN - 1 1984

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

ROBERT H. SHENWELL, CLERK
BY mm
DEPUTY

UNITED STATES OF AMERICA

VS.

CONOCO, INC.

CIVIL ACTION NO. 83-2518

FOR THE UNITED STATES

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VEV-239994

RULING ON DEFENDANT'S MOTIONS
FOR SUMMARY JUDGMENT OR FOR A STAY OF LITIGATION

The United States, at the request of the Administrator for the Environmental Protection Agency ("EPA"), filed a complaint against defendant Conoco, Inc. alleging violations of the emission standards for Vinyl Chloride ("VC") under the Clean Air Act at its plant in Westlake, Louisiana. Conoco moves for summary judgment on all claims or, in the alternative for a stay of litigation on 18 of the United States' 20 claims since two other cases involving the same issue are now before the Fifth Circuit Court of Appeals. The United States opposes any stay and argues that issues of material fact exist on its remaining two claims, making summary judgment inappropriate. After hearing oral argument on May 9, 1984, and analyzing the parties' submissions and applicable caselaw, the court stays litigation on the claims involving issues presently before the Fifth Circuit and grants Conoco summary judgment concerning the remaining two claims.

Briefly stated, the United States alleges that Conoco's plant discharged VC into the atmosphere from relief valves on equipment in VC service on some 14 occasions between 1978 and 1983 in violation of 40 C.F.R. § 61.65 (a) and 42 U.S.C. § 7412 (c). The complaint also charges that Conoco failed to report 4

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of these discharges within a ten-day period under the same regulations. Conoco contends that § 61.65 (a) is a work practices standard (requiring the use of certain techniques to limit emissions) rather than a maximum emissions standard, per se. Therefore, as their argument goes, EPA had no authority in 1976 when § 61.65 (a) was implemented, to promulgate such work practices until the Clean Air Act was so amended in 1977. See, e.g., Adamo Wrecking Co. v. United States, 434 U.S. 275, 287-89 (1978). Conoco further states that if § 61.65 (a) is not an emission standard and its purpose is to determine work practice violations, the 10-day reporting requirement is ineffectual and is so intertwined with the invalid portion of the regulation as to forbid enforcement. See Spokane Arcades, Inc. v. Brockett, 631 F.2d 135 (9th Cir.), aff'd. 454 U.S. 1022 (1981). The United States counters that 42 U.S.C. § 7607 (b) deprives this court of jurisdiction to determine whether or not § 61.65 (a) is an emission standard.

In any event, issues identical to the instant litigation are currently before the Fifth Circuit in United States v. Ethyl Corp., No. 83-3537 and United States v. Occidental Chemical Corp., No. 83-3656. These consolidated cases relate directly to 18 of the United States' claims in this matter. Consequently, it is in the interests of judicial economy that this litigation be stayed. See Landis V. North American, 299 U.S. 248, 253-55

(1936). The United States, nonetheless, contends that a stay will work damage to the public's interest in the environment since additional relief valve discharges and incinerator bypasses indicate a continuing problem at the Westlake facility. The court invites the United States to amend its complaint to add any additional alleged violations which have occurred prior to our present ruling.

Next, some comments on Conoco's remaining alleged two violations are in order. It appears that no existing caselaw addresses the claims the United States makes as to these two discharges. In any event, the court finds that the facts are not in dispute. Thus, this court need only make a legal determination as to these facts under F.R.Civ.P. 56.

The September 11, -1980 discharge occurred when the "B" flake caustic dryer, which is used in series with the "A" flake caustic dryer to reduce the concentration of water in VC prior to testing it for finished product specifications and storing it for shipping, was taken off line, emptied of VC, nitrogen purged, and opened for recharging with flake caustic. Residual nitrogen vapors are then vacuumed out of the dryer with the "Supersucker," an industrial vacuum. Conoco's established procedures require the operator to close the two valves to the Supersucker prior to putting the dryer back on line to receive VC. On this date, however, the operator failed to close the valves to the

Supersucker. Consequently, when the dryer was put back on line and VC reintroduced, the liquid VC was discharged onto the plant floor, which quickly changed into a gas and escaped into the atmosphere.

The November 3, 1981, discharge occurred under different circumstances. All major VC monomer vent streams (except the oxychlorination vent) were ducted to an incinerator to control the VC monomer emissions to the atmosphere to a concentration of less than 10 ppm. Before entering the incinerator, each vent stream flows through a knockout pot, which separates out entrained liquid from the gas going to the incinerator. Two high pressure protection systems, located at the exit of each knockout pot, protect the incinerator from over pressure. These systems are ducted separately to the C-500 vent scrubber, which vents to the atmosphere.

On the instant November date, Conoco detected a leak when a routine C-500 vent gas sample showed a VC monomer concentration of 3862 ppm and a second sample yielded 4602 ppm. Ultimately, Conoco found that the leak was caused by corrosion of the rupture disc in the vent line on the knockout pot exit of the wet vent header on the incinerator. Conoco then replaced the disc with a nickel, non-corrosive element.

Basically, the United States charges that Conoco's two VC releases violated, among other possible regulations, 40 C.F.R. § 61.63 (a), which states in pertinent part:

Vinyl Chloride formation and purification:
The concentration of vinyl chloride in all exhaust gases discharged to the atmosphere from any equipment used in vinyl chloride formation and/or purification is not to exceed 10 ppm except as provided in § 61.65 (a). ...

As to the September 11, 1980 incident, Conoco argues that the Supersucker is not involved in the formation and/or purification of VC and/or that only liquid, final-product VC was spilled, thus not constituting an exhaust gas. Alternatively, Conoco argues that this discharge is subject only to regulations concerning fugitive emissions. (See discussion, infra). The United States counters that exemption of the Supersucker from any formation and/or purification status would be analogous to allowing outfall pipes to release gases in circumvention of the spirit of EPA's regulations. It also argues that any liquid VC quickly changes to a gas at 7°C and thus becomes an exhaust gas.

As to the November 3, 1981 discharge, Conoco argues that the escaping gases left the system before entering the exhaust gas incinerator and/or tower and that, in any event, the gases were fugitive emissions under the meaning of 40 C.F.R. § 61.65 (b).

Section 61.65 (b) explicitly regulates fugitive emissions and consists primarily of work practices which are

required to "minimize" episodic, unpredictable, and unintended emissions of VC. It also requires plants to detect and seal leaks in accordance with a formal leak detection plan. The United States has not alleged and it appears that Conoco has not violated these fugitive emission regulations. The United States contends that the vent line knockout pot was a direct component of VC formation and/or purification. It also argues that no limitations exist in the EPA standards to "known, necessary and continuous" discharges, but that their regulations simply require that exhaust gases be controlled to limit VC to a concentration of 10 ppm. Their position, then, is that exhaust gas standards apply to all emissions from certain pieces of equipment, whether continuous or episodic.

However, unlike § 61.65 (b), 40 C.F.R. § 61.62 (a) (ethylene dichloride purification), 61.62 (b) (oxychlorination vents), and 61.63 (a) (vinyl chloride purification) were promulgated to regulate the known, necessary, and continuous discharges of VC exhaust gas from specific point sources. Thus, the EPA's framework regulates VC exhaust gases from intended exhaust points in excess of 10 ppm, but recognizes that occasionally some "mistakes" will happen and fugitive, or unintended releases of VC will occur. Such episodic, pre-exhaust-phase discharges are not illegal provided that certain work-practice standards are complied with to minimize such occurrences. Relief or

over-pressure valves, for example, are permitted to occasionally release quantities of VC when pressures within the plant's process become excessive, so that explosions can be avoided.

Moreover, even EPA's own testing methods for §§ 61.61 (a) and 61.63 (a) outline the difference between exhaust gas discharges and fugitive emissions. Volume II of the SBEIS [EPA's Standard Support Documents for their Applicable Regulations] at 2-34 details the following:

The fact that Test Method 106 is to be used to determine compliance with §§ 61.62 (a) and 61.63 (a) and that Test Method 106 is a stack testing method with a minimum sampling time of an hour indirectly excludes fugitive emissions such as leaks from valve stem packing and flange gaskets from applicability of the 10 ppm standard.

In sum, the September and November, 1981 discharges occurred before reaching the exhaust phase in the VC process and resulted from unintended breaks in the system. These occurrences constituted "leaks" rather than exhaust-gas emissions. In both cases, Conoco used acceptable VC work practices and immediately remedied the problems which caused the subject leaks (closing the Supersucker valves and replacing the corroded disc with a non-corrosive element). Fugitive emissions are, by their very nature, untreated gases which escape before reaching the exhaust-incinerator phase of a plant's VC process. Therefore, such emissions will always exceed the point sources' 10 ppm ceiling.

VEV-240001

Finding no disputed issue of material fact, Conoco is granted summary judgment as a matter of law on the 2 claims just discussed under F. R. Civ. P. 56 and this litigation is stayed as to 18 of the claims, awaiting the Fifth Circuit's decision on pertinent issues.

1st THUS DONE AND SIGNED at Lake Charles, Louisiana, this
day of June, 1984.

Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

FILED

JUN - 1 1984

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

ROBERT H. SHENWELL, CLERK

BY mw

DEPUTY

UNITED STATES OF AMERICA

VS.

CONOCO, INC.

CIVIL ACTION NO. 83-2518

J U D G M E N T

For written reasons assigned this date;

IT IS ORDERED, ADJUDGED AND DECREED that a stay of litigation on 18 of the United States' 20 claims is hereby granted, awaiting the Fifth Circuit's ruling on pertinent issues.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, CONOCO, INC. is granted summary judgment on the remaining 2 claims.

THUS DONE AND SIGNED at Lake Charles, Louisiana, on this 1st day of June, 1984.

Earl E. Veron
EARL E. VERON
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-4-84
By David Shirley
Copy To Uphicht / McDoude
Baxter (Cay)
Hern
Gillery
John
Wackerbarth
Asst. Sec.

VEV-240003