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February 6, 1987

Federal Express

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

Re: EPA Vinyl Chloride Standard Litigation

Dear Roy:

This letter summarizes the current status of the Vinyl Institute's challenge to amendments to the vinyl chloride standard promulgated by the Environmental Protection Agency (EPA) last fall and the status of a case brought by the Natural Resources Defense Council (NRDC) contesting EPA's withdrawal of its 1977 proposal to amend the vinyl chloride standard.

A. Settlement Discussions on 1986 Amendments

On January 26, 1987, we discussed with EPA officials the possibility of reaching an agreement on five definitional issues raised in response to the September 1986 revisions to the vinyl chloride standard. Although the meeting was held at EPA offices in North Carolina, several of us participated by telephone due to flight cancellations caused by severe winter weather. A memorandum summarizing the meeting is attached. We agreed to provide suggested regulatory language on a number of issues and a summary of meeting highlights is listed below.

- For the definition of exhaust gas, we agreed to provide suggested language to indicate that leaks are

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not exhaust gases and to define leak as an unintended release that is detected and repaired promptly after detention in accordance with leak detection and elimination plans.

- Although no consensus was reached with EPA on how to treat relief valve discharges that are routed through a control device and not discharged directly to the atmosphere, we agreed to provide EPA with examples of state enforcement based on stack monitor exceedances; we may wish to suggest new language for this definitional section also.

- We reminded EPA of the information previously submitted and W.C. Holbrook provided EPA with additional information supporting our position that intermediate product storage facilities should not be included within the definition of EDC purification. EPA is to review this information.

- We are to provide EPA with suggested language for interpreting the three-hour averaging provisions to eliminate the apparent ambiguity permitting a single hourly exceedance to result in three potential violations.

- We are to provide new language to the definition of a leak to clarify that, in the case of pump seals regulated under C.F.R. § 61.242-2, indications of liquid dripping would be a leak. However, we are also to develop additional language indicating that intermittent or slow leaks, infrequent drips or leaks associated with the installation of new seals are not intended to be "leaks" within the meaning of the definition.

EPA was unwilling to discuss the use of numerical limitations in place of the current "emergency" relief valve discharge provisions. Similarly, EPA was unwilling to discuss the applicability of Subpart V for controlling fugitive emissions.

I was to meet with Richard Roos-Collins of EPA's General Counsel's Office to develop language indicating that

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EPA was staying enforcement of provisions under negotiation. Although I scheduled a meeting, it has been postponed because, according to Mr. Roos-Collins, EPA has not yet reached agreement internally as to its preferred procedure and approach in implementing the stay. I am to contact Mr. Roos-Collins later today to see whether EPA has internally agreed to an acceptable approach.

During the course of our meeting with EPA, we also confirmed that Doreen Cantor, of the Stationary Source Enforcement Group within EPA's Air Office, was preparing a memorandum with guidance to enforcement personnel. We had been aware of two potential problems with the enforcement document based on how it defined a "process unit" for valve leak detection counting and for the applicability of the standard HCl product streams. EPA declined to discuss these issues at our January 26 meeting and suggested that we raise these issues separately in writing after receipt of the enforcement memorandum from Ms. Cantor. I have not yet received the guidance memorandum, although EPA had previously indicated it would be ready last week.

At our meeting on February 11, we should develop suggested regulatory language for EPA as outlined above, and, if we have received the guidance document, draft a separate letter outlining our concerns.

The discussions with EPA were in response to a Petition for Reconsideration we filed with the Agency. We also requested that the Court of Appeals stay the effectiveness of the regulations. We have received a copy of the court's order denying our motion for a stay. Although I disagree vehemently with the reasoning expressed in a two-page memorandum accompanying the court's order, it clearly contemplates that individual companies may seek a stay of the rules if EPA should bring enforcement actions while our judicial challenge to the amendments is pending.

B. EPA Withdrawal of the 1977 Proposal

Last November, the Court of Appeals issued a decision rejecting the Natural Resources Defense Council's challenge to EPA's withdrawal of its 1977 proposal to amend the vinyl chloride standard. The court's opinion established for the

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first time that EPA could consider cost and technological feasibility in establishing standards for hazardous air pollutant emissions. NRDC filed a Petition for Rehearing and a suggestion for Rehearing En Banc. Although the Petition for Rehearing by the three-judge panel was denied, a majority of the eleven active judges on the Court of Appeals voted to rehear the case en banc. This means that a hearing will be held at a time not yet scheduled before all eleven judges. We do not anticipate that the court will request additional briefing on the issues, although this is a slim possibility. The court's agreement to rehear the case is disheartening because it may reflect a tentative disposition by the majority of judges to reverse the panel's opinion or substantially revise the court's earlier decision.

I look forward to seeing you at the February 11 meeting. In the interim, if I can be of any assistance, please let me know.

Cordially yours,



Peter L. de la Cruz

Enclosures

cc:	Robert D. Luss, Esquire	(w/encs)
	W.C. Holbrook	"
	Paul Bork, Esquire	"
	Charles E. O'Connell	"
	Lewis R. Freeman, Jr.	"
	Hugh Patrick Toner	"
	Margaret Rogers	"

SPI-07792

**MEMORANDUM OF MEETING WITH
EPA EMISSION STANDARDS AND ENGINEERING DIVISION**

411 West Chapel Hill Street
Raleigh, North Carolina

January 26, 1987

Present:

For the Vinyl Institute

W.C. Holbrook BFGoodrich Co.
R. Oubre Dow Chemical U.S.A.
Gary C. Phillips Dow Chemical U.S.A.
Roy T. Gottesman The Vinyl Institute

For EPA

Robert Ajax
Les Evans
Gil Wood
Rob Rosensteel
Fred Dimmick (in part)

Participating by Telephone:

For the Vinyl Institute

Peter L. de la Cruz Keller and Heckman
Joseph Ledvina Vista Chemical Co.

For EPA

Richard Roos-Collins
EPA General Counsel's Office
Doreen Cantor
EPA Stationary Source Enforcement,
Air Office

Mr. Ajax opened the meeting by noting that EPA has looked at the Petition for Reconsideration and the items of concern detailed therein. He noted his belief that there is room for reaching an accommodation on five of the seven points raised. He stated that on a technical basis, the Agency feels it could litigate all seven items and win. Although it has no hesitancy in litigating, it would like to reach agreement on the five items where it feels an accommodation can be reached and avoid litigation on these.

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Mr. Roos-Collins stated that a condition for this meeting, to which counsel had agreed to was that no statement or representation by either side could be used in a subsequent litigation. It is the Agency's desire that this would lead to a candid off-the-record discussion.

The subsequent discussion covered the six provisions for which a stay was requested in the Petition for a stay and for reconsideration as filed with the Agency on November 24 (pgs. 6-15).

1. **Definition of "Exhaust" Gas**

Mr. Ajax noted that EPA's interest in this regulatory provision is its concern that a leak be repaired rapidly and its desire to issue a citation if a leak is not remedied. Vinyl Institute representatives wanted clarification that "a leak is not an exhaust gas." EPA offered the following suggested language: "An emission which is determined to be a leak by the Administrator is not an exhaust gas."

Roy Gottesman advised that from an industry point of view, having what constitutes a leak determined on a case-by-case basis by the Administrator was unsatisfactory and cumbersome. He offered the following language:

A leak is not an exhaust gas. A leak is defined separately as: An unintended release of vinyl chloride which is subject to regulation under the leak detection and elimination provision of the standard.

EPA objected since what constitutes an "unintended release" is subject to different interpretations.

Mr. Ajax suggested language to define a leak as an emission which is immediately detected by an area monitor and is thereafter promptly repaired. He expressed concern over the possibility that a leak, not uncovered in the leak detection and elimination program, might continue unabated.

It was agreed that Vinyl Institute representation will review this and propose language, via a submission from Mr. de la Cruz for EPA consideration, on a definition of "exhaust gas."

Mr. Ajax agreed that EPA will take a look at this and see if they can propose a definition that would reflect the fact that a leak which is unintended, detected, and repaired under the leak detection and elimination system, is not an exhaust gas. The applicability to exhaust gas containing less than 10 ppm VCM was left open.

2. Enforcement Guidance Memo on HCl Product Stream

Mr. Phillips noted that in discussions with EPA regional personnel, he was advised that an enforcement guidance memo was being prepared by EPA. He was informed that the guidance memo would subject HCl product streams to the standard if VCM concentrations exceeded 10 ppm. Mr. Phillips indicated that the 10 ppm level might be exceeded slightly during shut-down or start-up phases. Mr. Ajax indicated that the Agency did not wish to discuss the enforcement memorandum at this meeting because it was outside the Petition for Reconsideration. Rather, he asked that we present this issue to the Agency in writing.

3. Definition of Relief Valve Discharge

Mr. Ajax indicated that where relief valve discharges were routed to a control device that reduced emissions to less than 10 ppm, no violation occurred. Where relief valve discharges were routed to a dedicated control device, it was EPA's position that, when emissions exceeded 10 ppm, this was a relief valve discharge but not a 10 ppm control level violation. Where relief valve discharges were routed to a control device that was also used for limiting emissions from other streams, emissions above 10 ppm were both in exceedance of the 10 ppm limitation and a relief valve discharge. Industry attendees disagreed with EPA's characterization of relief valve discharges to control devices that resulted in exceedances. In addition, while EPA indicated that the 10 ppm exceedance was not necessarily a violation, Mr. Holbrook suggested that state enforcement officials did use continuous monitor exceedances as evidence of a violation, rather than relying on test method 106. Mr. Ajax was receptive to receiving information on state enforcement based on 10 ppm exceedances with the implication that the Agency might reconsider its position based on state activity. The Vinyl Institute should also restate its position and suggested interpretation for EPA.

4. Leak Detection and Elimination

Mr. Ajax indicated that EPA was unwilling to negotiate the leak detection and elimination revisions. Mr. Gottesman noted that our main complaint here was that if the 2% test was exceeded by companies there was no opportunity to retest without becoming subject to the Subpart V requirements. EPA reiterated its unwillingness to negotiate on this point.

During this discussion, Mr. Phillips raised another issue created by the enforcement memorandum EPA was preparing. In particular, he noted that EPA was using a very narrow definition of "a process unit" which affected the number of valves needed to be counted. In particular, he noted that based on comments by EPA regional enforcement personnel, tank farms, recovery areas, and other portions of production units were being considered discrete process units, each of which would be subject to the 10% or 200 valve count requirements. Although EPA declined to discuss this substantively, Doreen Cantor indicated that she was preparing the guidance document and would provide it to Mr. de la Cruz later in the week when it became available. Vinyl Institute was then to write to EPA separately on the guidance document issues.

Fred Dimmick of EPA indicated that a discussion in the June 1984 background information document involved with the synthetic organic chemical manufacturing industry fugitive emission proceedings should be examined to shed interpretative light on the definition of a process unit found in Subpart V.

5. Definition of EDC Purification

Bob Ajax and Les Evans indicated that intermediate product storage of facilities were included under the definition of EDC purification because the Agency lacked data justifying that no controls were needed. Karen Fidler of Radian Corporation was unable to attend the meeting and she apparently was the most knowledgeable person on the EPA position. Mr. Holbrook noted that the Vinyl Institute submitted information to EPA in March 1985 on this issue and that, in responding to Section 114 letters, EDC manufacturers had responded individually to EPA with information. In addition, Mr. Holbrook presented Mr. Evans with additional information indicating that additional controls under the vinyl chloride standard were not needed and not cost justified. EPA agreed that it would examine the new data and not enforce these provisions pending

EPA review of the submitted data. If initial review of the submitted data indicated that a change in EPA's interpretation was warranted, a formal order staying effectiveness would be considered. Peter de la Cruz was to meet with Richard Roos-Collins to develop language by which the Agency would indicate it was temporarily staying the rule.

6. Definition of Three-Hour Period

Mr. Ajax indicated that EPA was concerned with excluding events that should be considered as exceedances. Mr. de la Cruz explained the Vinyl Institute's position that rather than 24 rolling three-hour periods during a day only eight discrete three-hour periods should be considered. Although EPA did not express a willingness to change from a rolling three-hour period to eight discrete three-hour periods, Mr. Ajax did express a willingness to consider suggestions from industry on clarifying language. For example, if the hourly emissions were as follows: 0,0,50,0,0,0, EPA would interpret this as one exceedance although admitting that the language of the provision could be read to make this constitute three exceedances of three rolling three-hour periods in which the 50 ppm would be counted. Another situation with which EPA would be concerned would be when the 10 ppm level was exceeded for more than one, one-hour period. The Agency would be willing to consider clarifying language from the Institute on how to interpret exceedances.

7. Definition of Leak

Mr. Ajax indicated that EPA was not willing to make a change other than to indicate that the "liquid dripping" provision of the leak definition applied only to pump seals regulated under 40 C.F.R. § 61.242-2. Industry attendees expressed the view that only indications of liquid vinyl chloride dripping should be considered a leak. Mr. Smith noted that EPA should distinguish between single and double barrier seals. In addition, new double barrier seals tend to drip after installation and may be subject to an intermittent or infrequent leak that does not indicate the need for repair. Bob Ajax indicated that he would discuss this matter with Karen Fidler of Radian and, although not encouraging, did indicate a willingness to review any suggested additional language that the Vinyl Institute might provide to indicate that these intermittent leaks from pump seals not be included under the definition of a leak.

8. **Emergency Relief Valve Discharges**

EPA indicated that it was not willing to discuss a change to the emergency relief valve discharge provision. Industry supported the substitution of a numerical discharge limitation.

The meeting concluded at 3:30 p.m.

Respectfully submitted,

Peter L. de la Cruz

Peter L. de la Cruz

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

September Term, 19 86

Natural Resources Defense Council, Inc.

v.

Environmental Protection Agency, et al.

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 7 8 1987

GEORGE A. FISHER
CLERK

BEFORE: EDWARDS and BORK, Circuit Judges; WRIGHT,
Senior Circuit Judge

ORDER

Upon consideration of petitioner's petition for rehearing, it is
ORDERED. by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

SPI-07799

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-1150

September Term, 19 86

Natural Resources Defense Council, Inc.

United States Court of Appeals
For the District of Columbia Circuit

v.

FILED JAN 28 1987

Environmental Protection Agency. et al.

GEORGE A. FISHER
CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg,
Bork, Starr, Silberman, Buckley, Williams and D. H. Ginsburg,
Circuit Judges

ORDER

Petitioner's suggestion for rehearing en banc was circulated to the full Court. The taking of a vote thereon was requested. A majority of the judges of the Court in regular active service have voted in favor of the suggestion. Accordingly, it is

ORDERED, by the Court en banc, that this matter will be reheard by the Court sitting en banc, and it is

FURTHER ORDERED, by the Court en banc, that the opinion and judgment of November 4, 1986 be, and the same hereby are, vacated.

A future order will govern further proceedings.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY: *Robert A. Bonner*
Robert A. Bonner
Chief Deputy Clerk

SPI-07800

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1640

September Term, 19 86

Society of the Plastics Industry, Inc.,
et al.,

Petitioners

v.

U.S. Environmental Protection Agency
and Lee Thomas, Administrator,

Respondents

United States Court of Appeals
For the District of Columbia Circuit

FILED JAN 3 1987

GEORGE A. FISHER
CLERK

BEFORE: Ruth B. Ginsburg and Williams, Circuit Judges;

ORDER

Upon consideration of petitioners' motion for stay and the opposition thereto, it is

ORDERED by the court that respondents' lodged response in opposition to petitioners' motion for stay be filed. It is

FURTHER ORDERED by the court that petitioners' motion for stay be denied for the reasons set forth in the accompanying memorandum.

Per Curiam

SPI-07801

MEMORANDUM

Petitioners' motion for administrative stay was requested after the close of business on November 25, 1986. Petitioners' motion for judicial stay was filed in this court on November 26, 1986. We do not regard these back-to-back filings as in genuine compliance with Rule 18 of the Federal Rules of Appellate Procedure, particularly in view of the September 30, 1986 promulgation date of the Environmental Protection Agency's (EPA) final rule. Rule 18 requires a petitioner to show "that the action of the agency did not afford the relief which the applicant had requested." Fed. R. App. P. 18. Here, petitioners state that EPA has not yet reached a decision on their request. But a stay applicant cannot make that statement reasonably, with candor, unless the applicant has given the agency a fair opportunity to respond to the request for an administrative stay, or has demonstrated urgent need for immediate court intervention.

EPA has responded on the merits, however, and the case seems to us so clear that definitive denial of the stay is in order. Petitioners assert irreparable harm absent a stay of the effectiveness of the 1986 Amendments pending this court's review. The assertion is not well founded. For a harm to be irreparable, "the injury must be both certain and great; it must be actual and not theoretical." Wisconsin Gas v. FERC, 758 F.2d 669 (D.C. Cir. 1985). Here, the contention that petitioners will face contempt citations is conjectural. Moreover, should

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petitioners' supposition become manifest, they can be compensated for their interim loss, so their injury, if any, will not be irreparable. Id. We note, finally, that petitioners' lateness in filing their stay request hardly adds to the credibility of their claim of imminent, irreparable injury. See Wisconsin Gas, supra, 758 F.2d at 674.