

MEMORANDUM

November 30, 1976

TO: Mr. Jerome Heckman
FROM: Beveridge, Fairbanks & Diamond
RE: EDF Petition to Review EPA Vinyl Chloride Standard

Factual Background

Pursuant to our meeting on November 23, 1976, we have reviewed the background of the Environmental Defense Fund (EDF) Petition in greater detail. In addition, we have generally examined the legal options available to SPI.

On November 22, 1976, Gary Baise advised you that EDF believes EPA did not use "best available technology" in setting the Vinyl Chloride Standard. Based on further discussion, we have determined that the technology referred to by EDF involves the oxidation of vinyl chloride by ozone in the presence of ultra-violet light. This technology, according to EPA, has been successful in the laboratory but has not been used on a commercial basis.

EPA is seeking a demonstration project for the ozone technology and will be ready to supply equipment for such a project to one or more companies in a couple of months.

This technology was brought to the Agency's attention by Houston Research Corporation, Houston, Texas; Westgate Research Corporation, California and General Electric. G.E. is apparently using this technology for solving its PCB problem. At least one firm has tried to sell this technology to a producer of polyvinyl chloride but was turned down.

Notwithstanding the development of this new technology, the EPA staff at Research Triangle Park, North Carolina, believes that best practicable, demonstrable technology was used and they stand behind their decision. One note of caution: Bernard J. Steigerwald, Deputy Assistant Administrator for Air Quality Planning and Standards, who was in overall charge of the Vinyl Chloride Standard, has resigned his post and he has been replaced by Walter Barber. The impact of this change cannot be underestimated.

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Mr. Barber has already determined that the Vinyl Chloride Standard and the events leading up to its promulgation should be re-examined and has advised EDF accordingly. Furthermore, we have been advised that Mr. Barber would like to see this case settled. He believes the case will cause a manpower drain and if an acceptable solution to the law suit can be devised, he would welcome one.

One option which may be considered by Mr. Barber is to apply the present Standard to existing plants and the new ozone technology, if proven practicable, to new sources. This might be acceptable to EDF because it believes that the two year period in the Clean Air Act allowed for installation of controls is intended to give adequate time in which to develop new technology to virtually prohibit emissions.

It is also known that Mr. Barber is concerned over the fact that the Maltoni data submitted by Ralph Harding to Messrs. Talley and Strelow was not formally brought to the attention of the Administrator by these EPA officials or their staffs before he signed the Standard.

Regarding the Maltoni data, the EPA staff does not seem to be overly concerned. They believe it would be an error to change the Standard because these new data have not been replicated, are not statistically significant; and as Dr. Maltoni admitted, are inconclusive. Therefore, the Standard can be defended from a medical standpoint. One word of caution: this view is not official and has not been reviewed by the policy makers in the Agency.

It is clear that the EDF Petition has created uncertainty with respect to the Vinyl Chloride Standard, and creates problems for the enforcement of the Standard. Because of the statutory 90 day waiver period and the requirement in EPA's regulations for a compliance schedule, contractual commitments and installation of control technology, the EPA General Counsel is reviewing the question of waivers.

Discussion

There is uncertainty as to what position EPA will adopt with respect to: (1) defending the Standard in the face of the EDF challenge; (2) enforcement of the current Standard; (3) the waiver process with its 90 day deadline. In light of these considerations, we have reviewed the legal issues and conclude that there are only two which require a decision by SPI. They are whether to move to intervene and whether to seek an order from the Court staying the effective date of the Administrator's final action.

1. Intervention

We believe the advantages of intervention are: (a) EPA may not adequately defend the Standard; (b) even if it does so, SPI may wish to argue different issues; (c) SPI will be in a better position to protect its interests in settlement discussions; (d) SPI will have the opportunity to ensure that the record on appeal is complete and (e) it will be in a better position to protect its interest in any further appeals. The major objection to interventions is that by defending the Standard, SPI might appear to compromise EPA by giving the impression that the Standard is an "industry standard".

On balance, we believe the reasons for intervention clearly outweigh the reason against and that papers should be prepared as promptly as possible pursuant to Rule 24(a), F.R.C.P. Although EDF has not decided whether to oppose such a motion, we believe that the motion will be granted even if opposed.

2. Stay

Under the Act, the filing of a petition for review does not automatically stay the proceedings and the statutory time limits for waivers (90 days) and final compliance with the Standard (two years after the effective date) continue to apply. This creates serious practical problems for the industry.

We recommend the following:

(1) SPI file as promptly as possible a motion to stay the effective date of the Administrator's final action. The Clean Air Act, unlike other statutes, e.g. the Occupational Safety and Health Act, does not contain an explicit provision authorizing a court to order such a stay. However, we believe that in a case of this importance, that the Court will consider such a request.

(2) Each company which intends to seek a waiver should continue to follow the statutory and regulatory requirements currently in effect, but as previously advised, should not enter into any binding contractual obligations.

(3) SPI should continue its efforts to negotiate with EPA a practical solution to the problems created by EDF's petition and the statutory deadlines.