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November 24, 1986

Mr. Lee M. Thomas
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Request for Reconsideration and Stay of
Certain Provisions of Vinyl Chloride Standard

Dear Mr. Thomas:

The Society of the Plastics Industry, Inc. (SPI) respectfully requests that the Environmental Protection Agency (EPA) reconsider and stay its final rule amending the National Emission Standard for Vinyl Chloride. See Subpart F of 40 C.F.R. Part 61; 51 Fed. Reg. 34,904 (Sept. 30, 1986). This rulemaking is of particular concern to members of the Vinyl Institute, a division of SPI whose members are the major domestic producers of vinyl chloride and polyvinyl chloride.

Our reasoning is detailed in the attached petition. We are particularly concerned with seven provisions of the final rule. They are:

- (a) 40 C.F.R. § 61.61(o), definition of "ethylene dichloride purification;"
- (b) 40 C.F.R. § 61.61(w)(2), definition of "leak;"
- (c) 40 C.F.R. § 61.61(x), definition of "exhaust gas;"

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- (d) 40 C.F.R. § 61.61(y), definition of "relief valve discharge;"
- (e) 40 C.F.R. § 61.61(z), definition for "three-hour period;"
- (f) 40 C.F.R. § 61.65(a), the scope of "relief valve discharge" provisions; and
- (g) 40 C.F.R. § 61.65(b)(8), the revisions to the leak detection and elimination provision.

These provisions are not supported by the rulemaking record and individual changes have the effect of reversing existing case law, establishing new penalties, permitting multiple penalties for a single event, and enlarging the class of equipment covered by the standard. To protect our right to judicial review, we plan to file a petition for review with the United States Court of Appeals for the District of Columbia Circuit within the time limits permitted for such petitions. Since the original 1976 Standard will continue to be in effect while the 1986 Amendments are stayed pending reconsideration by EPA, the public health will continue to be protected.

Thank you for your consideration of this important matter. We would be happy to meet with you or your staff to discuss the prompt resolution of these issues.

Sincerely,



Peter L. de la Cruz
Counsel for The Society of
the Plastics Industry, Inc.

Enclosure

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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Petition of the Society of the Plastics Industry, Inc.
For A Stay and For Reconsideration of a Final Rule
Amending 40 C.F.R. Part 61,
National Emission Standard for Vinyl Chloride

Docket No. A-81-21

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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

PETITION OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.
FOR STAY AND FOR RECONSIDERATION OF A FINAL RULE
AMENDING 40 C.F.R. PART 61, NATIONAL EMISSION
STANDARD FOR VINYL CHLORIDE

Docket No. A-81-21

The Society of the Plastics Industry, Inc. (SPI) requests that the Environmental Protection Agency (EPA or Agency) stay its final rule revising the emission standard for vinyl chloride, 51 Fed. Reg. 34,904 (Sept. 30, 1986), pending EPA's reconsideration of certain provisions in the final rule or review by the U.S. Court of Appeals. This rulemaking is of particular concern to the Vinyl Institute, a division of SPI whose members represent the major domestic producers of vinyl chloride and polyvinyl chloride.*/

*/ SPI is a 1,800 member not-for-profit corporation organized under the laws of the State of New York. The Society's members include processors and manufacturers of plastics or plastics products, suppliers of raw materials, processors and converters of plastic resins and manufacturers of accessory equipment for the plastics industry. Founded in 1937, the Society is the "voice" of the plastics industry.

The Vinyl Institute's members account for approximately 82% of the domestic production of vinyl chloride and 63% of the domestic production of polyvinyl chloride. The members include: Air Products and Chemicals, Inc., the BFGoodrich Company, Borden, Inc., CertainTeed Corporation, The Dow Chemical Company, Georgia Gulf Corporation, Occidental Chemical Corporation, PPG Industries, Inc., and Vista Chemical Company.

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Without adequate notice or explanation, EPA has revised key provisions with the effect of: (1) overturning existing case law, (2) imposing new penalties, (3) creating multiple penalties for the same event, and (4) expanding the types of equipment subject to the standard. In addition, as a result of prior enforcement action, some SPI members have entered into consent decrees requiring compliance with the vinyl chloride standard. Since almost all these changes were effective immediately upon publication in the Federal Register, member companies may be held in contempt for violating their consent decrees unless a stay is granted pending reconsideration by EPA or review by the Court of Appeals.

A. REGULATORY PROCEEDINGS

Vinyl chloride monomer (vinyl chloride or VCM) is a gas at ambient temperatures and pressure. Vinyl chloride is used principally to produce polyvinyl chloride (PVC), an inert plastic which can be fabricated into many items including blood transfusion bags, medical devices, photograph records, water and sewage pipes, food wraps and bottles.

In December 1975, EPA designated vinyl chloride as a hazardous air pollutant under Section 112 of the Clean Air Act 42 U.S.C. § 7412, and published a proposed standard. 40 Fed. Reg. 59,532 (1975). That notice outlined data linking vinyl chloride to various carcinogenic and non-carcinogenic disorders and proposed emission levels which would provide an ample margin of safety while taking the limitations of the available technology into consideration. Id. at 59,534.

EPA promulgated final rules for vinyl chloride on October 21, 1976. 41 Fed. Reg. 46,560 (1976); 40 C.F.R. §§ 61.60 to 61.71 (hereinafter "1976 Standard"). The standard created a comprehensive regulatory scheme for minimizing emissions of vinyl chloride from ethylene dichloride plants, vinyl chloride plants and polyvinyl chloride plants. In general, the rules applied only to those portions of the plant that were "in vinyl chloride service," which is defined as equipment contacting a liquid or gas that is at least 10% vinyl chloride.

Because of its physical properties, vinyl chloride is contained in pressurized reactors, vessels or piping during manufacture and use. Reactions involving vinyl chloride also

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generate heat. As a necessary precaution dictated by safety, environmental and insurance concerns, the reactors are equipped with safety relief valves. The relief valves are set to open and safely relieve any increasing pressure at a level below the pressure at which the reactor or vessel would rupture. The 1976 Standard prohibits all but emergency relief valve discharges.

The 1976 Standard also requires that vinyl chloride in exhaust gases be controlled to no more than 10 parts per million (ppm). Other provisions of the 1976 Standard require the institution of detailed leak detection and elimination programs. Periodic reports and records detailing leak detection and repair must be maintained. In addition, there are a variety of other monitoring, recordkeeping and reporting requirements.

The Environmental Defense Fund (EDF) sought review of the 1976 Standard in the U.S. Court of Appeals for the District of Columbia Circuit but later dismissed its petition as part of a settlement between EDF and EPA. SPI and industry were excluded from the settlement process. The Agency agreed to propose new and more stringent rules and did so in June 1977. 42 Fed. Reg. 28,454 (June 2, 1977).

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In January 1985, EPA published a notice withdrawing the 1977 proposal and simultaneously proposing a new set of revisions to the standard. 50 Fed. Reg. 1,182 (Jan. 9, 1985) (hereinafter "1985-Proposal"). The Agency's withdrawal of the 1977 proposal was upheld by the D.C. Circuit Court in National Resources Defense Council, Inc. v. EPA, No. 85-1150 (D.C. Cir. Nov. 4, 1986).

The 1985 Proposal suggested: (1) replacing the industry-specific leak detection and elimination programs with a generic program; (2) substituting a numerical limitation for the "emergency" relief valve discharge provision; (3) revising some key definitions; and (4) adding several new definitions.

EPA issued a final rule on September 30, 1986. 51 Fed. Reg. 34,904 (1986) (hereinafter 1986 Amendments). The 1986 Amendments differ significantly from the 1985 Proposal. For example, the final rule reverts to the 1976 Standard permitting only "emergency" pressure relief valve discharges as compared to the proposed numerical limitation. Other provisions of particular importance to our request for a stay are explained more fully in the following section.

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B. PROVISIONS OF THE STANDARD FOR WHICH A STAY IS REQUESTED

SPI is requesting that EPA stay six specific provisions of the 1986 Amendments, the adverse impact of each is outlined below.

(1) Definition of "Exhaust Gas;" § 61.61(x)

Under the 1976 Standard, exhaust gases had to be routed to a control device which limits the amount of vinyl chloride discharged to 10 parts per million (ppm). In contrast, there was no specific concentration limitation for leaks. There can be none. Rather, leaks were controlled through leak detection and elimination plans developed for each individual plant. Contrary to the regulatory history underlying the vinyl chloride standard, EPA has attempted to categorize emissions from leaks as exhaust gases and to allege violation of the 10 ppm emission limitation requirement. In United States v. Conoco, Inc., Civ. Action No. 83-2518 (W.D.La. June 1, 1984), the court reviewed the regulatory history and concluded that leaks are not exhaust gases and, therefore, are not subject to the 10 ppm emission limitation. A copy of the decision is attached.

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The 1976 Standard contained no definition of exhaust gas. In the 1985 Proposal, EPA proposed a definition for exhaust gas that was consistent with the Conoco decision and specifically stated: "A leak . . . is not an exhaust gas." 50 Fed. Reg. 1,194; proposed § 61.61(x). Without adequate explanation or comment requesting such change, the definition for exhaust gas promulgated in the 1986 Amendments deleted this key sentence.

EPA can now argue that emissions from leaks are exhaust gases. The discussion in EPA's Background Information Document is inadequate. Vinyl Chloride Standards: Responses to Comments on January 1985 Proposed Revisions, pg. 2-52 (Sept. 1986) (hereinafter "Background Information Document"). This represents an unjustified change in the 1976 Standard that attempts to silently overturn the Conoco decision. Such a rule is fundamentally unfair since it was promulgated without notice or opportunity to comment as required by Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d). A stay is required because leaks from equipment in vinyl chloride service will exceed the 10 ppm emission limitation for exhaust gases, thus subjecting industries to a potential fine of \$25,000 per day for each leak notwithstanding compliance with the leak detection and elimination requirements in 40 C.F.R. § 61.65(b)(8).

(2) Definition of "Relief Valve Discharge;" § 61.61(y)

The interpretation of the relief valve discharge provisions of the vinyl chloride standard have been the primary point of contention between industry and EPA. Although serious questions of technological feasibility, safety and cost exist, EPA has urged industry to develop methods for routing relief valve discharges through equipment to minimize emissions of vinyl chloride to the atmosphere. Although no definition of "relief valve discharge" existed in the 1976 Standard, EPA's 1985 Proposal defined relief valve discharge to mean "any nonleak discharge through a relief valve." 50 Fed. Reg. 1,194 (Jan. 9, 1985). Again, without explanation and without any support in the record of which we are presently aware, EPA added the following language to this definition in the 1986 Amendments, 51 Fed. Reg. 34,909 (Sept. 30, 1986):

"Relief valve discharge" does not include discharges ducted to a control system from which the concentration of vinyl chloride and exhaust gases does not exceed 10 ppm (average for 3-hour period), or equivalent as provided in § 61.66.

Although somewhat ambiguous, we understand this language to mean that, when vinyl chloride is routed from a pressure relief valve to a control system, no violation of the 1986 Amendments occurs. Nonetheless, the preamble to the 1986

Amendments can be read to mean that, when vinyl chloride travels through a relief valve to a control system, this is a violation; and if this causes emissions from the control system to exceed 10 ppm, the company would be subject to a double penalty for both the relief valve discharge and a 10 ppm exhaust gas exceedance.

A stay for this provision is necessary because it was promulgated without notice and the opportunity for comment required by Section 307(d) of the Clean Air Act, 42 U.S.C. § 7607(d). Moreover, if interpreted to impose double penalties, this provision would exceed EPA's statutory authority and unlawfully increase the maximum statutory penalty created by Congress for a single event that leads to an excursion.

We are also concerned that this change in regulatory language may be employed by EPA to vitiate the requirement in 40 C.F.R. § 61.65(a) that only relief valve discharges "to the atmosphere" may violate that regulation. EPA has recently reversed six years of regulatory interpretation by asserting that relief valve discharges to flares and other emission reduction equipment may none the less violate § 61.65(a). This

new interpretation is currently being litigated before the United States Court of Appeals for the Fifth Circuit in Dow Chemical Company v. EPA, No. 86-4286 (5th Cir.), and is not properly the subject of this rulemaking. Accordingly, we request that EPA confirm that the proposed amendment to § 61.61(y) is inapposite to the issue presented in Dow and that the court's decision in Dow will apply to the new standard as well as the old standard.

(3) Leak Detection and Elimination; § 61.65(b)(8)

Under the 1976 Standard, companies installed area monitors and developed plant-specific leak detection and elimination programs that included the routine use of portable monitors. Since that time, EPA developed a generic leak detection and elimination program which is codified in 40 C.F.R. Part 61 Subpart V of EPA's regulations establishing National Emission Standards for Hazardous Air Pollutants (NESHAPS). 40 C.F.R. §§ 61.240-61.247 (Subpart V). The Subpart V requirements were based on equipment and data for other industries, particularly benzene equipment, that EPA developed in conjunction with fugitive emission rules for those industries. BID at 2-25; 50 Fed. Reg. 1,191.

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EPA is not letting the vinyl chloride and PVC industry continue its plant-specific program, nor is it simply imposing the Subpart V requirements. Rather, the Agency is requiring the retention of the area monitoring and also imposing Subpart V requirements. The Agency's justification that area monitors detect large leaks that might go undetected (50 Fed. Reg. 1,190) may be true. But, if it is, it is true for all industries regulated under NESHAPS, not just the vinyl chloride and PVC industry. The Agency fails to present any rational distinction. Moreover, while maintaining that a program which results in less than 2% of valves leaking (id. at 1,191) is effective, even a demonstration of effectiveness does not qualify for an exemption from all of Subpart V, only designated sections. See § 61.65(b)(8)(ii); 51 Fed. Reg. 34,911.

EPA's position and the impact of the final rule is arbitrarily discriminatory. It attempts to impose additional Subpart V requirements while maintaining that the plant specific plans and area monitors are effective. Given the differences between the vinyl industry and the industries on which Subpart V was based, and a decade of successful leak detection and elimination programs under the vinyl chlorid standard, retention of the original program is appropriate.

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EPA's new combination requirements in the 1986 Amendments find no record justification for the imposition of more burdensome requirements, especially when existing programs have been effective.

(4) Definition of Ethylene Dichloride Purification;
§ 61.61(o)

For reasons that are not altogether clear, the 1986 Amendments change the definition of ethylene dichloride purification. The definition excludes product storage following the vinyl finishing column. Again, while differences between the proposed and final rule are unexplained, based on EPA's Background Information Document (BID), the Agency intended to exclude not only final product storage but also intermediate product storage. BID, pp. 2-43, 2-44 and 1-2. The 1986 Amendments fail to reflect exclusion of intermediate storage equipment. Even if EPA intended to include intermediate storage, the cost effectiveness ratios, shown on page 2-44 of the BID, exceeds EPA's own reasonableness criteria for control of extremely low quantities of vinyl chloride emissions. Because the provisions of the final rule are unexplained and conflict with the Agency's supporting

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materials, they are arbitrary and should be stayed pending the Agency's reconsideration of the final rule or review by the Court of Appeals.

(5) Definition of "Three-Hour Period;" § 61.61(z)

In adding a definition of three-hour period to the vinyl chloride standard, EPA was attempting to clarify that the emission limits prescribed in certain sections of the standard are considered to be three-hour averages. This is consistent with the intent of the original regulation as discussed by EPA. See 50 Fed. Reg. 1,192. While emission limitations may be properly evaluated on the basis of a three-hour average, the final rule presents a rolling three-hour period beginning on the hour, that is, "any three consecutive one-hour periods, each hour commencing on the hour." It is our understanding that EPA intends to have 24 three-hour periods each day, rather than eight three-hour periods. However well intended, this definition can result in multiple penalties since a single discharge during the one-hour period could cause the average in three three-hour periods to exceed 10 ppm. Defining a single event in this fashion can lead to double or treble penalties and thereby exceed the maximum penalty permissible under the

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Clean Air Act. This is an unwarranted position in excess of statutory authority, unsupported by the record and should be stayed pending revision.

(6) Definition of Leak; § 61.61(w)

The definition of leak in the 1986 Amendments lists a number of events that are examples of leaks. One such example is "indications of a liquid dripping." Section 61.61(w)(2); 51 Fed. Reg. 34,998 (Sept. 30, 1986). This example is arbitrarily overbroad. As SPI noted in its comments to the Agency in response to the 1985 Proposal, the intent of the definition of the term leak is to describe those events related to the unintended release of vinyl chloride. The phrase "liquid dripping" can mean many things in addition to the escape of vinyl chloride. For example, if piping or equipment become cold due to the nature of the process, condensation forming on the outside of equipment may be "liquid dripping." The same could be said for water remaining after equipment is cleaned or hosed down. Another example is liquid dripping from a pump. That could be seal fluid and not vinyl chloride. To be reasonable, the phrase liquid dripping should be deleted or revised to refer to vinyl chloride. Since this

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definition potentially impacts the leak detection and elimination programs conducted by industry under the Standard, a stay is merited.

C. ARGUMENT IN SUPPORT OF STAY

Because the requirements for a stay of agency action have been met, the Agency should stay effectiveness of the 1986 Amendments pending its reconsideration of the issues raised in this petition or a final decision by the Court of Appeals. The Agency has clear authority to stay its own actions pending review. 5 U.S.C. § 705. In deciding whether to issue a stay, the Agency must consider four factors:

- (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal;
- (2) the likelihood that the moving party will be irreparably harmed absent a stay;
- (3) the prospect that others will be harmed if the court grants the stay; and
- (4) the public interest in granting the stay.

Wisconsin Gas Company v. FERC, 758 F. 2d 669, 673-74 (D.C. Cir. 1985)(citing Virginia Petroleum Jobbers Assn. v. FPC, 259 F. 2d 921, 925 (D.C. Cir. 1958)). These factors are not to be

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applied in accordance with some precise mathematical formula, but rather should be considered together in arriving at a "balance of equities." Washington Metro Area Transit Comm'n. v. Holiday Tours, Inc., 559 F. 2d 841, 844 (D.C. Cir. 1977).

In its discussion of the balancing approach to interim injunctive relief, the Court in Holiday Tours described the function and purpose of a stay pending appeal:

Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant.

559 F. 2d at 844. The Court also endorsed an earlier approach taken by the Second Circuit in Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam), namely, that a party seeking preliminary injunctive relief could prevail by demonstrating that the case raised serious legal issues and that the balance of equities favored the party seeking relief. Id. Thus, the Agency may decide to grant a stay based on either the four factors given in Virginia Petroleum Jobbers or on an overall balancing of the equities. The following discussion of each of the four factors demon-

strates that each is met and that the balance of equities tips sharply in favor of granting a stay in this case.

1. Probability of Success on the Merits

In order to obtain a stay, SPI must demonstrate to the Agency that it is likely to prevail on the merits of its action. While it is no longer necessary for SPI to demonstrate a "substantial" probability of success, Holiday Tours, 559 F.2d at 844 (the court "should not be required at an early stage to draw the fine line between a mathematical probability and a substantial probability of success"), SPI believes that it has not only presented "difficult legal question[s]," id., but that it also has a very strong probability of succeeding on the merits.

EPA's promulgation of the 1986 Amendments disregards the notice and comment procedures contained in the rulemaking provisions of the Clean Air Act, 42 U.S.C. § 7607(d)(3), and the Administrative Procedure Act, 5 U.S.C. § 553, and the due process requirements of the U.S. Constitution. Certain provisions of the 1985 Proposal have been changed without adequate notice or justification by EPA. For example, the 1986

Amendments excise a critical sentence in the definition of exhaust gas which would have made clear that "a leak . . . is not an exhaust gas." 50 Fed. Reg. 1182. No reasons are given for the deletion of that sentence, even though the result is to silently nullify prevailing case law. See discussion, *supra*, in section B.1.

Another example of EPA's failure to adequately explain or justify the changes made by the 1986 Amendments is its definition of "relief valve discharge," which has the effect of discouraging the use of control devices on relief valve discharges. It would impose double penalties on regulated parties whose relief valve emissions were vented to control devices which would significantly reduce the emission of vinyl chloride but which still might exceed 10 ppm. This result is not only unfair to those parties that do use controls, it also conflicts with the aims of the Clean Air Act.

EPA's definition of "EDC purification" in the 1986 Amendments is at odds with the Agency's expressed intentions throughout the rulemaking history. The Agency apparently intended to exclude both final product storage and intermediate storage from the EDC purification process, see BID pp. 2-43,44,

but the 1986 Amendments do not reflect this intention. In this and other instances, SPI has had no opportunity to present its views and oppose the rules other than this request for a stay and reconsideration. This is particularly true for those provisions that SPI considered acceptable in 1985.

The Agency's apparent disregard of the record, including the history and underlying rationale for the proposed rules, forces SPI to conclude that the decisions leading to the 1986 Amendments were arbitrary and capricious. See, 42 U.S.C. § 7607(d)(9)(A).

2. Irreparable Injury

Industry members represented by SPI will suffer irreparable harm if the effectiveness of the 1986 Amendments is not stayed during the period of Agency reconsideration or review by this Court of Appeals. Member companies have entered consent decrees with EPA that require these companies to fully comply with EPA's vinyl chloride standard. If a stay is not granted, these members will be technically in contempt for violating the consent decrees unless they begin to comply with the 1986 Amendments at the same time these changes are being

challenged. See, e.g., United States v. Georgia-Pacific Corp., Civil Action Nos. 84-457-B and 85-136-B (M.D. La.) (see paragraph III of Consent Decree); United States v. Shell Oil Co., Civil Action No. 83-4494 (E.D. La.) (see paragraph V(E) of Consent Decree); United States v. Conoco Inc., Civil Action No. 83-1916-E, (W. D. Okla. Aug. 21, 1985) (see paragraph III of Consent Decree).

Since EPA can effectively be forced to sue companies for violations under the citizen suit provisions of section 304 of the Clean Air Act, the Agency cannot assert that it will exercise its prosecutorial discretion in any predictable fashion. Moreover, concepts of judicial economy dictate that a single stay in this forum would be preferable to the entry of stays in a number of district court proceedings.

A regulated party, obligated by a consent decree to comply with the 1986 Amendments despite ambiguities which make rational action impossible, will be in technical contempt and subject to a contempt citation if it awaits further guidance from the Agency or the Court of Appeals. This is the type of injury for which there is no adequate legal remedy. A stay of the 1986 Amendments should be granted to avoid this inequitable and irreparable injury.

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An example using provisions from the 1986 Amendments will serve to illustrate another type of irreparable injury at issue. The definition of "exhaust gas" in the 1986 Amendments fails to make clear, as the proposed rule did, that a "leak" as defined in the Amendments does not also fall within the definition of exhaust gas. Compare proposed definition at 50 Fed. Reg. 1194 (Jan. 9, 1985) with definition in 1986 Amendments at 51 Fed. Reg. 34909 (Sept. 30, 1986). If leaks are treated as exhaust gases, every leak would be a violation of the 10 ppm limitation.

3. A Stay Will Cause No Harm to Other
Parties or the Public Interest

The two remaining factors which the Agency must consider in determining whether to grant a stay are:
(i) whether possible harm to other parties would be caused by the stay, or (ii) whether a stay would adversely affect the public interest. Here, a stay of the 1986 Amendments will result in no harm to other parties and will promote the public interest.

Despite the immediate and detrimental impact of the 1986 Amendments on the regulated industry, EPA characterized the Amendments as making only "administrative and clarifying revisions" to the VC standard. 51 Fed. Reg. 34904 (Sept. 30, 1986). In the Agency's view, EPA did not attempt to change the substantive regulatory framework now in place. Thus, immediate implementation is not necessary to protect the public health. If a stay is granted, the existing vinyl chloride standard will remain in effect and will continue to provide adequate protection for human health and the environment during the period of Agency or appellate review. Harm will not result from maintaining the status quo for the relatively brief time necessary to obtain final judicial resolution of the issues raised by this petition.

Far from having an adverse impact on the public interest, a stay will ensure that both industry and EPA do not engage in wasteful and unnecessary efforts to comply with the 1986 Amendments when they are likely to undergo significant revision. Thus, the public interest is promoted by delaying effectiveness of the 1986 Amendments until either EPA or the Court has an opportunity to provide the clarity and guidance which the 1986 Amendments failed to provide.

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D. RELIEF VALVE DISCHARGE LIMITATION

In addition to seeking a stay and reconsideration of the six provisions already discussed in detail above, SPI also requests reconsideration of EPA's decision to retain the original relief valve discharge provision rather than implementing a numerical limitation standard.

The relief valve discharge limitation found in section 61.65(a) of the 1976 Standard has been the most troublesome provision of the entire vinyl chloride standard. The 1976 Standard permits only "emergency" relief valve discharges, those that "could not have been avoided by taking measures to prevent the discharge."

In its preamble to the 1985 Proposal, EPA concluded that this provision drew "significant use of agency resources to evaluate individual discharges for preventability," and created "uncertainty on the part of producers regarding whether they comply with the standard." 50 Fed. Reg. 1,187 (1985). Stated more directly, every time there is a relief valve discharge a question arises as to whether it could have been "avoided." EPA has testified under oath, pursuant to Federal

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Rule of Civil Procedure 30(b)(6), that the Agency has never concluded that a discharge has resulted from an emergency, despite the Agency's recognition that relief valve discharges are inevitable and-unavoidable. Indeed, EPA enforcement personnel have de facto deleted the emergency concept from § 61.65(a). Regardless of the fairness of the actual language of section 61.65(a), EPA's enforcement of the relief valve discharge provision has made it arbitrary, unfair and void for vagueness.

If reasonably interpreted and enforced, the numerical limitation is stricter than the 1976 emergency discharge provision because "[e]ach discharge causing an exceedence of any numerical limit. . . would be considered a violation without regard to whether any individual discharge was preventable." 50 Fed. Reg. 1,188 (1985). Moreover, the amount of vinyl chloride that can potentially be released in any one discharge is limited by a number of factors such as the amount of free vinyl chloride present in the vessel and the inherent design of relief valves, which reseal after the pressure in the vessel decreases to a safe level. Additionally, producers do not benefit from carelessly releasing their product or raw material. Relief valves are designed for the practical purpose

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of protecting life and property, and to close when no longer needed. Regulated parties have sufficient economic incentive to ensure that relief valves work as designed, regardless of the standard promulgated.

Nevertheless, EPA decided not to finalize the numerical limitation proposal and retained the emergency discharge provision of the 1976 Standard. In the 20 months between proposal and finalization, EPA decided that industry had become enlightened as to the meaning of "emergency" and that "enforcement of the relief valve discharge standard has been made more efficient." 51 Fed. Reg. 34,906 (1986). The record supports no such conclusion.

A fair reading of the record and enforcement history surrounding the 1976 Standard can lead only to the conclusion that, as written, § 61.65(a) impermissably delegates rulemaking authority to enforcement personnel and is unconstitutionally vague and that, as applied, the regulation is unfair, unlawful, arbitrary and capricious. The numerical limitation would remedy these fatal flaws and at the same time lessen the administrative burden on both EPA and the regulated community. EPA's rejection of the proposed revision should be reconsidered by the Agency.

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E. CONCLUSION

For the reasons given above, SPI respectfully requests that the Agency issue a stay of the 1986 Amendments to the vinyl chloride standard and reconsider the provisions discussed in this petition. We would be happy to discuss these matters in more detail or to provide any additional information you might require.

Respectfully submitted,

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CTL026765

JUN -1 1984

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

ROBERT H. SHENWELL C.

BY: mm

DEPT

UNITED STATES OF AMERICA

VS.

CONOCO, INC.

CIVIL ACTION NO. 83-2518

FOR THE UNITED STATES

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CTL026766

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.

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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 these 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 SSZIS [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.

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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.

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

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

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JUN - 1 1984

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

ROBERT W. SHENWELL, CLERK
BY [Signature]
DEPUTY

UNITED STATES OF AMERICA

VS.

CIVIL ACTION NO. 83-2518

CONOCO, INC.

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.

[Signature]
EARL E. VERON
UNITED STATES DISTRICT JUDGE

Judgment Entered 6-4-84
By [Signature]
Copy To Wolcott / McDoude
Burton (Copy)
Hern
Gilkey
Moore

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