



Roy T. Gottesman
Executive Director

March 28, 1986

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R. PHILIP CAREY

To: Vinyl Institute Executive Board
Vinyl Institute Legal Committee
Vinyl Institute Health, Safety & Environment Committee

Subject: NRDC v. EPA, No. 85-1150 D. C. Cir.)

I enclose for your information, review and files a copy of Peter de la Cruz's letter to me of March 25 in which he has reported on and summarized his impressions of the oral arguments in the subject case which was heard on February 26 in the D.C. Circuit Court of Appeals.

Note that a decision might not be forthcoming until sometime between August 1986 and August 1987 and Peter's observation that an adverse court ruling could confront industry with "a long and costly regulatory proceeding involving the establishment of a new agency policy on a number of fundamental issues." Unfortunately, there is nothing we can do in the interim until the Court renders its decision.

We will, of course, keep you advised of developments.

RTG:g

Enc.

cc: Peter L. de la Cruz, Esq.

Roy

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March 25, 1986

Roy T. Gottesman
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Re: NRDC v. EPA, No. 85-1150 (D.C. Cir.)

Dear Roy:

At the Vinyl Institute Executive Board meeting on March 5, 1986, I reported on the February 26, 1986, oral argument involving the Natural Resources Defense Council, Inc.'s (NRDC) challenge to the Environmental Protection Agency's (EPA) withdrawal of the 1976 proposal to amend the vinyl chloride standard. Because of the potentially serious implications of an adverse decision by the Court of Appeals, this letter summarizes my oral report so that your records will be complete and so that you may distribute it to others within the Vinyl Institute.

By way of procedural background, in scheduling oral argument the Court granted 20 minutes each to NRDC and EPA. The order indicated that EPA "may" share its time with the Vinyl Institute. We were informed on February 20, 1986, that EPA would not share any of its time. We then filed a motion for permission to present 10 minutes of oral argument. The Court granted us 5 minutes, which is the amount of time we actually wanted, and added 5 minutes to NRDC's time. Copies of our motion, NRDC's response, and the Court's order as well as some miscellaneous pleadings are enclosed so that your records will be complete.

The panel consisted of Judges J. Skelly Wright, Harry T. Edwards, and Robert H. Bork. Although all generalizations

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concerned with safety and did not appear to be satisfied with EPA's representations that vinyl chloride emissions were adequately controlled. In other questions, Judge Edwards appeared to disagree with EPA's position that Congress ratified the vinyl chloride standard when it enacted the 1977 amendments to the Clean Air Act as well as with EPA's interpretation of the case law supporting Agency consideration of feasibility. In responding to a question from Judge Wright, Salo noted that safety is not to be disregarded and is the overriding factor, but feasibility is a permissible consideration.

Rob Brager of Beveridge and Diamond presented oral argument on behalf of the Vinyl Institute. Quite properly, he structured his argument to answer questions that the panel previously asked NRDC and EPA but that were not accurately or completely answered. He began by noting that the decision by the United States Court of Appeals for the Fifth Circuit in United States v. Ethyl Corporation, 761 F.2d 1153 (5th Cir. 1985), plainly interpreted §307(b)(1) of the Clean Air Act to preclude NRDC from raising the feasibility issue here. As you undoubtedly recall, the Ethyl case involved an industry challenge to EPA's authority to enforce the vinyl chloride standard because it constituted a work practice regulation promulgated when EPA had authority only to issue emission standards. In the course of its opinion, the Fifth Circuit concluded that the jurisdictional provisions of the Clean Air Act barred industry challenge in an enforcement proceeding. I was quite disturbed by a remark by Judge Edwards that barring an industry challenge was different and in some way permissible while NRDC might have standing nonetheless.

Next, Mr. Brager noted that the Court's prior decision in Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978) explicitly envisioned the consideration of feasibility within the meaning of the ample margin of safety language in the statute (see footnote 45 in the Hercules decision). After additional discussion on the ample margin of safety aspect, Mr. Brager closed by noting that, if EPA had promulgated the 1976 proposal, NRDC would lack standing to challenge that action. Similarly, NRDC lacked standing to challenge the Agency's withdrawal of that proposal. This line of reasoning appeared to attract Judge Wright's attention. The only issue before the Court was whether EPA acted arbitrarily in withdrawing the proposal, not the extraneous issues NRDC sought to raise.

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THIS CASE IS SCHEDULED FOR
ORAL ARGUMENT ON FEBRUARY 26, 1986

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

NATURAL RESOURCES DEFENSE COUNCIL, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 85-1150
	)	
UNITED STATES ENVIRONMENTAL PROTECTION	)	
AGENCY, <u>et al.</u> ,	)	
	)	
Respondents,	)	
	)	
and	)	
	)	
THE VINYL INSTITUTE, a Division of	)	
The Society of the Plastics Industry,	)	
	)	
Intervenor.	)	
	)	

MOTION OF INTERVENOR THE VINYL INSTITUTE FOR
PERMISSION TO PRESENT A TEN MINUTE ORAL OF ARGUMENT

On January 16, 1986, this Court scheduled oral argument in the above-captioned action for February 26, 1986. By order filed February 10, 1986, the Court awarded the Natural Resources Defense Council, Inc. (hereinafter "NRDC") and the United States Environmental Protection Agency (hereinafter "EPA") twenty (20) minutes each for presentation of oral argument, and noted that EPA may share some of its time with Intervenor, the Vinyl Institute. The Vinyl Institute (sometimes hereinafter referred to as "the Institute") learned yesterday, February 20, 1986, that EPA would not share any of

broad picture regarding Section 112 rather than the issues involving the vinyl chloride standards--has indicated that it will not address the points raised by NRDC. The Vinyl Institute has filed this motion because it believes that some of the Court's attention should be focused on subject matter jurisdiction and the Institute wishes to address the points raised by NRDC.

3. There Will Be No Repetition of Argument.

The Institute only wishes to present argument on the issue of subject matter jurisdiction. Because EPA has stated that it will not address this issue, there will be no duplication of argument if this motion is granted.

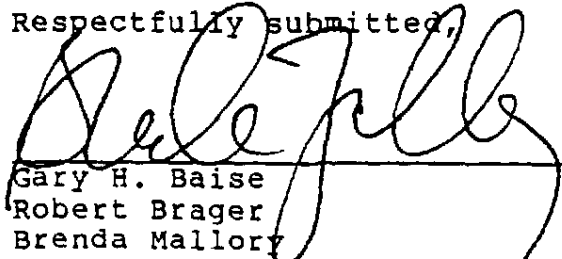
Counsel for both EPA and NRDC have been advised that the Institute is requesting permission to present ten minutes of oral argument. EPA has no objection to this motion, although NRDC does.

Wherefore, the Vinyl Institute respectfully requests that this Court grant the Institute's motion for permission to present ten minutes of oral argument.


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Respectfully submitted,


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