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May 15, 1987

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

Re: Oral Argument in NRDC v. EPA

Dear Roy:

This letter summarizes our prior discussions concerning the oral argument before the United States Court of Appeals for the District of Columbia Circuit in Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency, No. 85-1150. This case involves NRDC's challenge to EPA's withdrawal of its 1977 proposal to amend the vinyl chloride standard. The primary issue that the Court of Appeals focused on during rehearing en banc was whether EPA can consider cost and technological feasibility in setting emission standards under Section 112 of the Clean Air Act.

I was both pleased and impressed with the thoroughness with which the 11 judges had reviewed the briefs in this case. They were obviously conversant with the issues and had given the case considerable thought before argument. It was clear that they had read and understood the Vinyl Institute's brief, which differed in some particulars from that of EPA and the other industry parties that filed amicus briefs.

On behalf of NRDC, David Donniger argued that EPA has no authority to consider cost and technological feasibility when setting emission standards. If the material is a carcinogen or any other non-threshold pollutant, there is no "ample margin of safety" at any exposure level according to NRDC and,

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established, EPA has no authority to require industry to minimize emissions simply because the Agency does not view the further reductions as being costly.

Judge Williams referred to the 1979 decision in Monsanto Company v. Kennedy which affirmed the Food and Drug Administration's ability to disregard insignificant carcinogenic risks under the Federal Food, Drug, and Cosmetic Act. That case, in which we participated on behalf of SPI, involved Monsanto's styrene-acrylonitrile copolymer bottle. We were happy to hear Judge Williams' reference to Monsanto because it supports a general tenant of administrative law that agencies may disregard insignificant risks or problems. Following up on Judge Williams' observation, Judge Silberman noted that the de minimis approach could also include cost considerations.

A number of questions addressed to both NRDC and the government concerned the legislative history of the Clean Air Act and the lack of clear congressional guidance. One or two of the judges suggested that Congress was focusing on threshold pollutants rather than carcinogens when it was discussing how Section 112 would operate. Obviously, there are several ways in which to read the statutory language. Judge Gingsburg asked whether EPA had made any recommendations to Congress for amendment of Section 112. Steenland replied that the Agency had made none to his knowledge. He also clearly indicated that the ample margin of safety language in Section 112 tolerates some risk.

It is normally difficult to predict a court's decision based on the oral argument. Plainly, there were several differing factions in the court and there could well be two or three opinions issued. As noted previously, the apparent rejection of NRDC's zero emission position provides some comfort.

There is no established timetable from which to predict when a decision will be issued. Although it is not unusual for the court to take a year or more to issue an opinion, Chief Judge Wald has been trying to improve the court's timeliness. In addition, appeals involving the regulation of benzene and radionuclides as hazardous air pollutants have been stayed pending a decision in the vinyl chloride case. An optimistic

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projection might look for a decision in three to six months if the judges are able to establish their individual positions promptly. Indecision by any of the individual justices or difficulty in drafting opinions could well extend the date we see an opinion until well into 1988.

If you have any comments or questions, please let me know.

Cordially yours,



Peter L. de la Cruz

cc: Robert D. Luss, Esquire
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