

LAW OFFICES
KELLER AND HECKMAN

1150 17TH STREET, N.W.
SUITE 1000
WASHINGTON, D.C. 20036

(202) 956-5600

JOSEPH E. KELLER
JEROME H. HECKMAN
CHARLES M. HECKMAN
WILLIAM M. BORGHESANI, JR.
MALCOLM D. MACARTHUR
WAYNE V. BLACK
MARTIN W. SERCOVICI
JOHN S. ELDRED
CAROLE C. HARRIS
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JOHN S. DUSECK
PETER L. DE LA CRUZ
CHRISTINE A. NEAGHER
SHIRLEY S. FUJIMOTO
LAWRENCE P. HALPRIN
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RALPH A. SIMMONS
C. DOUGLAS JARRETT
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ILENE RINGEL KELLER
SUSAN T. CONTI
SUSAN J. BLUM
MARK C. HAYES
SANDRA J.P. DENNIS
PATRICK J. MURDO
E. ADAM LEVENS
S. CRAIG TAUTPST
DAVID H. JETT

*ADMITTED IN VIRGINIA ONLY
**ADMITTED IN PENNSYLVANIA ONLY

SCIENTIFIC STAFF
DANIEL S. DIXLER
OURWARD F. DODGEN
CHARLES V. BREDER

TELEX
48 88851

TELECOPIER
(202) 296-7882

CABLE ADDRESS "KELMAN"

WRITER'S DIRECT DIAL NUMBER

(202) 956-5641

November 17, 1986

FEDERAL EXPRESS

Roy T. Gottesman, Ph.D.
The Vinyl Institute
Wayne Interchange Plaza II
155 Route 46 West
Wayne, New Jersey 07470

Re: EPA Revisions to the Vinyl
Chloride Standard

RECEIVED

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Sherry M. Carr.

Dear Roy:

Enclosed is the draft Petition for Review, Motion for Stay, and Memorandum in Support of Motion for Stay developed in response to the Environmental Protection Agency's (EPA) revisions to the Vinyl Chloride Standard published on September 30, 1986. 51 Fed. Reg. 34,904 (Sept. 30, 1986). The materials should be consistent with the recommendations of the Health Safety and Environment Committee as well as the Task Force that met on November 4, 1986. In reviewing these materials, please remember that they are intended to address only the issues for which a stay is being requested. Thus, we do not address EPA's failure to revise the relief valve discharge provisions and substitute a numerical standard. That issue will be addressed in our brief on the merits. Similarly, the new Section 61.61(2)(2) which defines the term "leak" will also be challenged.

If your schedule and the agenda permits, I would like to discuss this with you and the Legal Committee at our meeting on Wednesday.

I have informed EPA's Office of the General Counsel that we intend to challenge the standard. As a technical matter, we must request the stay from EPA before requesting a stay from the Court of Appeals. However, there is no

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Roy T. Gottesman, Ph.D.
November 17, 1986
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need to await a decision from EPA on the stay before requesting one from the Court of Appeals. I am hoping that the discussions on the stay will provide an opportunity to determine whether EPA will take corrective action independently.

I look forward to seeing you at the Legal Committee meeting later this week. In the interim, if you have any comments or questions, please give me a call.

Cordially yours,



Peter L. de la Cruz

Enclosures

cc:	Legal Committee	(w/encs.)
	W. C. Holbrook	"
	Charles E. O'Connell	"
	Lewis R. Freeman, Jr.	"
	Robert Brager, Esq.	"

CTL026823

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE SOCIETY OF THE PLASTICS	)	
INDUSTRY, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY and LEE THOMAS,	)	
Administrator, U.S. Environmental	)	
Protection Agency,	)	
	)	
Respondent.	)	
	)	

PETITION FOR REVIEW

Pursuant to Rule 15 of the Federal Rules of Appellate -
Procedure and Section 307(b)(1) of the Clean Air Act, 42 U.S.C.
§ 7607(b), The Society of the Plastics Industry, Inc. hereby
petitions the Court for review of a Final Rule promulgated by
the United States Environmental Protection Agency. 51 Fed.
Reg. 34,904-34,915 (Sept. 30, 1986). This Rule revises the
standard governing emissions of vinyl chloride found in
Subparts F and V of 40 C.F.R. Part 61. We respectfully request
that the Court grant this Petition.

Respectfully submitted,

Jerome H. Heckman
Peter L. de la Cruz
Keller & Heckman
1150 17th Street, N.W.,
Suite 1000
Washington, D.C. 20036
(202) 956-5600

Gary H. Baise
Robert Brager
Beveridge and Diamond
1333 New Hampshire Ave., N.W.
Suite 900
Washington, D.C. 20036

Counsel for The Society of the
Plastics Industry, Inc.

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CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Review of the
Society of the Plastics Industry, Inc. was mailed, postag
prepaid, this _____ day of November, 1986 to:

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

Gerald Yamnada, Esq.
Acting General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Edwin Meese III, Esq.
Attorney General
Department of Justice
Constitution Avenue &
10th Street, N.W.
Washington, D.C. 20530

Peter L. de la Cruz

CTL026825

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE SOCIETY OF THE PLASTICS	)	
INDUSTRY, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY and LEE THOMAS,	)	
Administrator, U.S.E.P.A.,	)	
	)	
Respondent.	)	
	)	

ON PETITION FOR REVIEW OF AN ORDER OF
THE U.S. ENVIRONMENTAL PROTECTION AGENCY

MOTION FOR STAY

1. The Society of the Plastics Industry, Inc., (SPI) has this day filed its petition for review of a Final Rule promulgated by the respondent United States Environmental Protection Agency (EPA). 51 Fed. Reg. 34,904-34,915 (Sept. 30, 1986). The Final Rule revises the standard governing emissions of vinyl chloride found in Subparts F and V of 40 C.F.R. Part 61. Pursuant to Rule 18 of the Federal Rules of Appellate Procedure, Petitioner respectfully moves this Court to stay enforcement of the Final Rule.

2. 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

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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 Vinyl Institute members have entered into consent decrees requiring compliance with the vinyl chloride standard. Since EPA chose to make these changes 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 during the pendency of this review proceeding.

3. As more fully described in the memorandum accompanying this motion, SPI is likely to succeed on the merits of its claims, member companies will suffer irreparable damage without adequate legal remedy if the Final Rule is enforced prior to a decision on appeal, other parties will suffer no harm if a stay is granted, and the public interest will be promoted rather than harmed by a grant of a stay.

4. Application for the relief sought by this motion was made to the Respondent EPA on November, 1986. The Agency has not yet reached a decision on the request.

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WHEREFORE, Petitioner SPI respectfully moves this Court to enter an order staying the enforcement of the provisions of the Final Rule promulgated by Respondent until final determination in this Court of the issues raised by the Petition for Review.

Respectfully submitted,

Jerome H. Heckman
Peter L. de la Cruz
Keller and Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

Gary H. Baise
Robert Brager
Beveridge and Diamond
1333 New Hampshire Ave., N.W.
Suite 900
Washington, D.C. 20036
(202) 828-0200

Counsel for The Society of the
Plastics Industry, Inc.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE SOCIETY OF THE PLASTICS	)	
INDUSTRY, INC.	)	
	)	
Petitioner,	)	
	)	
v.	)	No.
	)	
UNITED STATES ENVIRONMENTAL	)	
PROTECTION AGENCY AND LEE THOMAS,	)	
ADMINISTRATOR, U.S. ENVIRONMENTAL	)	
PROTECTION AGENCY,	)	
	)	
Respondent.	)	
	)	

ON PETITION FOR REVIEW OF AN ORDER
OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

MEMORANDUM IN SUPPORT OF
MOTION TO STAY

The Vinyl Institute a division of The Society of the
Plastics Industry, Inc. (SPI), requests that this Court stay a
final rule revising the emission standard for vinyl chloride
promulgated by the United States Environmental Protection
Agency (EPA) on September 30, 1986. 51 Fed. Reg. 34,904 (Sept.
30, 1986).^{*/}

^{*/} The Vinyl Institute's members collectively 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, the BFGoodrich
Chemical Group, Borden Chemical, Certain-Teed, Dow Chemical
U.S.A., Georgia Gulf, Occidental Chemical, PPG Industries,
Tenneco Polymers and Vista Chemical. 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.

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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 Vinyl Institute members have entered into consent decrees requiring compliance with the vinyl chloride standard. Since EPA chose to make these changes 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 during the pendency of this review proceeding.

A. **FACTS**

1. Regulatory Proceedings

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

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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. 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 "in vinyl chlorid service," which is defined as equipment contacting a liquid or gas that is at least 10% vinyl chloride.

In a chemical process called polymerization, vinyl chloride is converted to polyvinyl chloride in pressurized reactors. The reaction generates heat. As a necessary precaution dictated by insurance and safety code concerns, the

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reactors are equipped with relief valves. The relief valves are set to open at a pressure safely below the explosion limit of the reactor vessel. The standard prohibits all but emergency discharges.

Vinyl chloride in exhaust gas from normal operations must be controlled to no more than 10 parts per million (ppm). Other provisions require the institution of detailed leak detection and elimination programs. To ensure compliance with these programs, periodic reports and records detailing emission testing and monitoring must be maintained.

The Environmental Defense Fund (EDF) sought review of the 1976 rules in this Court 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).

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). The Agency's withdrawal of the 1977 proposal was upheld by this

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Court in National Resources Defense Council, Inc. v. EPA, No. 85-1150 (D.C. Cir. Nov. 4, 1986).

The 1985 proposals suggested: (1) replacing the industry-specific leak detection and elimination with a generic program initially designed for benzene producers; (2) substituting the "emergency" relief valve discharge provision with a numerical limitation; (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). The final rules differ significantly from the 1985 proposals and adversely change the definitions and standard. For example, the final rule reverts to the 1976 rule permitting only "emergency" discharges as compared to the proposed numerical limitation. Other provisions of particular importance to this motion for a stay are explained more fully in the following section.

2. Provisions of the Standard
For Which A Stay Is Required

Although the vinyl chloride standard is complex, for purposes of this motion to stay the Vinyl Institute is focusing

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on five specific provisions, the adverse impact of which is outlined below.

(a) Definition of Exhaust Gas--Under the 1976 standard, exhaust gases must be routed to a control device which limits the amount of vinyl chloride discharged to 10 parts per million. In contrast, there is no specific emission limitation for leaks. Rather, companies subject to the standard must adhere to their leak detection and elimination program. Failure to adhere to the program constitutes a violation. In prior enforcement actions, EPA attempted to categorize leaks as exhaust gases and allege a 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 held that leaks are not exhaust gases and, therefore, are not subject to the 10 ppm emission limitation. A copy of the decision is attached.

The 1976 standard contained no definition of exhaust gas. In its January 1985 proposal, EPA presented a definition for exhaust gas which included the following statement: "A leak . . . is not an exhaust gas." 50 Fed. Reg. 1,194; proposed § 61.61(x). Without explanation, the definition for exhaust

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gas promulgated as a final rule in September 1986 deleted this key sentence. According to normal standards of interpretation, EPA enforcement personnel can now argue that leaks are exhaust gases. There is no explanation for this change in the preamble of the final rule; it represents an unjustified change in the standard that attempts to silently overturn the Conoco decision. Such a rule is fundamentally unfair because almost any leak of pure vinyl chloride will exceed the 10 ppm emission limitation for exhaust gases, thus subjecting the companies to a potential fine of \$25,000 per day for each leak regardless of their best efforts to eliminate all leaks.

(b) Definition of Relief Valve Discharge--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 chlorid to the atmosphere. Although no definition for a relief valve discharge existed in the original rule, EPA's 1985 proposal defined relief valve discharge to mean "any nonleak discharge through a relief valve." Again, without explanation and without

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any support in the record of which we are presently aware, FDA added the following language to this definition.

'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 this additional language superficially appears to treat relief valve discharges ducted through a control device as exhaust gases rather than relief valve discharges, closer examination reveals that, if vinyl chloride discharged through a relief valve is ducted to a control system that exceeds the 10 ppm limitation, the involved company may be subject to a double penalty for both a relief valve discharge and a violation of the 10 ppm exhaust gas limitation.

A stay for this provision is necessary because it is arbitrary and conflicts with stated Agency policy to subject parties who connect their relief valves to emission minimize equipment to double penalties. Moreover, the status of relief

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valve discharges that are not released directly to the atmosphere are currently being litigated before the United States Court of Appeals for the Fifth Circuit. Dow Chemical Company v. EPA [CITE]. A stay of the revised definition pending consideration by this court and the Fifth Circuit is warranted.

(c) Leak Detection and Elimination--Under the 1976 standard, companies installed area monitors and developed plant-specific leak detection and elimination program. Since that time, as part of the benzene standard, EPA developed a generic leak detection and elimination program which is codified in 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 final rule imposes significant, additional requirements. Examples include open-ended valves, pump standards and compressor standards. Since Subpart V was promulgated as part of the benzene standard and benzene producers are not required to maintain continuous monitoring systems like vinyl chloride and polyvinyl chloride producers (See Section 61.65(b)(8)), as well as other specifications, there is clearly disparate and discriminatory treatment of vinyl chloride and polyvinyl

chloride producers and users which is adverse. Given the differences in industries and a decade of successful leak detection and elimination programs under the vinyl chloride standard, retention of the original program is appropriate. EPA's desire for a single uniform program is not sufficient to justify the imposition of more burdensome requirements, especially when existing programs have been effective.

(d) Definition of Ethylene Dichloride Purification--

For reasons that are not altogether clear, the 1986 rule amends the definition of ethylene dichloride purification found in 40 C.F.R. § 61.61(o). 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, the Agency intended to exclude not only final product storage but also intermediate product storage. See, Vinyl Chloride Standards; Responses to Comments on January 1985 Proposed Revisions, pp. 2-43, 2-44 and 1-2 (Sept. 1986) (EPA-450/3-86-004). The final rule failed to reflect exclusion of intermediate storage equipment. Even if EPA intended to include intermediate storage, the cost affecting these ratios shown on page 2-44 of the background information document, exceeds EPA's own reasonableness criteria for

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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 materials, they are arbitrary and should be stayed pending final review.

(e) Definition of "Three-Hour Period"--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 we agree that the emission limitations are 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. However well intended, this definition can result in double or treble penalties since a single discharge during the one-hour period could cause the average in three 3-hour periods to exceed 10 ppm. Defining a single event in this fashion can lead to double or treble penalties. This is an unwarranted position that is unsupported by the record and should be stayed pending final review.

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B. ARGUMENT

Because the requirements for a stay of agency action have been met, the Court should stay enforcement of the final rule pending a final decision on the issues raised in the petition to review. The Court has clear authority to stay agency actions pending judicial review. 5 U.S.C. § 705. In deciding whether to issue a stay pending appellate court action, appeal, the Court 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 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).

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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 Charlies Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam), which stated 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 Court may rest its decision to grant a stay on a consideration of the four individual factors or on an overall balancing of the equities. In either case, the following discussion of each of the four factors will demonstrate that the balance of equities tips sharply in favor of granting a stay in this case.

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1. Probability of Success on the Merits

In order to obtain a stay, SPI must show the Court that it is likely to prevail on the merits of this appeal. 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"), VI believes that it has not only presented a "difficult legal question," id., but that it also has a very strong probability of succeeding on the merits.

EPA's promulgation of this final rule evidences the Agency's significant disregard and violation of 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. Certain provisions of the 1985 proposed rule have been changed without adequate notice or justification by EPA. For example, the final rule excises 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*, at p. ____.

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Another example of EPA's failure to adequately explain or justify the changes made by the final rule 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 the 10 ppm exhaust gas standard. The regulated party is encouraged to discharge directly into the atmosphere without controls and be subject only to the relief valve discharge standard. This result is not only unfair to those parties that do use controls, it is also in conflict with the aims of the Clean Air Act.

EPA's final definition of "EDC purification" also indicates a change in the final rule that is at odds with EPA'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 final rule does not reflect this intention. In this and other instances, SPI has had no opportunity to present its views and oppose the rules other than to request review. This is particularly true for those provisions that SPI considered acceptable in 1985.

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The Agency's present disregard of the record, including the history and development of the proposed rules and the factors EPA previously stated it would consider, forces SPI to conclude that the decisions leading to the final rule were arbitrary and capricious. 42 U.S.C. § 7607(d)(9)(A).

2. Irreparable Injury

Industry members represented by the SPI in this litigation will suffer irreparable harm if the enforcement of the final rule is not stayed during the period of review by the Court of Appeals. Member companies have entered consent decrees with EPA which require these companies to fully comply with all EPA standards and regulations. If a stay is not granted, these members will be technically in contempt for violating the consent decrees.

An example using provisions from the final rule will serve to illustrate the type of irreparable injury at issue. The definition of "exhaust gas" in the final rule fails to make clear, as the proposed rule did, that a "leak" as defined in the rule does not also fall within the definition of exhaust gas. Compare proposed definition at 50 Fed. Reg. 1194 (Jan. 9,

1985) with definition in final rule at 51 Fed. Reg. 34909 (Sept. 30, 1986). If leaks are treated as exhaust gases, every leak could potentially subject a company to a contempt citation for failure to comply with the 10 ppm limitation.

While this review proceeding is likely to result in clarification of these definitions, a regulated party, obligated by a consent decree to comply with the final rule 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 Court of Appeals. This is the type of injury for which there is no adequate legal remedy. A temporary stay of the final rule should be granted to avoid this inequitable and irreparable injury.

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

The two final factors which the Court 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 final rule pending a decision by the Court

of Appeals should be granted because it will result in no harm to other parties and will promote the public interest.

Despite the immediate and detrimental impact of the final rule on the regulated industry, EPA characterized the rule as making only "administrative and clarifying revisions" to the VC standard. 51 Fed. Reg. 34904 (Sept. 30, 1986). In the Agency's view, it did not attempt to change the substantive regulatory framework now in place. Thus, EPA can hardly argue that immediate implementation is necessary to serve some public health goal. 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 appellate review. It is impossible to assert that any harm would result from maintaining the status quo for the relatively brief amount of time necessary to obtain final judicial resolution of the issues raised by the final rule.

Far from having an adverse impact on the public interest, a stay will ensure that both industry and the Agency do not engage in wasteful and unnecessary efforts, at taxpayers' and consumers' expense, to comply with a standard that is likely to undergo significant revision by the appellate court. Thus,

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the public interest is promoted by delaying enforcement of the rule until the court has an opportunity to provide the additional clarity and guidance which the rule failed to provide.

C. CONCLUSION

For the reasons set forth above, SPI respectfully requests that a stay of the 1986 amendments to the vinyl chloride standard be issued.

Respectfully submitted,

Jerome H. Heckman
Peter L. de la Cruz
Keller and Heckman
Suite 1000
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 956-5600

Gary H. Baise
Robert Brager
Beveridge & Diamond, P.C.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 828-0200

CTL026847

CERTIFICATE OF SERVICE

I certify that a copy of the Motion for Stay by The Society of the Plastics Industry, Inc., was mailed, postag prepaid, this _____ day of November, 1986 to:

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

Gerald Yamnada, Esq.
Acting General Counsel
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Edwin Meese III, Esq.
Attorney General
Department of Justice
Constitution Avenue and
10th Street, N.W.
Washington, D.C. 20530

Peter L. de la Cruz

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