LAW OFFICES
BEVERIDGE, FAIRBANKS & DIAMOND
ONE FARRAGUT SQUARE SOUTH
WASHINGTON, D. C. 20006

TELEPHONE
(202) 638-7800

RICHARD M. FAIRBANKS, III
HENRY L. DIAMOND
ALBERT J. BEVERIDGE, III
GARY H. BAISE
A. JAMES BARNES
HAROLD HIMMELMAN
CHRISTOPHER H. BUCKLEY, JR.
JONATHAN Z. CANNON
ANDREW E. MISHKIN
CHARLES A. PATRIZIA
SCOTT W. BOWEN
CATHERINE M. DUNLAP
CYNTHIA A. LEWIS *
KARL S. BOURDEAU *

* NOT MEMBER OF D. C. BAR

CARL EARDLEY
ELLIOTT GOLDSTEIN
OF COUNSEL

CABLE ADDRESS
"INDLAW"

TELECOPIER
(202) 638-4194

December 7, 1978

Joseph E. Hadley, Esquire
Keller & Heckman
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036

Re: Emergency Relief Valve Discharges

Dear Joe:

Pursuant to our discussion regarding relief valve discharges, attached please find a draft memorandum which suggests some options as to how SPI or a member company might seek review of EPA's interpretations of what constitutes an emergency discharge. If you have any questions, please advise.

Cordially,

Gary

Gary H. Baise

GHB:jrn

Attachment

GENC016979

PRIVILEGED
AND
CONFIDENTIAL

AGENDA

Lawyers Committee
PVC Safety Group, SPI

Washington, DC

December 7, 1978

I. Background

A. Memorandum on Enforcement of the Vinyl Chloride Standard Against Owners or Operators with Relief Valve Discharges, October 14, 1978

B. EPA Enforcement Memoranda

1. Enforcement Options and Policy

a. September 18, 1978, DSSE to regions

2. Relief Valve Discharges

a. February 23, 1978, DSSE to Region II

b. February 28, 1978, DSSE to regions

c. May 18, 1978, DSSE to regions

d. October 26, 1978, DSSE to regions

C. PVC Safety Group

1. July 7, 1978 letter

2. Steering Committee, October 18, 1978

3. Manufacturing Technology Committee, December 5, 1978

GENC016980

PRIVILEGED AND CONFIDENTIAL

D. Discussions with EPA

1. October 18, 1978, DSSE

2. November 17, 1978, ESED (RTP)

3. December 6, 1978, ESED (RTP)

E. EPA Enforcement Actions

1. Region VI letters, June 16, 1978

2. Region III letters, November 7, 1978

3. Other

F. Comments on Relief Valve Discharge Provisions, 1975-76.

II. Strategy and Timing

A. Do Nothing

1. Wait for EPA Enforcement Action

B. Preemptive Strike

1. Court of Appeals

2. District Court

III. Legal Options

A. Administrative Relief

B. Review of Substance of Relief Valve Discharge Provision

1. Petition for Review

2. EPA Enforcement Action

C. Review of Current Enforcement Position

1. Action to Compel Rule Making Proceedings

2. EPA Enforcement Action

D. Conclusions

1. Factual Information

2. Legal Options

a. January 8, 1979

BEVERIDGE, FAIRBANKS & DIAMOND December 6, 1978

TO: The Society of the Plastics Industry, Inc.
PVC Safety Group Lawyers Committee

DRAFT

NOT REVIEWED BY CLIENT

Memorandum Re Possible Actions Contesting
Relief Valve Regulation and Interpretation

With respect to the possibility of filing an action based upon the alleged invalidity of the regulation, 40 C.F.R. 61.65-(a), and/or its interpretation as manifested through recent memoranda 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 was promulgated on October 21, 1976. 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. Discharges which will be defined as violations are those due to power outages, operator errors (due to lack of training or negligence), preventable equipment failures, malfunctions, or those discharges which could have been prevented through the use of back-up equipment.

Further, one SPI member has received a letter dated November 7, 1978 in which EPA recites its interpretation of

GENC016983

PRIVILEGED AND CONFIDENTIAL

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.

There are several conceivable courses which could be pursued in the courts, each of which will be addressed in turn:

1. An action in the Court of Appeals, District of Columbia, to review the regulation, 40 C.F.R. 61.65(a).

2. An action in a district court contending that the memoranda were, in reality, rules and to require the Administrator to follow the rule making procedures.

3. An action in a district court to set aside the interpretations on the ground that they are final actions of EPA and are, in whole or in part, arbitrary and capricious.

1. Petition for Review of 40 CFR 61.65(a)

The thrust of such an action would be the claimed unenforceability of the regulation in question until November 9, 1978. The support for this action is somewhat technical.

Under 42 U.S.C. 7607 petitions for review of regulations must be filed within sixty days of their promulgation. The regulation in question here was promulgated on October 20, 1976, and normally an attack at this time would be foreclosed. But an argument could be made that the normal rule does not apply here, on the following premises:

1. Under Adamo Wrecking Company v. EPA, 54 L.Ed.2d 538 (Jan. 10, 1978), work practice standards were not enforceable criminally under Section 7413, since they were not emission standards.1/

2. At the time the regulation in question was promulgated, October 20, 1976, the work practice standard now in 42 U.S.C. 7412(e) had not been enacted. Hence, it was probably unenforceable. The statute authorizing work practice standards was promulgated in August 1977, but without any indication by Congress, except perhaps by implication, that it was intending to validate previously unenforceable regulations.

1/ The Adamo Wrecking Company case in connection with civil cases is less than conclusive. The majority opinion holds that work practices are not emission standards under Section 7412 insofar as criminal cases are concerned. It does not hold that there is no enforcement available in a civil case; and leaves open the question as to whether agency interpretation may be binding in a civil but not a criminal case. The court said, page 4065, "In sum a survey of the statutory scheme does not compel agreement with the Government's contention that Congress intended that the Administrator's designation of a regulation as an emission standard should be conclusive in a criminal prosecution. Under these circumstances we adhere to the familiar rule that 'where there is an ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'" (Underscoring supplied.)

Justice Stevens in a separate dissent (three other justices joined in another dissenting opinion) repeatedly declared that accepting the majority opinion ruled out any enforcement of a work practice standard under the then existing law. As he pointed out, although the work practice provision had been enacted in 1977 (August 7) that provision had not been included among those enforceable by the application of Section 7413. Justice Stevens said, page 4068, ". . . the Court's reading of the statute in its current form leads to the anomolous conclusion that work practice rules, even though properly promulgated, are entirely unenforceable." He repeats this conclusion on page 4071.

GENC016985

PRIVILEGED AND CONFIDENTIAL

3. The work practice standard was by statute, effective November 9, 1978, declared to be an emission standard. Hence, it became enforceable under 42 U.S.C. 7413.

4. The sixty day provision for review set forth in Section 7607 was not intended to relate to unenforceable provisions of the Clean Air Act, since a justiciable controversy could not arise in relation to an unenforceable provision.

5. This being so, the sixty day limitation commenced on November 9, 1978, and a petition for review would now be timely.

In our judgment a petition for review based on such an argument should not be dismissed as frivolous, although for reasons hereinafter stated, the chances of success are questionable.

A court, faced with an attack on a regulation designed to protect the public health, and a regulation which had not been challenged for a period of two years following promulgation, would probably make a stout effort to find a valid reason for upholding the regulation. The reasons which could be seized upon are:

1. Although the regulation was not enforceable under Section 7413 until November 1978, it was enforceable under the general equity powers of the court. Section 7610 of the Act provides ". . . this chapter shall not be construed as superseding or limiting the authorities and responsibilities under any provision of law of the Administrator."

In the case of Mitchell v. De Mario Jewelry, 361 U.S. 288 (1960), the Secretary of Labor asked for an injunction to enjoin alleged violations of the Fair Labor Standards Act. The lower court (260 F.2d 929, 933 (5th Cir., 1958)) dismissed the case, holding that jurisdiction "must be expressly conferred by an act of Congress or necessarily implied from a congressional enactment." The Supreme Court reversed. The Court quoted from Porter v. Warner Holding Co., 328 U.S. 395, at 397 (1945), as follows:

> "Thus the Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake . . . . [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances. . . .
>
> "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' Brown v. Swann, 10 Pet. 497, 503. . . ." 328 U.S., at 397, 398.

Also see Sprague v. Ticonic National Bank, 307 U.S. 161 (1938).

PRIVILEGED AND CONFIDENTIAL

GENC016987

In State of Alabama v. United States, 304 F.2d 583 (5th Cir., 1962), aff'd without opinion, at 317 U.S. 37, the court said:

> Once Congress has vested jurisdiction of a cause in a district court, said court has, in the absence of statutory limitations, all the tradition and facilities of a court of equity . . . Where a federal statute establishes a general right to sue "federal courts may use any available remedy to make good the wrong done." Bell v. Hood, 1946, 327 U.S. 678, 684 . . . This may at times even require that a body of federal substantive law be fashioned to effectuate the policy underlying the grant of jurisdiction. . . . The aim of equity is to adapt judicial power to the needs of the situation. This relief in matters of public, rather than private, interests may be quite different from that ordinarily granted.

In response, of course, SPI can refer to the opinion of Justice Stevens that the work practice standards were "entirely unenforceable". His opinion is entitled to respect, but it would be of greater significance had he made any reference to the possibility that work practice standards could be enforced civilly in an equity court. He did not.

2. The fact that Congress in 1978 declared the work practice standard to be an emission standard suggests that Congress was attempting to correct a legislative oversight. Hence, a court might read into the enforcement provisions of

7413 the work practice section. Many courts have construed statutes very broadly to achieve the legislative intent.[2/]

However, in 1977 when the work practice standard was placed in Section 7412 by statute it was not declared to be an emission standard; and as previously noted the Supreme Court in the Adamo Wrecking case in January 1978 ruled that a work practice standard was not an emission standard, at least in the context of a criminal case. Therefore, we doubt that a court, in good conscience, could rule, based on these facts, that the Congress in 1977 intended the work practice standard to be an emission standard. Such a decision would stretch the power of the courts to correct legislative oversights to an extreme.

This memorandum does not endeavor to state a definitive opinion concerning the likely action of a court, when presented with the unusual factual structure presented in this instance. We are satisfied, as previously stated, that the argument in favor of now contesting the regulation has some merit, and may be worth the effort, since the jurisdictional and procedural issues could be judicially resolved before briefing on the merits.[3/]

2/ In the Adamo Wrecking Company case, supra, neither the Court nor the dissent alluded to such a possible construction of the Act. This is understandable since, in criminal cases, statutes are strictly construed.

3/ An extensive discussion concerning enforcement of vinyl chloride standards is set forth in our memorandum of June 30, 1978.

2. An Action to Compel the Administrator to Follow Rule Making Procedures

The Clean Air Act (42 U.S.C. 7604) authorizes a private citizen to sue the Administrator in a district court for the purpose of compelling him to comply with the mandatory provisions of the Act. An argument could be fashioned based on a theory that the EPA interpretative memoranda are not permissible interpretations of the regulations, but additional rules which must proceed through the rule making procedures.

Under the Clean Air Act rules cannot be legally promulgated without notice and opportunity for comment. (42 U.S.C. 7607) In the instant case Section 61.65(a) provides that an emergency relief valve discharge is a "discharge which could not have been avoided by taking measures to prevent the discharge." EPA through various directives to the regions have purported to interpret the language quoted above to mean discharges which are caused by Acts of God, but not discharges caused by power outages, operator errors (due to lack of training or negligence), preventable equipment failures, malfunctions, or discharges which could have been prevented through the use of back-up equipment.

The issue is whether these directives fall within the category of permissible interpretation. Or are they new rules which require notice and comment?

PRIVILEGED AND CONFIDENTIAL

The difference between an interpretation and a rule was stated in general terms in Gosman v. United States, 573 F.2d 31 (Ct.Cl., 1978): "All agree that an interpretative rule merely clarifies or explains existing law or regulations." (Page 39)

A more expansive declaration is found in Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir., 1952), where the issue was whether or not wine made from boysenberries could be properly labeled as blackberry wine. The court stated, at page 331:

> The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that "regulations", "substantive rules" or "legislative rules" are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means. Discussion of the subject will be found in many places. See, for example, "Rule Making Under the Administrative Procedure Act" by David Reich, in Volume VII, New York University School of Law Institute Proceedings, pages 492, 516 (Feb. 1947), where the author says: "A substantive rule is one which, as I have said, is intended to implement the statutory structure or the statutory powers of an agency. An interpretative rule is one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms in an Act. If you had an expression in a statute such as 'Interurban Railway,' the query might come up as to what is an

> 'interurban railway.' A particular agency may adopt a rule defining an interurban railway. That, in a sense, may be called an interpretative rule." And also see, in the same volume, pages 389, 400-401, "The Impact of the Federal Administrative Procedure Act on the Federal Food, Drug, and Cosmetic Act" by Michael F. Markel. Professor Davis discusses the subject at some length in his new book on Administrative Law, Section 55, and other references will be found there.

The courts have been prone to find that agency interpretations are not rules under the APA, 5 U.S.C. 553(A),[4/] which provides that the rule making procedures do not apply "to interpretative rules, general statements of policy . . . ."

For example, a letter dealing with a method of determining "reasonable costs" was not a rule, but an interpretation. New Jersey Cha. Inc., A.P.T.A. Inc. v. Prudential Insurance Co., 502 F.2d 500 (D.C.A., 1974). The inclusion of late payment charges in the regulatory "finance charge" was not rule making. Continental Oil Co. v. Burns, 317 F.Supp. 194 (Del., 1970).

On the other hand where an alleged interpretation or statement of policy has an immediate and adverse impact on parties affected thereby, courts will not permit agencies to by-pass notice and comment by a label. In Pharmaceutical Manufacturers Assoc. v. Finch, 307 F.Supp. 858 (D. Del., 1970),

---

4/ The rule making procedures in the Clean Air Act, 42 U.S.C. 7607, are patterned after the APA, and precedents under the APA would have great weight in a case involving rule making under the Clean Air Act.

regulations issued by HEW promulgating new standards of evidence necessary to demonstrate effectiveness of drug products, and applied retroactively, were held invalid because of failure to abide by the rule making procedures. Also see: Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C.A., 1974); Aiken v. Obledo, 442 F.Supp. 628 (E.D. Cal., 1977); and Lewis v. Weinburger, 415 F.Supp. 652 (D.N.M., 1976). Plainly, it is unlikely that any precedent will be found which precisely fits the facts in the SPI matter. Cases dependent on the construction of such terms as "interpretations", "policy" and "procedures" are decided on an ad hoc basis. In the SPI case EPA would argue that it was advising the industry what was meant by the regulation -- in short, what it meant by the words "measures to prevent", and what actions would and would not come within the compass of that regulatory langauge. A court probably would construe the regulatory language to mean reasonable "measures to prevent", and the issue would be whether "power outages", "operator errors" due to negligence or lack of training, preventable equipment failures and malfunctions, or failure to contain discharges by the use of back-up equipment would be considered by a court to be a defensible description of measures reasonably necessary to prevent a discharge. It seems probable that a court would consider the EPA letters to be appropriate interpretations, at least in the abstract.

In its effort to establish that the so-called interpretations were, in reality, unreasonable additions to the rules SPI could argue that had the industry contemplated that EPA would promulgate such interpretations, particularly on the eve of enforcement, it would have petitioned for review of the regulations two years ago. The industry might be able to show that it was never thought that back-up equipment would be required regardless of cost. It could also point out that it will take many months to secure such equipment, and to install it, and that during such a period the members would be subject to the imposition of heavy penalties. The industry might be able to claim also that never, in the course of long discussions, did EPA indicate that it would require back-up equipment, no matter how few and how relatively harmless the discharges might be.[5/] Such arguments might be persuasive, but it cannot be forgotten that in matters involving the public health the courts will not set aside regulations designed to protect the public health except under severe compulsion. We are not optimistic that this sort of challenge would be successful.[6/]

5/ This argument would lose much impact if, in fact, industry has been on notice of the interpretation for many months.

6/ In a recent case in the district court, District of Columbia, Chrysler Corp. v. EPA, No. 78-2152, the plaintiff attacked certain "advisory circulars" as rules subject to the rule making procedures. The only action thus far in the case is a denial of a TRO. The court stated that plaintiff had not demonstrated irreparable injury; that the public interest would be adversely affected if the TRO were granted; and that plaintiff has not demonstrated a substantial likelihood of succeeding on the merits.

PRIVILEGED AND CONFIDENTIAL

3. An Action in the District Court to Set Aside the Interpretations on the Ground That They Are Arbitrary and Capricious

It has been held that interpretations are subject to judicial review in the district court. 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).

But under the APA it must be established that the agency action is final, and that it was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.7/

Final Agency Action - Ripeness

The initial question is finality. Courts will not undertake to review disputes with agencies which involve actions or opinions of the agency which are not final but subject to change.

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" (p. 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.

7/ It will be noted that Section 7607 has the same provisions, as they relate to rule making. Whether the review should take place under the APA or Section 7607 is of no significance since the provisions are basically the same, and the concepts developed through judicial review apply in both cases.

PRIVILEGED AND CONFIDENTIAL

GENC016995

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.

The lead case concerning the lack of immediate impact is Toilet Goods Assn. v. Gardner, 387 U.S. 158 (1967). There 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 noted the lack of real damage to the plaintiff since on suspension of certificate such a determination could be promptly challenged through the administrative procedures. Also see: State of Florida v. Weinburger, 492 F.2d 488 (5th Cir., 1974).

In the instant action the memoranda complained of were sent to the regions by the Director, Division of Stationary Source Enforcement. The memos were issued at various times in the period, February to October 1978, and contained substantially the same instructions. Since the Director is responsible for enforcement policy, and in view of the period of time during which the memoranda were issued, a reasonable conclusion can be drawn that the Administrator of EPA was aware of the interpretations and approved of them. Under these circumstances it is reasonable to believe that a court would consider the interpretations as final agency action, particularly since the final statement came out on the eve of enforcement and since the interpretations have been distributed to the industry.

The Test - Practical Effect

The reviewable action taken can vary. It may be a regulation, an opinion, or a statement of policy. The label is immaterial.

In Independent Broker-Deal. T. Ass'n v. SEC, 442 F.2d 132 (D.C.A., 1971), cert. den., 404 U.S. 828, the court reviewed a request by the agency to stock exchanges that they abolish customer directed give-ups. The Court said, pp. 139-140:

> 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 Atlantic-Richfield Co. v. FEA, 556 F.2d 542 (Temp. Emerg. Ct. of App., 1977), the court undertook to review "interpretations" and "decisions and orders" and said:

> 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.

As indicated the basic consideration is not the label but the practical effect of the agency action on the party seeking review.

PRIVILEGED AND CONFIDENTIAL

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, 582 F.2d 107 (D.C.A., 1975); Frozen Food Express v. United States, 351 U.S. 40 (1955); and CBS v. FCC, 316 U.S. 407 (1941).

Arbitrary and Capriciousness of the Interpretations

This is the peg on which a court could hang a ruling that the case is not ripe for judicial review. For example, the court could conclude that the interpretations, on their face, are not arbitrary and capricious.

GENC016999

PRIVILEGED
AND
CONFIDENTIAL

Let us take up each interpretation separately: Discharges due to:

1. Power outages - Are such discharges reasonably preventable? Is it reasonable to require a company to have a standby source of power available? What types of dual systems are sufficient, and how far must they go?
2. Operator errors due to lack of training - Is it reasonable to require that the operators be trained to deal with emergency conditions? How much training is enough?
3. Operator negligence - Should a company be responsible for carelessness by its personnel?
4. Equipment failures - What equipment failures and malfunctions are preventable?
5. Lack of back-up equipment - What equipment do companies normally provide? What equipment is prohibitively expensive? How far must a company go?

These types of questions lead us to believe that if the interpretations are arbitrary and capricious a court would prefer to develop its judgment in the context of an enforcement proceeding rather than in an abstract setting. A final judgment cannot be made until better factual information is available from the members and the Manufacturing Technology Committee. Whether review of the regulation itself will be available in an enforcement proceeding will depend on whether prior adequate and exclusive opportunity for review was available in the Court of Appeals on a petition for review.