JOSEPH S. KELLER
JEROME E. HECKMAN
CHARLES M. KERRAN
WILLIAM E. BORGHESANI, JR.
ROBERT E. TIERNAN
WAYNE V. BLACK
DAVID L. HILL
MARTIN W. BERCOVICI
PETER M. NEMKOV
JOSEPH E. HADLEY, JR.
CAROLE C. HARRIS
PETER THOMAS SMITH
MICHAEL F. MORRONE
LARRY S. SOLOMON
JOHN B. DUBECK
CHRISTINE A. MEAGHER

LAW OFFICES
KELLER AND HECKMAN
1150 17TH STREET, N. W.
SUITE 1000
WASHINGTON, D. C. 20036

TELEPHONE
202 457-1100
CABLE ADDRESS "KELMAN"
WRITER'S DIRECT DIAL NUMBER
(202) 457-1116

May 4, 1977

Re: SPI--VCM/PVC--E.D.F. v. Train

REDACTED

Despite the fact that a number of legal papers have been filed in the above referenced case since we last wrote, all substantive activities were discussed at the April 13 meeting. Nonetheless, so that your records will be complete, the following is a listing of the docket items not yet sent:

(1) Response of The Goodyear Tire & Rubber Company to the Joint Motion To Dismiss, filed April 4, 1977.

(2) A Court Order dated April 6, 1977 which extends the time for the filing of Petitioner--EDF's Brief to April 15, 1977.

(3) Respondent's Reply to Intervenors' Responses to the Joint Motion to Dismiss; this is the Department of Justice/EPA filing of April 7, 1977 which seeks to counter the SPI and Goodyear Responses to the Joint Motion to Dismiss.

(4) Petitioner Environmental Defense Fund's Reply to "Suggestion of Mootness and Response of the Society of the Plastics Industry, Inc." and "Response of the Goodyear Tire & Rubber Company" to Petitioner's and Respondent's Joint Motion to Dismiss. Filed on April 11, 1977, like the Department of Justice/EPA document described above, this is the EDF Reply.

(5) Motion to Extend the Time for Filing Petitioner's Brief, filed April 14, 1977. This document requests an additional extension of time until May 2, 1977 for EDF to file its brief.

(6) April 19, 1977 Motion Of The Society of the Plastics Industry, Inc. for Leave to File a Supplemental Statement and Supplemental Statement of The Society of the Plastics Industry, Inc. The Supplemental Statement was filed to clarify for the record the dispute between SPI and the Environmental Defense Fund relative to the EDF characterization to the press of the proposed settlement agreement which is incorporated in the Motion to Dismiss.

(7) April 25, 1977 Order of the Court granting the SPI Motion to file its Supplemental Statement.

A copy of each of the foregoing is attached to this letter.

In addition to the items specific to the EDF Petition for Review, we have received from Associate Counsel, Gary Baise of Beveridge, Fairbanks and Diamond, a copy of the Freedom of Information Act request filed with EPA concerning whether any additional information which would support a revised standard has been obtained by EPA; a report on the Adamo Wrecking Company case, the first challenge to Section 112 of the Clean Air Act; and a short backgrounder which explains what EDF is. Copies of these are also attached.

Prior to the time we receive word from the Court about its decision on the Motion to Dismiss or are otherwise in touch with you, should you have any questions, comments or suggestions relative to any aspect of these matters, please do not hesitate contact us.

Cordially yours,

Joseph E. Hadley, Jr.

Enclosures

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

ENVIRONMENTAL DEFENSE FUND, INC., Petitioner, v. RUSSELL E. TRAIN, ADMINISTRATOR ENVIRONMENTAL PROTECTION AGENCY, Respondent, and THE GOODYEAR TIRE & RUBBER COMPANY, Intervenor.	Civil Action No. 76-2045

RESPONSE OF THE GOODYEAR
TIRE & RUBBER COMPANY TO
THE JOINT MOTION TO DISMISS

Under the guise of a Joint Motion to Dismiss filed on March 24, 1977, EDF and EPA in effect have asked this Court to approve sweeping proposed amendments to the existing EPA regulations now before this Court, the grounds for which amendments are not explained in the motion and indeed have never been made public.

The Goodyear Tire & Rubber Company (hereinafter "Goodyear") opposes the granting of the motion on the terms set forth therein. For the reasons set forth below it is the position of Goodyear (a) that it would be inappropriate

for this Court to approve the proposed amendments to the EPA vinyl chloride standards set forth in the motion, (b) that this case should be dismissed with prejudice since EDF has represented that it has no intent to challenge the present EPA regulations, and (c) that in dismissing this case the Court should expressly state that it takes no position as to whether the proposed action to be taken by EPA will or will not be factually supported or conform to the requirements of the Clean Air Act.

Introduction

1. The Background Of This Action

This case concerns a petition filed by EDF to review regulations published by EPA on October 21, 1976 establishing a national emission standard for vinyl chloride pursuant to Section 112 of the Clean Air Act, 42 U.S.C. § 1857c-7. These standards represent an informed judgment which was reached by EPA following lengthy rulemaking proceedings. (41 Fed. Reg. 46560-73; 40 C.F.R. §§ 61.60-61.70).

Goodyear, a company which owns and operates polyvinyl plants which are affected by the vinyl chloride standard, subsequently intervened in this action.*/

In February 1977, the undersigned counsel for Goodyear learned that EDF and EPA were discussing a possible

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*/ SPI and Air Products and Chemical, Inc. also intervened in this case.

settlement of this case. Our request for an opportunity to participate in these discussions was refused. We were "apprised" of the terms of the proposed settlement two weeks before the motion was filed and only after a final agreement had been reached.

2. The Motion To Dismiss

The Joint Motion To Dismiss was filed by EDF and EPA on March 24, 1977. The motion is not a simple request for dismissal. Instead, it asks the Court to dismiss "in accordance with the terms and conditions hereinafter set forth." (Motion at 1). These so-called conditions include sweeping and detailed proposed amendments to the vinyl chloride emissions standard as set forth in Attachment A to the motion. The attachment states that EPA will propose inter alia to make the emission standard twice as stringent within 3 years as to existing plants and within 6 months for new plants, that more stringent emission limits for the oxychlorination process and for the stripping of dispersion resins will be proposed for new sources, and that EPA will propose to bar the expansion of existing facilities unless increased vinyl chloride emissions are offset by reductions in emissions at the expanding facility. By asking for dismissal under the conditions set forth, EDF and EPA are in effect asking this Court to approve the proposed amendments to the regulations.

The motion provides no explanation whatsoever as to the scientific, legal or policy bases for the proposed amendments, other than to state that they represent a settlement of this litigation. The agency has never stated that its present standards for vinyl chloride are not factually supported and legally valid based on the record before the agency. Similarly, EDF has not publicly come forward with any new data demonstrating the need for amending the standards, and we know of no such data.

3. The Adverse Effect Of The Motion Upon Goodyear

The joint motion erroneously contends (at 3) that the attached agreement and the conditions of the motion will not have an adverse impact upon the intervenors. The argument advanced is that if, pursuant to the settlement agreement, EPA publishes proposed regulations which are unlawful or unachievable, the intervenors can simply participate in proceedings before EPA and ultimately ask this Court to review the regulations and thereby remedy the situation.

What the proponents of the joint motion have forgotten is that the successful attainment of such a remedy can cost the aggrieved parties an enormous amount of time and expense.

The suggestion that the proposed settlement in its present form may lead to EPA's proposal of unlawful

regulations is not fanciful. The agreement requires EPA to propose standards for vinyl chloride which are twice as stringent as the current regulations. We know of no data demonstrating that such a reduction is either necessary or technologically achievable.

I. This Court Has A Responsibility To Scrutinize The Terms Of The Motion To Dismiss

The motion to dismiss improperly suggests that merely because EPA and EDF have reached an agreement, this Court should approve the agreement without carefully scrutinizing its terms or the requested conditions of dismissal.

Rule 42(b) of the Federal Rules of Appellate Procedure provides that an appeal may be dismissed on motion of the appellant "upon such terms as may be agreed upon by the parties or fixed by the court." Since all of the parties do not agree upon the terms of dismissal requested by EDF and EPA, this Court has an obligation to determine whether the requested terms are in the interest of justice. Blount v. State Bank & Trust Co., 425 F.2d 266 (4th Cir. 1970). As the Court stated in Shellman v. United States Lines, 528 F.2d 675 (9th Cir. 1975), cert. denied, 425 U.S. 936 (1976):

> "[T]he court has discretion in deciding whether to dismiss an appeal on appellant's motion under Rule 42(b)." (528 F.2d at 678).

See Home Owners' Loan Corp. v. Huffman, 134 F.2d 314 (8th Cir. 1943).*/

This Court has repeatedly emphasized, moreover, that it "has been assigned special responsibility" for deciding cases arising under The Clean Air Act, in which the Court "is in a real sense part of the total administrative process." Kennecott Copper Corp. v. EPA, 149 U.S. App. D.C. 231, 233, 462 F.2d 846, 848-49 (D.C. Cir. 1972). See International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 443-44, 478 F.2d 615, 647-48 (D.C. Cir. 1973); Portland Cement Ass'n v. Ruckelshaus, 158 U.S. App. D.C. 308, 334-35, 486 F.2d 375, 402 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974). These cases underscore the responsibility of the Court carefully to scrutinize the settlement agreement proposed here and to refuse to approve its terms in the absence of a showing that it is reasoned and in conformity with the Act.

II. This Court Should Refuse To Approve The Terms Of The Motion

The motion to dismiss filed by EPA and EDF asks this Court judicially to approve a new regulatory proposal,

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*/ Dismissal under these circumstances is governed by considerations similar to those under Rule 41(a)(2) of the Federal Rules of Civil Procedure, which provides that the Court may order dismissal "upon such terms and conditions as the court deems proper." "Here the court has an express judicial function to perform." American Cyanamid Co. v. McGhee, 317 F.2d 295, 298 (5th Cir. 1963). See 5 Moore's FEDERAL PRACTICE ¶ 41.05[1]; Katopodis v. Liberian S/T Olympic Sun, 282 F. Supp. 369 (E.D. Va. 1968) (defendant negotiated a settlement "behind the back" of plaintiff's counsel.).

the basis for which is not explained in the motion. This Court should refuse to do so.

1. There Has Been No Showing In Support Of The Proposed Regulations

Despite the breadth and detail of the settlement agreement, and the proposed regulations which would be issued by EPA thereunder, the motion offers no explanation of the grounds for the agreement. The Court thus has no basis upon which it can properly evaluate the terms and conditions of the motion and approve them as requested by EDF and EPA.

The regulations at issue were published after extensive rulemaking proceedings. EPA has never stated that it now believes that its action in establishing these regulations was erroneous or invalid. These regulations must thus be considered to represent EPA's informed judgment based upon the record of those proceedings.

A court properly denies a motion to dismiss where there is no showing made in support of the motion. Blue Mountain Construction Co. v. Werner, 270 F.2d 305, 306 (9th Cir. 1959), cert. denied, 361 U.S. 931 (1960). This Court should refuse to approve the terms and conditions of the agreement where there has been no showing as to the basis therefor.

2. The Motion Undermines Established Procedures For Modification Of Existing Regulations

The grounds for proposed amendments have never been publicly explained by EDF or EPA, and since they are the

result of private discussions from which Goodyear was excluded, we can only speculate as to the basis therefor. However since EPA has never stated that its existing regulations are in error based on the record before the agency, only two other possible bases for the settlement agreement come to mind. Either one would require this Court to refuse to dismiss on the terms proposed in the motion.

The first possibility is that EDF simply coerced EPA into agreeing to propose the regulations set forth in the motion in order to avoid litigation, and that EDF offered no new data in support of the proposal. Clearly if this were the case, such EPA action for extraneous reasons unrelated to the requirements of the Act would be arbitrary and invalid and should not be sanctioned by this Court. D.C. Federation of Civic Associations v. Volpe, 148 U.S. App. D.C. 207, 222, 459 F.2d 1231, 1245-46 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). Center on Corporate Responsibility v. Shultz, 368 F. Supp. 863, 871 (D.D.C. 1973); 5 U.S.C. § 706(2)(A).

The other possibility is that EDF persuaded EPA to propose to amend the regulations based on some new scientific or other data which were not in the record before EPA when the existing regulations were promulgated and which have not been made public. If this is the case, the motion before the Court contravenes established principles for the modification of existing regulations based upon new data.

The proper procedure was set forth by this Court in Oljato Chapter of Navajo Tribe v. Train, 169 U.S. App. D.C. 195, 515 F.2d 654 (D.C. Cir. 1975). In that case, after certain EPA regulations applicable to power plants were published, petitioners wrote a letter requesting that EPA modify the regulations but provided no supporting data. This Court dismissed the suit challenging EPA's refusal to modify, stating:

> "Accordingly, we find it within our inherent powers to enforce our interest in informed decision-making by requiring presentation to the Administrator of any new information thought to justify revision of a standard of performance, or any other standard reviewable under Section 307, before we will exercise our Section 307 jurisdiction." (169 U.S. App. D.C. at 207, 515 F.2d at 666).

Assuming that EDF believes that there are some previously undisclosed data which support the proposed amendments, the proper procedure would have been for EDF to make a formal submission to EPA together with the supporting data. EPA properly would have then publicly announced the request, would have sought public comments thereon,*/ and would have acted on a reasoned basis to reach a decision on a record which this Court could review. The present motion, assuming arguendo that it is based upon some new data, completely undermines the administrative process required by this Court's Oljato decision and thus the terms of the motion should not be approved by this Court.

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*/ EPA followed this procedure in response to this Court's Oljato decision. See 42 Fed. Reg. 5121 (January 27, 1977).

3. This Court Should Expressly Decline To Approve The Terms Of The Motion

For the reasons discussed above, the motion to dismiss improperly asks this Court to grant the motion based on the conditions stated therein, and thereby judicially to approve the terms of proposed regulations the basis for which is not explained and the proposal of which would circumvent established administrative procedures.

That being so, Goodyear believes that it would be inappropriate for this Court to grant the motion as requested and thereby appear to take a position as to the appropriateness of the proposed regulations. The proper procedure, we submit, would be for the Court expressly to decline to pass judgment on such matters until concrete agency action based on a record (as distinguished from unimplemented future proposals) has been brought before the Court and the attendant legal issues have been fully briefed and argued.

For the foregoing reasons, Goodyear requests that in acting on the motion to dismiss, the Court's order contain a statement as follows:

> "The Court by this order expresses no opinion as to whether the actions proposed to be taken by the Environmental Protection Agency as described in the Joint Motion to Dismiss and the Attachment thereto will or will not have a valid factual basis and conform to the requirements of the Clean Air Act."

Such language will make it clear that this Court has declined to approve the specific terms and conditions of the motion and agreement.

III. This Court Should Dismiss The Petition With Prejudice

The motion filed by EDF and EPA requests simple dismissal. However it is clear from the text of the motion that EDF does not intend to challenge the existing regulations. EDF has reserved the right to review the final action taken by EPA with respect to the proposed regulations, but the Joint Motion expressly recites that "[i]n any such action, EDF shall be precluded from challenging the existing standard." (Motion at 3). Although Goodyear opposes the granting of the motion to dismiss upon all of the terms and conditions requested, Goodyear submits that the foregoing condition stated in the motion is fully warranted, and should be implemented by this Court's dismissal with prejudice. It is clear that, whether or not this Court approves of the settlement agreement, EPA intends to publish new proposed standards, and that at present no case or controversy exists with respect to the existing vinyl chloride standards which are the subject of this

action. It is accordingly particularly appropriate that this case be dismissed with prejudice.

Conclusion

For the foregoing reasons, this Court should dismiss the petition with prejudice, and should expressly refuse to approve the terms and conditions of the joint motion filed by EDF and EPA.

Respectfully submitted,

THEODORE L. GARRETT

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Counsel for The Goodyear
Tire & Rubber Company

April 4, 1977