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November 1, 1984

Dr. Roy T. Gottesman
The Society of the Plastics
Industry, Inc.
355 Lexington Avenue
New York, New York 10017

Re: Judicial Review of the
Vinyl Chloride Standard

Dear Roy:

Gary Baise called to report on the oral argument held on October 30, 1984 by the United States Court of Appeals for the Fifth Circuit in United States v. Ethyl Corp., Nos. 83-3537 and 83-3656 (5th Cir.). The panel consisted of Judges Clark, Rubin and Goldberg. Gary indicated that the court did not appear well prepared for this case. In particular, the judges did not demonstrate a thorough understanding of environmental regulation in this area or the briefs.

Oral argument should provide an opportunity for counsel to answer questions not resolved by the briefs and to persuade the court. Because the court was not well prepared, oral argument tended to consist of a briefing and familiarization process for the judges. Under the circumstances, it is difficult to predict how the panel will react. Based on the questions and immediate reaction of the judges, Gary's best guess is that Judge Clark would vote for industry's position and Judge Rubin for the government's, with Judge Goldberg being undecided. Thus, the outcome is uncertain. In any event, given the crowded docket and the court's delay in hearing oral argument, we may have a considerable delay before an opinion is issued.

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While Meredith Scheck undoubtedly reported on the meeting of the Manufacturing Practices Committee with the Environmental Protection Agency (EPA) on October 30, there were two points which I would like to raise in conjunction with the leak detection provisions and the incinerator bypass question. While discussing the leak detection provisions, it became apparent that the EPA staff was closely wedded to the NESHAPS Part V leak detection program. Based on EPA's experience with leak detection programs for other areas of the petrochemical industry, the staff seemed reluctant to agree that the existing fixed point monitoring system would be as effective as EPA's portable monitor program. We did not reach any agreement with EPA on this point, although Bob Ajax indicated that EPA would draft language designed to minimize any administrative or recordkeeping burden that the EPA program might inadvertently impose. If the EPA proposal is unsatisfactory, one or more Vinyl Institute members may wish to invite EPA to conduct a leak detection inspection using the Part V system to compare the effectiveness of the current program. If the demonstration is successful, it may convince EPA that industry's current monitoring system is satisfactory.

Much discussion also focused on the incinerator bypass question. Because this issue has been overshadowed by other concerns, the Vinyl Institute has only brought it to EPA's attention relatively recently. Regulatory relief will require additional information and justification for a bypass or malfunction provision. Because this is really an add-on to the current EPA draft and because we do not wish to delay EPA's efforts, this project may need to be pursued separately in a subsequent rulemaking. However, it is important and should be pursued.

If you have any comments or questions, please let me know.

Cordially yours,

Peter

Peter L. de la Cruz

cc: W.C. Holbrook
G.H. Baise

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