



A Division of The Society of The Plastics Industry, Inc.

Roy T. Gottesman
Executive Director

August 17, 1987

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Sherry M. Carr

TO: The VI Health, Safety & Environment Committee
The VI Legal Committee

RE: Decision By Court of Appeals in the NRDC v. EPA Case

I attach for your information, a letter from Peter de la Cruz at Keller and Heckman dated August 12, 1987 providing an assessment on the recent decision in the NRDC v. EPA case.


RTG/pmb

cc: M. N. Scheck

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DR. R. T. GOTTESMAN

August 12, 1987

Roy T. Gottesman, Ph.D.
The Vinyl Institute
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Re: NRDC v. EPA

Dear Roy:

In keeping with our prior discussions, we are providing a follow-up assessment of the decision in Natural Resources Defense Council v. Environmental Protection Agency, No. 85-1150 (D.C. Cir. July 28, 1987), which involves EPA's withdrawal of its 1977 proposal to amend the vinyl chloride standard. Since the opinion was circulated previously, many of the members have already had an opportunity to review the decision. We have received several calls from members who are particularly interested in the decision's impact on the current vinyl chloride standard. Our discussion will focus on how the decision will affect (1) the current standard, (2) the on-going negotiations with EPA regarding the 1986 amendments to the standard, and (3) the status of the 1977 proposal. We have spoken with EPA personnel involved in implementing emission standards under the Clean Air Act and they indicate that the Agency itself has not yet made a final assessment of how the decision will impact its current methods and procedures.

Impact on Existing VC Standard

Simply put, the decision of the Court of Appeals will have no impact on the existing 1976 standard, as amended by EPA's 1986 rulemaking. This standard remains in effect. EPA is not required by the decision to take any action to amend the current standard, nor do we anticipate that the Agency would

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take any such action on its own initiative based on its reading of the opinion.

Impact on Settlement Negotiations with EPA

The court's decision dealt with the question of what factors the Agency could properly consider in establishing emission standards under Section 112 of the Clean Air Act. The 1986 amendments to the VC standard involve technical or clarifying changes that were needed to more effectively implement the current standard. These revisions did not establish a new standard nor did they make substantive changes to the existing one. Since the court's decision applies only to the process used by EPA in establishing emission standards, it will have no impact on these non-substantive technical revisions.

Consequently, we are continuing our settlement discussions with the Agency in the case of SPI v. EPA. On August 6, I spoke with Richard Roos-Collins, the EPA attorney handling the case. He assured me that he was in the process of drafting a settlement agreement and that it would include as an attachment the revised regulatory language to which we agreed. Bob Ajax, EPA's chief technical advisor in the case, was on vacation until August 10. We will not receive the draft agreement until after Mr. Ajax has returned and approved any changes in the technical language included in the agreement. Thus, we do not expect to receive the draft agreement until later this month.

Impact on 1977 Proposal

The court's decision vacated EPA's 1986 withdrawal of its 1977 proposal to amend the vinyl chloride standard and remanded the matter to the Agency for timely reconsideration of its action consistent with the court's decision. This means that the 1977 proposal has been reinstated and EPA has an obligation to take some action on the proposal. The Agency has not yet made a decision on exactly what course it will follow.

The court based its decision on the Agency's failure to expressly find that its decision to withdraw the 1977 proposal and maintain the current standard would provide an "ample margin of safety" to protect the public health. In briefs filed with the court, EPA had argued that the 1976 standard should be understood to provide an ample margin of safety and that this was implicit in its withdrawal of the 1977 proposal, even if no explicit statement to that effect was made. The Agency argued that the existing standard did, in fact, provide

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an ample margin of safety. Based upon its statements during the litigation, EPA recognizes that the 1977 proposal is no longer necessary or appropriate and should be withdrawn. Using risk analysis and other appropriate scientific methodologies, EPA should be in a position to provide a sound and reasonable scientific basis for its conclusion that the existing standard provides an ample margin of safety and that withdrawal of the 1977 proposal is appropriate. The 1977 proposal can also be withdrawn on the basis that it was predicated on an erroneous understanding of the law given the court's opinion.

Overall Impact on Regulation of Air Pollutants

The decision in NRDC v. EPA is a landmark in the law governing the regulation of hazardous air pollutants. The court's clearest and perhaps most significant ruling is that Section 112 does not require EPA to establish a zero emission standard for non-threshold pollutants. It also confirms that EPA has discretion to consider cost and technological feasibility in developing emission standards, provided that the standard is derived from a health-based determination that the resulting exposure level will provide an ample margin of safety.

As a unanimous decision by all eleven judges on the court, the opinion necessarily reflects the process of judicial compromise. Some critical points will require further elucidation in other proceedings involving EPA's regulation of hazardous air pollutants under Section 112. Because of the convoluted language of the opinion, there is still some question as to precisely how EPA can use cost and technological considerations in establishing emission standards. Part of the problem arises from the Court's inconsistent use of the terms "safe" and "ample margin of safety" which appear to be used interchangeably in some portions of the opinion while, in other parts of the opinion, the court clearly distinguishes between the two.

The court explicitly stated that EPA was not required to use any specific method in determining a "safe" emission level. In addition, it did not endorse any particular risk level to be used in making a determination of safety. The court does, however, impose the general requirement that EPA consider only health factors in determining what emission level is safe. Because of the uncertainty involved in the use of statistical or scientific methodologies to make this determination of "safety," the court also held that EPA may consider cost and technological feasibility in setting a reasonable

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emission standard that would further reduce any possible health risk that might remain. However, when an agency is revising an existing standard, the Supreme Court's 1980 Benzene decision in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980), requires the agency to demonstrate that an existing standard no longer provides an ample margin of safety while a new standard would be protective before the agency can establish a more stringent standard.

We trust that this brief assessment of the impact of the decision in NRDC v. EPA will be adequate. If you should have any questions regarding further implications of this decision, please give us a call.

Cordially yours,



Peter L. de la Cruz

cc: Robert D. Luss, Esq.
W. C. Holbrook
Charles E. O'Connell
Lewis R. Freeman, Jr.
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