IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ______________

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| THE SOCIETY OF THE PLASTICS INDUSTRY, INC., | ) | |
| AND | ) | |
| XXX CORPORATION, | ) | |
| Plaintiffs, | ) | |
| vs. | ) | Civil Action No. ________ |
| ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| AND | ) | |
| DOUGLAS M. COSTLE, Administrator, ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| AND | ) | |
| EDWARD E. REICH, Director, DIVISION OF STATIONARY SOURCE ENFORCEMENT, ENVIRONMENTAL PROTECTION AGENCY, | ) | |
| Defendants | ) | |

## MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTIONS FOR A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

### I. STATEMENT OF THE CASE

Plaintiffs respectfully submit this Memorandum of Points and Authorities in support of their Motions for a Temporary Restraining Order and a Preliminary Injunction barring implementation of certain rules issued by defendant Environmental Protection Agency ("EPA" or "the Agency"). The challenged rules are set forth in a series of memoranda ("the Memoranda") issued between February 23, 1978 and April 24, 1979 by EPA's Division of Stationary Source Enforcement ("DSSE") to its Regional Enforcement Directors. The rules relate to the application and enforcement of the relief valve discharge provisions of the National Emission Standard for Vinyl Chloride ("the Vinyl Chloride Standard" or "the Standard")[1/] promulgated by EPA pursuant to Section 112[2/] of the Clean Air Act.

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1/ 40 C.F.R. § 61.60 *et seq*.

2/ 42 U.S.C. § 7412.

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Plaintiffs contend that they are entitled to injunctive relief during the pendency of this suit because they can demonstrate that the rules contained in the Memoranda are procedurally and substantively invalid; that implementation of the rules would substantially and irreparably injure plaintiff XXX Corporation and other members of plaintiff SPI subject to the Vinyl Chloride Standard; and that the entry of an injunction to stay implementation of the rules pending this Court's final decision on the merits would not significantly injure defendants or be contrary to the public interest.

## II. FACTS

The significant facts in this case are set forth below. These facts, we believe, are not subject to dispute.

### The Vinyl Chloride Standard

Section 112 of the Clean Air Act authorizes EPA to establish emission standards for hazardous air pollutants. Pursuant to Section 112, EPA promulgated the Vinyl Chloride Standard on October 21, 1976[3/] to control emissions from industrial sources engaged in vinyl chloride[4/] production. The Standard was promulgated in accordance with required notice and comment procedures, and plaintiffs and other members of the vinyl chloride industry participated in its development. During the public comment period preceding promulgation of the Standard, plaintiffs and other industry members submitted written information and comments, and made oral presentations at the public hearing on the proposed standard held on February 3, 1976.

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3/ 41 Fed. Reg. 46560-73. The Vinyl Chloride Standard became effective immediately upon promulgation, but most existing sources were granted statutory waivers permitting delayed compliance, allowing industry sufficient time to take measures to reduce relief valve discharges to a minimum. (42 U.S.C. § 112(c)(1)(B)(ii)). By the terms of the statute, the waivers expired on October 20, 1978.

4/ The Standard applies to plants producing vinyl chloride, polyvinyl chloride, and ethylene dichloride.

The provisions of the Standard pertinent to this case relate to "relief valve discharges"[5/] and provide:

> Except for an emergency relief discharge, there is to be no discharge to the atmosphere from any relief valve on any equipment in vinyl chloride service. An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge. . . . (40 C.F.R. § 61.65(a))

Section 61.65(a) does not explain further what constitutes an emergency (i.e., non-preventable) relief discharge; nor does it prescribe measures that a facility must adopt to prevent relief valve discharges.[6/] Based on the indefinite language of Section 61.65(a), and conferences with Agency officials, plaintiffs had expected that EPA would evaluate the preventability of relief valve discharges on a case-by-case basis. The Agency had taken that position in the preamble to the proposed vinyl chloride standard:

> Discharges which cannot be avoided . . . will not be in violation of the proposed standard if the owner or operator notifies EPA within 10 days concerning the nature and cause of the discharge. This notification provision is necessary to permit EPA to investigate the surrounding conditions and determine whether the discharge could have been prevented.7/

<u>The Memoranda</u>

In February, 1978 DSSE began to issue memoranda to its Regional Enforcement Directors relating to the application and

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5/ Relief valve discharges from equipment in vinyl chloride service are sometimes necessary to lower dangerously high pressure levels in the production system which can result in severe explosions and fires.

6/ Section 61.65(a) may thus be contrasted with other provisions of the Standard that do specify measures a source must take to control vinyl chloride emissions (see, *e. g.*, §61.65(b)).

7/ 40 Fed. Reg. 59539 (December 24, 1975).

enforcement of the relief valve discharge provisions. The Memoranda (attached, Exhibit A) set forth, inter alia, the following rules:

(1) A relief valve discharge will be considered an emergency discharge only if it occurs as the result of an unpreventable disaster (i.e., tornado, hurricane, earthquake, flood, riot, sabotage, etc.). [May 18, 1978 DSSE memorandum]

(2) After experiencing an initial discharge, companies can reasonably be expected to (a) properly instrument reactors to detect upset conditions, (b) inject chemicals to stop the polymerization reaction during upset conditions, (c) vent the reactor contents to a gasholder during upset conditions and ultimately to a recovery system, (d) provide employees with improved training on preventing and handling upset conditions, and (e) maintain a backup source of power. [April 24, 1979 DSSE memorandum]

(3) When a source reports a relief valve discharge, the Agency will presume that the discharge was not due to an emergency, but was preventable; and, therefore, that the discharge constitutes a violation of Section 61.65(a). [April 24, 1979 DSSE memorandum]

These rules set forth in the Memoranda are not contained in the Standard itself.

The Memoranda were issued without prior notice to the public of the terms or substance of the rules contained therein. The Agency did not give interested persons an opportunity to participate in the development of the rules through submission of written data or comments. Moreover, the rules were issued without a concise general statement of basis and purpose containing the factual data on which they are based and the legal and policy considerations underlying them. Plaintiffs believe that the rules contained in the Memorandum are in several respects unfounded and arbitrary, and plaintiffs would have objected to and commented on the rules had they been given a timely opportunity to do so.

EPA Enforcement Action

DSSE has taken the position that, as a matter of policy, all non-emergency discharges require enforcement action by EPA.[8/] The Agency already has started to take enforcement action based on the rules set forth in the Memoranda. Several of plaintiff SPI's members have received compliance orders (attached, Exhibit B) based on Agency findings that they have discharged vinyl chloride under non-emergency conditions, in violation of Section 61.65(a). The letters accompanying these compliance orders contain language identical to language in the Memoranda. Other members of plaintiff SPI subject to the Standard, including XXX Corporation, have been issued show-cause orders (attached, Exhibit C) or received letters (attached, Exhibit D) from EPA threatening enforcement action based on the rules contained in the Memoranda.

The Agency has taken these enforcement steps even though plaintiff XXX Corporation and other industry members have taken various actions, since the adoption of the Standard, to prevent relief valve discharges. Actions taken include installing new equipment, instituting inspection and maintenance programs, and providing special training programs for employees. Adoption of these measures has significantly lowered the incidence of relief valve discharges at the facilities of plaintiff XXX Corporation and at other industry facilities (see Exhibit E, attached). EPA itself is aware of the decline in relief valve discharges, since companies subject to the Standard are required to report all discharges to the Agency.

## III. ARGUMENT

Plaintiffs have moved for a preliminary injunction to prevent EPA from implementing the rules set forth in the Memoranda, because they believe that the rules are procedurally and

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8/ May 18, 1978 DSSE memorandum.

substantively invalid. Plaintiffs believe that they are likely to succeed on the merits, but a future determination that the rules are unlawful will not provide adequate relief if the rules are implemented before this litigation is complete. Accordingly, to prevent irreparable injury to plaintiffs, the issuance of a preliminary injunction at this time is both necessary and appropriate.

It is well-established in this circuit that a court has discretion to issue a preliminary injunction to protect a plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits. The United States Court of Appeals for the Fifth Circuit has consistently stated that a court must exercise its discretion to grant injunctive relief when the following factors are present:[9/]

> (1) a substantial likelihood that plaintiff will prevail on the merits;[10/]
>
> (2) a substantial threat that plaintiff will suffer irreparable injury if an injunction is not granted;
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> (3) the threatened injury to the plaintiff outweighs the harm the injunction may do to the defendant;
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> (4) granting the preliminary injunction will not be contrary to the public interest.

Plaintiffs respectfully submit that, as set forth below, each of these four conditions for granting injunctive relief are met in this case.

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9/ See Barrett v. Roberts, 551 F.2d 662 (5th Cir. 1977); Canal Authority of the State of Florida v. Calloway, 489 F.2d 567 (5th Cir. 1974); Allison v. Froehlke, 470 F.2d 1123 (5th Cir. 1972).

10/ A mathematical probability of success is not required. Where the plaintiff shows that the equities favor the granting of relief, it is sufficient that the plaintiff "has made a substantial case on the merits." Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). This rule has been followed by the Fifth Circuit. See Canal Authority of the State of Florida v. Calloway, *supra*.

A. Plaintiffs Are Likely to Prevail on the Merits Because the Rules Set Forth in the Memoranda are Invalid, Both Procedurally and Substantively.

1. The Rules Set Forth in the Memoranda Are Substantive Rules Issued Without Compliance With Statutory Notice and Comment Requirements, and Therefore Are Invalid.

The Administrative Procedure Act ("APA") expressly requires federal agencies to (a) publish notice of the terms or substance of proposed rules or a description of the subjects and issues involved; (b) provide interested persons with an opportunity to participate in rule making through the submission of written comments; and (c) incorporate in adopted rules a concise general statement of their basis and purpose.[11/] Rules issued without compliance with APA procedures have repeatedly been struck down by the courts.[12/] See, e.g., United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979); Joseph v. United States Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977); Pickus v. United States Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1976); Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2nd Cir. 1972); Texaco, Inc. V. FPC, 412 F.2d 740 (3d Cir. 1969); Dow Chemical v. CPSC, 459 F.Supp. 378 (W.D. La. 1978); City of New York v. Diamond, 379 F.Supp. 503 (S.D.N.Y. 1974).

EPA has attempted to bypass required notice and comment procedures issuing the challenged rules in informal "memoranda". However, it is by now well-settled that courts will look beyond the label attached by the agency to determine the nature of the

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11/ 5 U.S.C. § 553(b). Technically, rulemaking under the Clean Air Act is governed by Section 307 of that Act, rather than the APA. However, since the procedural provisions of the two acts are substantially the same, an analysis of notice and comment issues in terms of the APA provisions applies equally to rulemaking under the Clean Air Act.

12/ The APA provides that a reviewing court shall "hold unlawful and set aside agency action" taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

agency's action. Morton v. Ruiz, 415 U.S. 199 (1974) ("manual"); Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407 (1942) ("announcement of policy"); United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) ("news release"); City of New York v. Diamond, 379 F.Supp. 503 (S.D.N.Y. 1974), Nader v. Butterfield, 373 F.Supp. 1175 (D.D.C. 1974) ("memorandum").

The APA definition of "rule" reads, in pertinent part, as follows:

> . . . the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . .13/

The rules set forth in the DSSE memoranda fall squarely within this broad definition, and the statutory notice and comment requirements apply.

However, the rules would be exempt from the statutory procedural requirements if they were interpretative rules or general statements of policy.14/ While the terms "interpretative rule" and "general statement of policy" are not defined in the APA, they have been construed in a number of judicial decisions. Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33 (D.C. Cir. 1974), involved review of a Federal Power Commission Order that due to market shortages, suppliers should allocate natural gas on the basis of end use rather than on the basis of prior contract commitments. In considering whether the procedural requirements of the APA applied to the FPC Order, the United States Court of Appeals for the District of Columbia described the "critical distinction" between a substantive rule and a general statement of policy as follows:

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13/ 5 U.S.C. § 551(4).

14/ 5 U.S.C. § 553(b).

> A properly adopted substantive rule establishes a standard of conduct which has the force of law. In subsequent administrative proceedings involving a substantive rule, the issues are whether the adjudicated facts conform to the rule and whether the rule should be waived or applied in that particular instance. The underlying policy embodied in the rule is not generally subject to challenge before the agency.
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> A general statement of policy, on the other hand, does not establish a "binding norm" . . . . [A] general statement of policy only announces what the agency seeks to establish as policy. A policy statement announces the agency's tentative intentions for the future.[15/]

The D.C. Circuit elaborated upon the distinction between substantive rules and general statements of policy in Pickus v. U.S. Board of Parole, 507 F.2d 1107 (D.C. Cir. 1974). In Pickus, prison inmates challenged parole board guidelines that specified factors for administrators to consider in exercising their discretion to parole prisoners. Even though the parole board guidelines permitted the administrators to consider factors other than those specified, the court held that the guidelines were substantive rules subject to the APA's procedural requirements. The court reasoned that the guidelines "cannot help but focus the decision-maker's attention on the Board-approved criteria" and thus "narrow his field of vision."[16/] Therefore, the court concluded: "[T]he rules which define parole selection criteria . . . are substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad powers."[17/]

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15/ 506 F.2d at 38. The court in Pacific Gas ruled that the FPC Order was a statement of policy not subject to the procedural requirements of the APA, basing its decision on statements by the Commission indicating that the Order would have no binding effect or "final, inflexible impact upon the petitioners." 506 F.2d at 41.

16/ 507 F.2d at 1113.

17/ Id.

More recently, in Guardian Federal Savings and Loan Association v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978), the D.C. Circuit reiterated its position:

> A general statement of policy . . . must leave the administrator free to exercise his informed discretion in the situations that arise. . . .
>
> If if appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is - a binding rule of substantive law.18/

The "interpretative rule" exception to the procedural provisions of the APA has also been analyzed in a number of cases. Recently, in Gosman v. United States, 573 F.2d 31 (Ct. Cl. 1978), the Court of Claims, citing a number of leading precedents, concluded that "[a]ll agree that an interpretative rule merely clarifies or explains existing law or regulations."19/ See also, Guardian Federal Savings and Loan Association v. FSLIC, supra; American Association of Councils of Medical Staffs v. Mathews, 421 F.Supp. 848 (E.D.La. 1976); Continental Oil Co v. Burns, 317 F.Supp. 194 (D.Del. 1970). Other decisions similarly define interpretative rules as rules which create no law and have no effect beyond that of the statute. Citizens to Save Spencer County v. EPA, No. 78-1002, slip opinion (D.C. Cir. 27 March 1979); Pesikoff v. Secretary of Labor, 501 F.2d 757 (D.C.Cir. 1974), cert. denied, 419 U.S. 1038 (1974); Gibson Wine Co. v. Snyder, 194 F.2d 329 (D.C. Cir. 1952).

Applying these principles to the present case, it is clear that the rules set forth in the DSSE memoranda are not interpretative rules or general policy statements, but substantive

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18/ 589 F.2d at 666. In Guardian, the issue was whether criteria specified by the agency for evaluating audit reports were policy statements or substantive rules. The administrator in that case was authorized to accept audit reports that failed to satisfy the specified criteria. The court held that the criteria were policy statements since they effectively preserved the administrator's discretion in particular cases.

19/ 573 F.2d at 39.

rules subject to statutory procedural requirements. Th rules set forth in the Memoranda cannot be general statements of policy because they do not use the language of latitude or administrative discretion. The Memoranda state (emphasis supplied):

* "[A] plant may be required by EPA to implement measures designed to prevent future relief discharges." [February 28, 1978 memorandum]

* "In order to maintain national consistency in dealing with this matter, we request that the Regions follow the recommendations outlined . . ." [February 28, 1978 memorandum]

* "A relief discharge will be considered an emergency discharge only if it occurs as the result of an unpreventable disaster. . ." [May 18, 1978 memorandum]

* "[A]ll violations of §112 require mandatory enforcement action by EPA". [May 18, 1978 memorandum]

* "In order for a discharge to be considered an emergency . . . [a]s a minimum, the source would have to demonstrate that . . ." [April 24,1979 memorandum]

* "The final issue to be addressed in this memo concerns the types of actions a source should be expected to take, after experiencing a relief valve discharge, in order to prevent future discharges." [April 24, 1979 memorandum]

The language in the Memoranda shows that the rules contained therein are intended to be binding. The rules prescribe specific preventive measures that companies are expected to take, with no reference to alternatives. Likewise, the rules narrowly limit the discretion of the Regional Enforcement Directors. The rules set forth in the Memoranda strictly limit the types of discharges that may be considered emergency discharges. The rules furnish the Enforcement Directors with a simple checklist to be used to determine whether a particular discharge was preventable. Thus, the rules essentially eliminate administrative discretion, and therefore, cannot be general statements of policy exempt from statutory notice and comment requirements.

The rules set forth in the Memoranda cannot be interpretative rules either, for they go beyond mere clarification of the Vinyl Chloride Standard. In fact, the approach to relief valve discharges outlined in the Memoranda directly conflicts with the approach envisioned under the Standard. As stated in the preamble to the proposed standard, the Standard contemplates that the Agency will adopt a case-by-case approach and investigate the circumstances surrounding a particular discharge to determine if it was preventable. The Standard itself suggests a case-by-case approach by providing, in a rather general fashion:

> An emergency relief discharge means a discharge which could not have been avoided by taking measures to prevent the discharge . . . 20/

This definition of "emergency" discharge may be contrasted with that originally proposed: "An emergency relief discharge means a discharge which could not have been avoided by taking all available measures to prevent the discharge".21/

During the vinyl chloride rule making proceedings, the "all available measures" language was dropped. In its Standard Support Document published just prior to promulgation of the Standard, the Agency explained its revision of the proposed standard:

> The standard has been revised by deleting "all available" measures. EPA has listed several methods which it expects a plant to take in preventing discharges. EPA's primary concern is that the discharges are prevented. If a company has alternate methods which do prevent discharges, these are acceptable to EPA.22/

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20/ 40 C.F.R. §61.65(a)(emphasis supplied).

21/ Proposed §61.65(a), 40 Fed. Reg. 59545 (1975)(emphasis supplied).

22/ Standard Support and Environmental Impact Statement, Volume 2: Promulgated Emission Standard for Vinyl Chloride, EPA-450/2-75-009b (September 1976), §2.4.5, pp. 2-47 through 2-50 (emphasis supplied).

The Memoranda also go beyond mere clarification of the Standard by creating a presumption of preventability with respect to all relief valve discharges. There is no basis in the Vinyl Chloride Standard itself for such a presumption.

As set forth above, the Memoranda clearly go beyond mere clarification of the Vinyl Chloride Standard and create new law. Therefore, the rules set forth in the Memoranda cannot be interpretative rules exempt from statutory notice and comment requirements.

Based on the standards enunciated in leading judicial decisions, then, the rules challenged in this case are substantive rules subject to notice and comment procedures. Since the Agency failed to comply with those procedures in issuing the Memoranda, the rules set forth in the Memoranda are invalid.

2. Even If the Rules Set Forth in the Memoranda Are Not Substantive Rules, They Are Nonetheless Invalid Because They Have a Substantial Impact on the Public and Therefore Cannot Be Promulgated Without Compliance With Notice and Comment Procedures.

In a long line of cases, courts have held that regardless of how agency action is characterized, compliance with notice and comment procedures is required whenever the action has a "substantial impact".[23/]

In the recent case of National Helium Corporation v. FEA, 569 F.2d 1137 (Em.Ct.App. 1977), the Temporary Emergency Court of Appeals held that regardless of "facile semantic distinctions", notice and comment are required in connection with any agency action having a substantial effect upon the rights of the parties involved. The court's holding was based on two considerations,

23/ Some cases have held that rules having a substantial impact on the public are subject to the procedural requirements of the APA. Other cases do not rely on the provisions of the APA, but hold instead that common law principles of "elementary fairness" require notice and comment prior to promulgation of such rules. The courts are in agreement, however, with respect to the basic principle: agencies must follow certain procedures when they issue rules having a substantial impact.

both highly pertinent here: first, fundamental fairness to affected persons; second, the need for the agency to educate itself before issuing rules. The National Helium court's discussion of the relevant law is instructive:

> . . .[R]ather than rely on a "facile semantic distinction" between interpretative rules and substantive or legislative rules, the courts have looked instead to the "basic purpose of [the] statutory requirements [of notice and comment]" in deciding whether the requirements should be imposed. Pharmaceutical Manufacturer's Association v. Finch, 307 F.Supp. 858, 863 (D.Del. 1970). When an agency action has "palpable effects" upon the regulated industry and the public in general, it is necessary to expose that action "to the test of prior examination and comment by the affected parties". National Motor Freight Traffic Association v. United States, 268 F.Supp. 90, 96 (D.D.C. 1976)(three judge court) aff'd per curiam, 393 U.S. 18 (1968).
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> The APA's rulemaking procedures "were designed to assure fairness and mature consideration of rules of general application". NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). The prior publication and opportunity for comment requirements enable "the agency promulgating the rule to educate itself before establishing rules and procedures which have a substantial impact on those regulated." Texaco, Inc. v. FPC, 412 F.2d 740, 744 (3 Cir. 1969).24/

One of the cases cited by the National Helium court is the early and still influential case of Pharmaceutical Manufacturers Association v. Finch, 307 F.Supp. 858 (D.Del. 1970). That case involved Food and Drug Administration regulations that set forth detailed criteria explaining what the Commissioner would deem to be "substantial evidence" of the effectiveness of certain drugs. The regulations were challenged by a trade association on the grounds that FDA failed to provide notice and an opportunity for comment prior to issuing them. The district court held that "[b]ecause of the substantial impact of these regulations on the

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24/ 569 F.2d at 1145-46.

drug industry, the Commissioner should have issued these important regulations only after providing notice and an opportunity for comment".25/

In numerous other cases, courts have required compliance with notice and comment procedures where rules would have a substantial impact on the public. Lewis-Mota v. Secretary of Labor, 469 F.2d 478 (2d Cir. 1972), involved a challenge to a directive of the Secretary of Labor. The directive suspended a "precertification list" that exempted aliens engaged in certain listed occupations and destined for certain geographic areas from the customary requirement of showing a specific job offer. The court held that the action of the Secretary, taken without providing notice and an opportunity for comment, was invalid:

> We find that it changed existing rights and obligations by requiring aliens of the class of appellants to submit proof of specific job offers as well as a statement of their qualifications; it thereby made it more difficult for employers to fill vacancies in the occupations no longer precertified. By virtue of this substantial impact both upon the aliens and employers, notice and opportunity for comment by the public should first be provided.26/

Similarly, in Lewis v. Weinberger, 415 F.Supp. 652 (D.N.M. 1976), the court struck down an agency policy because it "effects a substantial change in existing statutes and regulations, and it has a direct and significant impact upon the substantive rights of a segment of the general public."27/ In City of New York v. Diamond, 379 F.Supp. 503 (S.D.N.Y. 1974), the court invalidated an agency "memorandum", stating:

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25/ 307 F. Supp. at 865.

26/ 469 F.2d at 482.

27/ 415 F.Supp. at 661.

> The fact that it is entitled "Memorandum to Heads of all Agencies" does not make it any less an exercise of administrative rule making power if it has, as it does, "substantial impact" on the public.[28]

The district court for the District of Columbia similarly invalidated an agency "memorandum" in Nader v. Butterfield, 373 F.Supp. 1175 (D.D.C. 1974).

Agency actions having a substantial impact on the public have been struck down in a host of other cases. See, e.g., Morton v. Ruiz, 415 U.S. 199 (1974); Aiken v. Obledo, 442 F.Supp. 628 (E.D.Cal. 1977); Akron, Canton & Youngstown R.Co. v. United States , 370 F.Supp. 1231 (D.Md. 1974); Hou Ching Chow v. Attorney General, 362 F.Supp. 1288 (D.D.C. 1973); Continental Oil Co v. Burns, 317 F.Supp. 194 (D.Del. 1970).

The foregoing cases demonstrate that agency rules that have a substantial impact on the public cannot be issued without compliance with notice and comment procedures. There can be no question in this case as to the substantial impact of the rules set forth in the Memoranda upon plaintiff XXX Corporation and other members of plaintiff SPI subject to the Vinyl Chloride Standard. Under the terms of the Memoranda, plaintiff XXX Corporation and other members of plaintiff SPI subject to the Standard will be forced, at great expense, to install additional equipment and institute additional maintenance and training programs. Forced implementation of these measures would have a substantial economic impact on the regulated companies.

The Memoranda also have the very significant effect of making plaintiff XXX Corporation and other members of plaintiff SPI subject to the Standard presumptively liable for serious civil and criminal penalties. In enforcement actions initiated by EPA against plaintiff XXX Corporation and other members of

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28/ 379 F.Supp. at 518.

plaintiff SPI, the companies' legal position will be unfairly and irreparably damaged by the Agency's presumption that a particular discharge was preventable.

Furthermore, under the terms of the Memoranda, any relief valve discharge by plaintiff XXX Corporation or by another member of plaintiff SPI subject to the Standard will precipitate a presumption and allegation by the Agency, of unlawful conduct, subjecting involved companies to possible citizen suits,29/ loss of goodwill, and consequent economic harm.

Therefore, regardless of whether the rules set forth in the Memoranda technically are substantive rules, they are invalid because they have a substantial impact on the public and were issued without compliance with notice and comment procedures.

3. Apart From Their Procedural Invalidity, The Rules Set Forth in the Memoranda Are Arbitrary, and Therefore Substantively Invalid.

The Administrative Procedure Act provides that a reviewing court shall hold unlawful and set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."30/ While plaintiffs believe that the DSSE memoranda are arbitrary in several fundamental respects, one of the rules set forth in the Memoranda - the presumption of preventability - is particularly objectionable.

The April 24, 1979 DSSE memorandum states that where there has been a relief valve discharge, the Agency will presume that the discharge was preventable. Presumptions are considered arbitrary - indeed, unconstitutional - if there is no "rational connection" between proven facts and the fact presumed. Leary v. United States, 395 U.S. 6 (1969); Tot v. United States, 319 U.S.

29/ 42 U.S.C. §7604.

30/ 5 U.S.C. §706(2)(A).

463 (1943); Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35 (1910). In Leary v. United States, the Supreme Court, striking down a criminal[31/] statutory presumption, elaborated upon the "rational connection" standard:

> . . . [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. 32/

More recently, however, in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), the Court upheld a civil statutory presumption, relying on a weaker formulation of the rational connection standard than it advanced in Leary:

> "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law . . . it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."[33/]

Yet in Turner, as in other leading cases upholding statutory presumptions, the Court's decision turned on its assumption that Congress had been presented with significant factual data supporting the statutory presumption.

By contrast, the Agency's presumption of preventability lacks an appropriate evidentiary foundation. The record of the regulatory proceedings leading to promulgation of the Vinyl Chloride Standard contains no factual support for the presumption

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31/ Relief valve discharges potentially involve criminal and civil sanctions.

32/ 395 U.S. at 36.

33/ 428 U.S. at 28, quoting Mobile, J. & K.C.R. Co. v. Turnipseed, supra, at 43.

that most vinyl chloride discharges are prev ntable. Unless the Agency can provide such evidentiary support, the presumption fails the "rational connection" test, however that test is formulated. If no such evidence exists, the presumption rule set forth in the Memoranda is obviously arbitrary, and therefore invalid. If evidence exists that was not disclosed to the public and thus could not be subjected to public scrutiny and comment, an additional argument for declaring the rules procedurally invalid arises. In any event, the Agency has presented no support for its presumption of preventability, which must therefore be considered arbitrary and invalid.[34]

Similarly, the Agency has produced no evidence showing that implementation of the rules set forth in the Memoranda will reduce the incidence of relief valve discharges. The Agency does not seem to recognize that relief valve discharges are extremely costly to plaintiff XXX Corporation and other members of SPI, because they result in product loss and a disruption of production. It is in the industry's best interest to minimize the number of relief valve discharges, and companies have already taken all steps that actually reduce the incidence of discharges (see Exhibits E and F, attached). Implementation of the rules set forth in the Memoranda will not result in further reduction of the incidence of relief valve discharges, and therefore, the rules are arbitrary and invalid.

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34/ Where a statutory presumption is involved - as in the cases cited - an argument that the presumption is arbitrary must be based on constitutional grounds. Where an administrative presumption is at issue - as in the present case - an argument that the presumption is arbitrary may be based on constitutional grounds, or on statutory grounds (see f.n. 30 and text accompanying, *supra*). The "rational connection" standard delineated in the constitutional cases above has also been employed by the courts to determine whether agency action is "arbitrary" under the APA. *See, e.g.*, Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977)(*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

B. Failure to Enjoin Implementation of the Rules Set Forth In The Memoranda Would Cause Plaintiffs Irreparable Injury

The affidavits accompanying this Memorandum (Exhibit G) demonstrate the irreparable injury which plaintiffs will face if this court does not enjoin implementation of the rules set forth in the DSSE memoranda. As already explained, under the terms of the Memoranda, plaintiff XXX Corporation and other members of plaintiff SPI subject to the Vinyl Chloride Standard will be forced to install additional costly equipment and institute additional expensive maintenance and training programs.

Forced implementation of these measures would have a substantial and irreparable economic impact on the regulated companies and would not reduce the incidence of relief valve discharges. At great expense, industry members have already taken steps that have reduced, to an absolute minimum, the frequency of such discharges (see Exhibits E and F, attached).

The Memoranda would also have the immediate and irreparable effect of making plaintiff XXX Corporation and other members of plaintiff SPI subject to the Standard presumptively liable for serious civil and criminal penalties. In enforcement actions initiated by EPA against plaintiff XXX Corporation and other members of plaintiff SPI, the companies' legal position will be unfairly and irreparably damaged by the Agency's unfounded presumption that discharges are preventable.

Furthermore, under the terms of the Memoranda, any relief valve discharge by plaintiff XXX Corporation or by another member of plaintiff SPI subject to the Standard will precipitate a presumption and allegation of unlawful conduct by the Agency, subjecting the involved companies to possible citizen suits,[35/] loss of goodwill, and consequent economic harm.

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35/ Indeed, the Agency's presumption of unlawful conduct may operate against the involved companies in citizen suits, as well as in Agency enforcement actions. Cf. Parklane Hosiery Company v. Shore, ____ U.S. ____, 58 L.Ed.2d 552 (1979) (in private stockholders' action, defendants were collaterally estopped from relitigating issues resolved against them in prior SEC action).



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EPA may attempt to argue that plaintiffs have not yet been subject to enforcement action, and that injunctive relief is thus not appropriate. However, in th leading case of Abbott Laboratories v. Gardner, 387 U.S. 136 (1967), the Supreme Court held that pre-enforcement review of agency action is appropriate in cases like this one. Furthermore, the Agency has already issued compliance orders and show-cause orders and sent letters to industry members threatening enforcement action based on the rules set forth in the Memoranda.

For the reasons stated, implementation of the challenged rules should be enjoined while this Court considers the merits of this action.

## C. The Injury To Plaintiffs Outweighs Any Possible Harm to EPA

We frankly cannot envision any possible harm to the Agency if implementation of the rules in the Memoranda is enjoined for the short time which it will take this Court to decide the merits of this case. Plaintiffs believe that this case can be disposed of in a straightforward, efficient manner through cross-motions for summary judgment.

The Vinyl Chloride Standard was promulgated three years ago, and all statutory waivers expired over thirteen months ago. EPA waited until recently to issue the rules set forth in the Memoranda. The Agency can hardly argue that its enforcement program will be significantly harmed by the short delay which would be imposed by granting plaintiffs' motion for injunctive relief. An injunction would not prohibit EPA from taking enforcement action with respect to discharges that violated the terms of Section 61.65(a). It would only prohibit EPA from relying on the unfounded and improperly promulgated rules contained in the Memoranda. In fact, the Agency would be better off if implementation of the rules is delayed until there has been an opportunity for comment to help clarify the issues raised by the Memoranda.

Any harm to EPA that might result if implementation of the rules is enjoined is far outweighed by the injury to the plaintiffs, discussed above, that will result if implementation of the rules is not enjoined.

Plaintiffs have demonstrated that they will suffer immediate, substantial, and irreparable harm if their request for a preliminary injunction is denied. The balance therefore tips heavily in favor of the plaintiffs, and calls for temporary relief. Poster Exchange, Inc. v.Nat'l Screen Service Corp., 198 F.Supp. 557 (N.D.Ga. 1961), aff'd., 305 F.2d 647 (5th Cir. 1962); GTE Sylvania, Inc. v. CPSC, 404 F.Supp. 352 (D.Del. 1975).

D. Granting Plaintiffs the Injunctive Relief They Seek is in the Public Interest

Plaintiffs' interests in this case are clearly linked with those of the public. Plaintiffs and the public both have a strong interest in ensuring that the integrity of the administrative rule making process is maintained and that the public is given an opportunity to comment before an agency implements rules that will have a significant impact. The need for procedural due process overrides the Agency's interest in immediate implementation of its regulations.

The public will be harmed if EPA takes enforcement action pursuant to the rules set forth in the Memoranda since production of substances that serve important functions in our society could be restricted, or even halted. The public therefore has a strong interest in ensuring a determination of the validity of the rules before they are put into effect. The public likewise has a strong interest in seeing that enforcement action is initiated only when there is legitimate evidence that there has been a non-emergency relief valve discharge. Granting the injunctive reli f plaintiffs are requesting would serve these public interests, as well as the mor general public interest of preventing EPA from implementing arbitrary and capricious rules which are unsupported by the record and were promulgated in violation of required notice and comment procedures.

## IV. CONCLUSION

For the reasons set forth above, this Court should grant the injunctive relief requested to protect plaintiffs and the public from irreparable injury and to preserve this Court's ability to render a meaningful decision on the merits.

Respectfully submitted,