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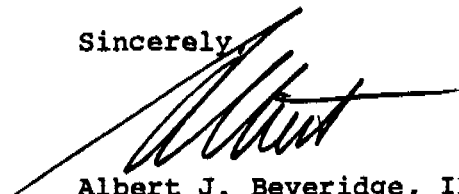
Mr. Joseph Hadley
1150-17th Street, N. W.
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Dear Joe:

Please find enclosed a memorandum on Enforcement of the National Emission Standard for Vinyl Chloride which you reviewed a couple of weeks ago. It has undergone a substantial change in the intervening period. We greatly benefited from your comments, most of which have been incorporated. Many thanks.

If you want to look the memorandum over, please feel free to do so. We think it's ready for distribution to the PVC Safety Group and would appreciate your making the necessary distribution.

Sincerely,



Albert J. Beveridge, III

AJB/jac

Enclosure

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ENFORCEMENT
OF THE
NATIONAL EMISSION STANDARD FOR VINYL CHLORIDE

June 30, 1978

UCC
012545

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Senate Report 95-127, May 10, 1977

A Section-by-Section Analysis of S. 252 and S. 253,
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MEMORANDUM TO THE PVC SAFETY GROUP

SPI

Re: Enforcement of the National Emission
Standard for Vinyl Chloride

I. Introduction

Section 112 of the Clean Air Act ("Act"), 42 USC §7412,^{1/} authorizes the Environmental Protection Agency ("EPA") to promulgate emission standards for hazardous air pollutants. Acting under Section 112, EPA on October 21, 1976 promulgated a National Emission Standard for Vinyl Chloride (the "Vinyl Chloride Standard" or the "Standard"), which became immediately effective. 40 CFR §61.60 et seq. (1977). The regulations limit vinyl chloride emissions from certain specified sources, require owners or operators to monitor their emissions by regular testing and maintain records of those tests, and finally, impose certain operating procedures on operators.

Other sections of the Act provide for the enforcement of Section 112 emission standards by EPA, state air pollution control agencies and by private citizens.

^{1/} The codification of the Clean Air Act was changed in 1977. Previously it was codified at 42 USC §1857 et seq.; it now is codified at 42 USC §7401 et seq. Citations to sections referred to frequently in this memorandum are:

- Section 112 - Hazardous air pollutants, 42 USC §7412
- Section 113 - Federal enforcement, 42 USC §7443
- Section 114 - Inspections and monitoring, 42 USC §7414
- Section 120 - Non-compliance penalty, 42 USC §7420
- Section 304 - Citizen suits, 42 USC §7604
- Section 307 - Judicial review, 42 USC §7607

Although the Standard was effective October 21, 1976, the Act authorizes EPA to grant waivers permitting a source "up to two years after the effective date of the Standard to comply with the Standard." Section 112(c)(1)(B)(ii). We understand that all sources have received waivers from EPA and that most received two-year waivers which, by the terms of the statute, expire on October 20, 1978. We also understand that some sources may be unable to comply with the Standard by October 20, and if so, will be in violation of the Standard.

We have been asked to analyze the general problems that could result from non-compliance with the Standard. This memorandum addresses five major issues:

1. Civil remedies available to EPA.^{2/}
2. Criminal penalties.
3. The enforcement policy of EPA.
4. Enforcement by private parties.
5. Possible defenses in civil or criminal cases.

2/ This memorandum does not address enforcement by the states. Under Subsection 112(d) of the Act, EPA can delegate enforcement authority to those states which adopt appropriate implementation plans. Vinyl Chloride Enforcement Authority has been delegated to the following states: Georgia, 42 Fed. Reg. 64145 (12/22/77); Indiana, 42 Fed. Reg. 45705 (9/12/77); Minnesota, 43 Fed. Reg. 33 (1/3/78). For delegation in Arizona, California, and Nevada, interested persons are directed to contact Region IX. See, 43 Fed. Reg. 21031 (5/16/78). In state-initiated enforcement Actions, the procedures will vary somewhat, with supervisory and review powers remaining vested in EPA.

Conclusions

1. We believe that initially EPA will proceed against major sources not in compliance with the Standard by civil suit, asking for (1) an injunction ordering compliance and (2) monetary penalties large enough to remove economic incentives for delaying compliance.

2. There is a possibility that EPA may seek criminal prosecution of individuals responsible for knowing violations of the Standard if the violations are sufficiently flagrant. A criminal conviction for the first offense under the Act carries a maximum penalty of \$25,000 per day or imprisonment for not longer than one year, or both.

3. In a criminal or civil enforcement action for violation of the 10 ppm limitation we doubt any defense based on the invalidity of the Standard would be successful.

4. In an action for enforcement of the non-numerical aspects of the Standard, particularly fugitive emissions, a much stronger argument exists for invalidity. However, whether a court would accept such an argument depends on a number of factors including:

1. The nature of the action--whether civil or criminal.
2. The nature of the offense--intended, unintended, severity of the violation, etc.
3. The character of the defendant.

There are so many variable factors that we could not express a general opinion on the matter and believe that no operator or owner should rely on the non-numerical aspect of the Standard being invalidated for planning purposes.

Discussion

II. EPA's Enforcement Options

A. Administrative Order

The Agency's principal enforcement tools are provided by Section 113 of the Act. Except as to major stationary sources, if the Administrator finds that a person is in violation of an emission standard, including those issued pursuant to Section 112, he may either issue an Administrative order, or request the Department of Justice to file a civil action. As to major sources, the Administrator must proceed by civil action.

If he chooses to enforce a Standard administratively against a "non-major" source, the order must specify the nature of the violation and fix a time for compliance, taking into account the seriousness of the offense and the good faith efforts of the person to meet the Standard. EPA need not give the alleged violator an opportunity to be heard prior to the issuance of the order but an order does not take effect until the party against whom it is issued has an opportunity to confer with the Agency about the alleged violation (Section 113(a)(4)). Until 1979 EPA cannot enforce its own administrative orders. It must apply to a court either for enforcement by injunction or for penalties.

B. Civil Action

As an alternative to an administrative order, the Agency may proceed directly by civil action against persons charged with a violation of a standard (Section 113(b)(3)). Civil actions can lead to permanent or temporary injunctions and civil penalties up to \$25,000 per day, or both. If a violator disobeys an injunction, he is, of course, subject to civil contempt and all of the penalties associated therewith including a jail sentence. In assessing a civil penalty the court must take into consideration among other factors "the size of the business, the economic impact of the penalty on the business, . . . the seriousness of the violation." (Section 113(b).)

In the case of violations by operators of "major stationary sources"^{3/} the Administrator cannot proceed administratively

^{3/} A "major" stationary source is one which emits, or has the potential to emit, 100 tons/year of a pollutant. Sec. 302(j). The Act does not define a "potential to emit." However, EPA has defined potential to emit in its Prevention of Significant Deterioration regulations as:

the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment. "Air pollution equipment" includes control equipment which is not, aside from air pollution control laws and regulations, vital to production of the normal product of the source or to its normal operation. Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the annual hours of operation. Enforceable permit conditions on the type of amount of materials combusted or processed may be used in determining the potential emission rate of a source.

but must seek enforcement by a civil action.

This unusual requirement can only be explained by the somewhat chaotic legislative path followed by the 1977 Amendments to the Clean Air Act.

Under early House bills the Administrator had the option of proceeding administratively or filing a civil action against all sources. However, the final bill adopted the Senate's position and the Conference Report^{4/} specifically noted that certain House provisions were agreed to only under certain conditions, one of which was to "require the Administrator to commence a civil action against major stationary sources." It is evident from other Committee reports that the Senate was concerned about lax enforcement of violations of the Clean Air Act.^{5/} We have also checked with EPA's office of general counsel and have been advised that the Agency regards the language of Subsection 113(b) as mandatory giving it no discretion when a violation is found. This interpretation seems to square with the legislative history.

Although it is likely to be used only infrequently, the Act also has an Emergency Powers provision which permits EPA to seek an immediate restraining order to halt any activity that presents "an imminent and substantial endangerment to the health of persons." Section 303.

4/ Conference Report 95-564, August 3, 1977, p. 132

5/ See S. Report No. 95-127 (May 10, 1977) by the Committee on Environment and Public Works, pp. 45-53.

C. Criminal Prosecution

Under the Act "any person" can be found criminally liable for any knowing violation of a Section 112 emission standard. Section 113(c)(1)(C). For the first offense, punishment may be by fine of not more than \$25,000 per day, or imprisonment for not more than one year, or both. Subsequent offenses carry a potential fine of \$50,000 per day and potential imprisonment of two years. Section 113(c)(1)(D).

It is also a criminal offense knowingly to make a false statement or misrepresentation in any report or other document, or to tamper with any monitoring device. A conviction under this subsection is punishable by a fine not more than \$10,000 or imprisonment not longer than six months, or both. Subsection 113(c)(2).

A corporation can, of course, be held criminally liable if an employee in the course of his duties knowingly violates an emission standard. United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir., 1972) cert. den. 409 U.S. 1125 (1973); United States v. Steiner Plastics Manufacturing Co., 231 F.2d 149 (2nd Cir., 1956). It is not necessary to establish that the employee knew of the criminal statute involved, only that he knowingly performed the act which was in violation of the statute. Standard Oil Co. of Texas v. United States, 307 F.2d 120, 126-7, 130 (5th Cir., 1962).

In addition to the corporation, individuals are subject to criminal prosecution. The statute specifically provides that the word "person" includes "any responsible corporate officer." Section 113(c)(3).^{6/}

At this time it is not possible to predict the extent to which the federal government will rely on criminal prosecution to enforce the Act. In exercising its prosecutorial discretion the government will probably weigh the following factors among others:

- (i) The danger to the public health posed by the violation.

^{6/} Section 113(c)(3) defines a person as including any of the entities referred to in Section 302(e) and in addition, any "responsible corporate officer." Section 302(e) defines a person as any "individual, corporation, partnership, association..." An entity is usually considered to be a combination of persons, such as a corporation, etc. If this is correct it would mean that a lower level manager or employee, directly responsible for the violation, could not be prosecuted under Section 113. However, we doubt whether a court would accept this position. We believe it would construe "entities" in Section 113(c)(3) to include all the parties named in Section 302(e). The legislative history is clear on this point. The definition of "person," for the purpose of determining who could be held criminally liable, is intended to assure that "those corporate officers under whose responsibility a violation has taken place" would be covered, "not just those employees directly involved in the operation of the violating source." A Section-by-Section Analysis of S. 252 and S. 253, Clean Air Act Amendments, Committee on Environment and Public Works, Senate, February 1977, Serial No. 95-2 (hereafter cited as Senate Report No. 95-2) at 15; S. Rep. No. 95-127 (May 10, 1977) at 51.

- (ii) The environmental damage caused by the violation.
- (iii) Whether the violation was inadvertent or pursuant to a predetermined policy.
- (iv) Whether the violation when discovered was reported by the violator, or whether there was concealment.
- (v) The visibility of the corporate defendant and the extent to which any prosecution would receive publicity.

D. Inspection

The Clean Air Act provides a method by which EPA can secure the data necessary to determine whether or not an emission standard is being violated. Section 114 gives the Administrator authority to require monitoring, maintenance of records, and reports; and the Agency has published regulations explicitly providing for such requirements. (40 CFR Part 61)^{7/} Further,

^{7/} EPA indicated in a Guideline issued to Regional Administrators, that when an effort is being made to determine from the source whether there is a violation of the Standard, a letter to an owner or operator should recite expressly that it is being sent pursuant to Subsection 114(a)(ii) or (iii), state specifically the information required, recite the penalties for non-compliance and specify a reasonable time to answer. The Guideline also directs that if a person denies entry to an inspector on grounds of self-incrimination, the Regional Administrator should treat the denial as an indication of non-compliance. Finally, the Guideline states that a failure to comply with Section 114 should ordinarily be dealt with administratively. See EPA Procedural Guideline § 12, 2 Pollution Control Guide (CCH) §3873, but this guideline has now been superseded by Section 113(b) requiring a civil action against major sources.

the Administrator can enter the premises, examine and copy records and inspect monitoring equipment and records relating to emission sampling.

EPA can enforce these requirements by issuing an administrative order, or by filing a civil action, which can culminate in injunctive orders or stiff monetary penalties.^{8/} Penalties for violating the record keeping and reporting requirements of Section 114 are independent of any other section of the Act; therefore, any violation of an emission standard should not be compounded by a refusal to comply with the inspection requirements which, we understand, are viewed as an important component of the enforcement scheme.^{9/}

EPA's Present Enforcement Policy

Although EPA is expected to obtain compliance with the Vinyl Chloride Standard by all sources covered by the Act, there are, to the best of our knowledge, no formal target areas or enforcement priorities yet established. It would be reasonable to assume that ultimately all emission sources will be checked.

8/ A maximum civil penalty of \$25,000 per day, §113(b)(4).

9/ The Supreme Court recently held in *Marshall v. Barlow's Inc.*, 46 U.S.L.W. 4483 (May 23, 1978) that OSHA inspectors could not conduct inspections of business premises without permission unless they obtained a search warrant. The extent to which the decision will be applied to other regulatory statutes is difficult to predict, since the Court carefully limited its holding to OSHA. However, at the moment, we believe the holding should also apply to non-consensual inspections under the Clean Air Act.

EPA also believes that under 1977 Amendments it must enforce compliance by major stationary sources through civil suits without prior issuance of notices of violation or administrative compliance orders.^{10/} Although there are few precedents, EPA has on occasion issued a notice of violation prior to filing suit, and is not restricted from doing so in vinyl chloride cases.

Officials at the Division of Stationary Source Enforcement at EPA indicate that the government will most likely seek both fines and injunctions in suits it files to implement the Standard. The Agency has developed a formula with seven variables by which it estimates the size of the fine it will seek.^{11/} Memorandum to Regional Administrators from [EPA] Asst. Adm. for Enforcement (Apr. 11, 1978), Curr. Dev., Envir. Rep. (BNA) 2011. The formula is based in part on the non-compliance penalty concept

^{10/} EPA may choose initially not to move against smaller sources not covered by the mandatory civil suit requirement of Subsection 113(b). In areas where discretion is allowed, it is EPA's general policy to give enforcement priorities to air quality control regions classified as Priority I, and to larger sources. See, EPA Procedural Guideline §14 (February 23, 1973). In view of the 1977 Amendments, however, these guidelines may be given limited effect.

^{11/} We are not aware of any reported decision addressing the issue whether the non-compliance formula satisfies the requirements of Subsection 113(b) of the Act that courts take into consideration "the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation" in determining the amount of a civil penalty.

set forth in Section 120 (discussed below), limited, of course, by the \$25,000 per day maximum penalty contained in Section 113. ^{12/}

12/ The fine is computed by adding together:

- (1) a sum appropriate to redress the harm or risk of harm to the public health or environment. EPA may use the cost of environmental restoration, traditional personal injury damages figures, recreation values developed by public agencies, etc.;
- (2) a sum appropriate to remove the economic benefit gained or to be gained from delayed compliance. This will reflect the present dollar value of savings attributable to (a) failing to operate and maintain a source pursuant to the Standard and (b) delaying capital investment. EPA is presently developing a more precise formula;
- (3) a sum appropriate as a penalty for recalcitrance, defiance, etc. This is not meant to penalize parties for non-frivolous exercises of rights to appeal; and
- (4) a sum sufficient to recover extraordinary enforcement costs excluding attorneys' fees. As an example of what is meant by extraordinary, EPA suggests that the sum should include expenses the government incurs to conduct sampling at a plant that refuses to do its own, but the sum should not include cost of sampling to confirm plant data.

From this total is subtracted:

- (1) a sum appropriate to reflect any part of non-compliance attributable to governmental action.
- (2) a sum appropriate to reflect factors completely beyond the source's control, such as flood or fire; and
- (3) a sum appropriate to reflect other mitigating factors.

The fact that a source is unable to pay this penalty will ordinarily be a justification for permitting the source to pay in installments over a period of time. Only in extreme cases will inability to pay be considered a mitigating factor justifying reduction in the penalty.

Although rules of general applicability can be issued, judicial decisions are seldom based on formulae. In environmental cases the variables are so many, and the issues so complex, that it will probably be some time before any pattern of penalties evolves from the courts. There will be a case-by-case decision in each instance, with the result dependent not only on the individual facts but the individual temperament and preconceptions of the particular judge. Nevertheless, the formula described above and the non-compliance provisions of Section 120 discussed below, are likely to be followed, and penalties could be significant.

Section 120 -- Non-compliance Penalty

Present enforcement procedures available to EPA do not permit it to administratively assess or collect penalties for non-compliance. Such penalties now must be assessed by a court. Beginning August 7, 1979, however, EPA will be authorized to assess and collect non-compliance penalties in accordance with Section 120 of the Clean Air Act.^{13/} The purpose of Section 120,

^{13/} Whether Section 120 becomes effective August 7, 1979 or July 1, 1979 with respect to compliance with existing emissions standards is unclear in the statute. EPA has announced that it will adhere to the later date until final regulations are developed. Memorandum to Regional Administrator of April 11, 1978, No.1.

which was enacted in the 1977 Amendments, is to eliminate any competitive advantage a manufacturer might gain because it postpones compliance with emission standards, for the Act assesses a penalty equal in amount to cost of compliance against the manufacturer.

In general, the provisions are applicable to all stationary sources not in compliance with an emission standard with certain exceptions.^{14/}

Penalties may be collected by either a state or by EPA, and the money belongs to the governmental entity making the collection.

Procedurally, it is incumbent upon EPA (or a state, if so authorized) to issue first a notice of non-compliance. Then the affected source is required to calculate the amount of the penalty owed, or if it denies liability, to file a petition challenging the notice, in which event the source will be entitled to a hearing.

The penalty is to be determined in accordance with regulations to be published by the Administrator.^{15/} In no event is it to be less

^{14/} The exceptions include: (i) sources using innovative techniques sanctioned by an enforcement order under Subsection 113(d)(4); (ii) sources receiving a temporary emergency suspension under Subsection 110(f) or (g); and (iii) sources whose violations the Administrator finds to be de minimus.

^{15/} The time within which he was directed by Congress to publish these regulations has already expired.

than the economic value of non-compliance to the owner of the source. Although there are a number of factors mentioned in the April 11, 1978 Memorandum which are not mentioned in Section 120, that memorandum is probably the best guide as to EPA's present thinking about implementing Section 120.

This method of inducing compliance with emission standards is not intended to interfere with other remedies available to the Administrator or the states, and it is probable that before July, 1979, EPA will have publicly indicated its policy with respect to vinyl chloride violations occurring after October 20, 1978.

Summary

EPA has several enforcement alternatives presently available to it to assure compliance with the Vinyl Chloride Standard: the administrative order; civil enforcement action; and criminal prosecution. To assist in its investigation, the Agency is authorized to enter plant premises and inspect pollution control equipment and related records. Beginning next July, it will be able administratively to assess non-compliance penalties as well.

As we have discussed, there is little likelihood that EPA will use administrative orders against major sources. It should be expected that compliance will be sought in the first instance by a civil action seeking an injunction and a fine based on the non-compliance penalty concept. One can also expect that

if EPA believes the Standard is being knowingly violated, it may seek criminal penalties against the company and the corporate officers responsible for vinyl chloride emissions.

Unfortunately, the only indication yet available concerning EPA's plans to use Section 120 is by indirection, through the policy it has announced for the computation of civil fines under Section 113.

III. Private Enforcement

The Clean Air Act also authorizes suits by private citizens to enforce emission standards. "Any person" may bring an action against the owner or operator of a plant not in compliance with a standard, or against any governmental agency that fails to act where the law requires that a certain action be taken.

Before commencing a citizen suit, a complainant must notify the owner or operator of the source, EPA and the appropriate agency of the alleged violation. Notice ordinarily must be given sixty days before filing suit, but a suit against EPA for failing to prosecute a major stationary source for violation of the Vinyl Chloride Standard can be filed immediately after notice is given. Section 304(b).

The statute preserves the right of citizens to sue under other statutes and common law theories. Section 304(e). Thus, an action against a manufacturer could be brought under a state

or federal statute that may not have environmental protection as its primary purpose, or under common law theories of nuisance, trespass, or negligence.

IV. Defenses to Enforcement of the Vinyl Chloride Standard

Introduction

This section is concerned with potential generally-applicable defenses to enforcement actions brought against sources for violations of the Standard by EPA pursuant to Section 113(b) or (c). In addition, defenses based on the particular circumstances surrounding the alleged violation may also be available. The vinyl chloride regulations set standards which are both numerical (10 ppm) and non-numerical (fugitive emission standards). We will first consider a possible defense to a violation of the numerical standard and then the more probable defense to a violation of the fugitive emission standard.

A. General Validity of the 10 PMM Portion of the Standard

The purpose of Section 112 is to protect the public by reducing emissions of any pollutant that may cause, or contribute to, an increase in mortality, serious irreversible illness or incapacitating reversible illness. Section 112(a)(1). The Act requires the Administrator to establish a standard providing for reducing emissions level to a level which provides an "ample margin of safety to protect the public health." Section 112(b)(1)(B) and 112(e)(1).

In promulgating the Vinyl Chloride Standard the Administrator did not explicitly find that it provided an "ample margin of safety." The Agency recognized the difficulty it faced when it proposed the Standard. It observed that in dealing with an "apparent non-threshold pollutant like vinyl chloride in the absence of strong evidence to the contrary, . . . there is no atmospheric concentration that poses absolutely no public health risk" and a "zero emission limitation would be the only emission standard which would offer absolute safety from ambient exposure."^{16/} However, the Agency adopted what it characterized as an alternative interpretation of Section 112, stating:

An alternative interpretation of Section 112 is that it authorizes setting emission standards that require emission reduction to the lowest level achievable by use of the best available control technology in cases involving apparent non-threshold pollutants, where complete emission prohibition would result in widespread industry closure and EPA has determined that the cost of such closure would be grossly disproportionate to the benefits of removing the risk that would remain after imposition of the best available control technology.^{17/}

^{16/} 40 Fed. Reg. 59534 (1975)

^{17/} Id.

An argument can be advanced that a standard based on "best available technology," as the Vinyl Chloride Standard is, does not meet the statutory requirement of an "ample margin of safety" and accordingly, is invalid. However, it may not be successful. Much the same argument was advanced in National Association of Demolition Contractors v. Costle, 565 F.2d 748, 753 (D.C. Cir., 1977). There the Association challenged an amendment to the Asbestos Standard which required wetting during demolition if temperatures were above freezing but no wetting if demolition took place at subfreezing temperatures because of the substantial dangers to workers. The Association's argument was logically irrefutable. As the court stated it:

NADC argues that the Administrator's statutory mandate to protect the public health with "an ample margin of safety" is inconsistent with his decision to use the "best available control methods at all temperatures." According to petitioner, since asbestos emissions do not vary with temperature, if wetting is not required to protect the public health with "an ample margin of safety"--and NADC reads the suspension at subfreezing temperatures to establish that it is not --then it can never be required.

The court disagreed:

Protection of the public with "an ample margin of safety" may necessitate use of different control measures, including use of "best available control methods," in different conditions.

The court did not discuss statutory language but appeared to base its decision on the reasonableness of the Agency's position. Although the court's holding may be open to some modification on the authority

of Adamo, if the numerical portion of the Vinyl Chloride Standard were subject to judicial review, we think a court would also be persuaded by the reasonable position taken by the Agency when faced with the difficulty of reconciling scientific uncertainty with statutory lack of precision. Furthermore, the legislative history of the 1977 Amendments buttresses the Agency's position. In describing the purpose of the new design or work practice standard embodied in Section 112(e), Senator Muskie stated:

Where numerical emission standards can be used they are required. But, wherever they are impossible or infeasible, the use of design, equipment, and operational standards, even for pollutants such as asbestos--where EPA has concluded that no margin of safety exists--is appropriate.^{18/}

Thus, Congress has recognized, it could be argued, that some pollutants have no margin of safety but that should not preclude the promulgation of an emission or design standard.

Furthermore, although the Administrator did not explicitly state that the Standard provided "an ample margin of safety," a court might conclude that he implicitly made such a finding. Indeed, if EDF is successful in recommencing litigation over the proposed amendments to the Standard, SPI may want to make this argument.

^{18/} 123 Cong. Rec. S. 9175 (daily ed. June 8, 1977).

Since the determination of "ample margin of safety" requires the exercise of judgment, based on scientific expertise, a court would be very reluctant to substitute its judgment for those of experts, especially in an area in which Congress has delegated authority to those experts, so long as the Agency has adequately stated its rationale. See Industrial Union Department AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir., 1974).

We will discuss at a later point whether a defense based upon the failure of the Administrator to set a Standard with "an ample margin of safety" could be raised in an enforcement proceeding. Suffice it at this point to state that we do not believe a court would permit the defense to be raised.

B. Validity of the Fugitive Emission Portion of the Standard

Although we believe those parts of the Standard which quantitatively limit emissions would be upheld as an emission standard, different issues arise as to that part of the Standard limiting fugitive emissions. Emissions of vinyl chloride from so-called fugitive emission sources are required to be "minimized" by specific procedures including ducting, installation of particular equipment, maintaining certain pressures, returning samples to the process, implementing a prescribed leak detection program, limiting the quantity of vinyl chloride in in-process waste water, and finally, writing an operating manual that incorporates these procedures.^{19/}

^{19/} The limits on residual vinyl chloride concentration in polyvinyl resin set by 40 C.F.R. §61.64(e) are difficult to classify and may be closer to the fugitive emission classification than to a numerical standard. The question remains open.

Recently, in Adamo Wrecking Co. v. United States, 46 U.S.L.W. 4063 (Jan. 10, 1978), the Supreme Court considered whether the "procedures to be followed in connection with building demolitions" pursuant to the National Emission Standard for Asbestos were an "emission standard" within the meaning of Section 112 of the Clean Air Act.

The regulation provided that insulation and fireproofing materials in buildings slated for demolition had to be watered down, thus reducing asbestos emissions, but contained no numerical or quantitative limitation on the amount of asbestos that could be emitted into the air. The Adamo Wrecking Company violated these work practice regulations of EPA, and a criminal action was instituted. Adamo contended that only violations of emission standards under Section 112(c) could be prosecuted, and that the work practice standards were not properly "emission standards." The Supreme Court, by a 5-to-4 vote, held that the work practice regulations were not "emission standards" within the meaning of the Act; an emission standard must set a numerical limit on emissions.^{20/}

^{20/} Mr. Justice Stevens dissented stating, "I am persuaded that the Administrator's solution was faithful to his statutory authority and that he would have misused his power if he had either failed to regulate asbestos emissions at all or unnecessarily demolished an entire industry." Adamo Wrecking Co. v. United States, 46 U.S.L.W. at 4069.

Although Adamo involved a criminal charge, the holding that an emission standard requires a numerical limitation would, we believe, also be applied in civil proceedings. Under the Clean Air Act as it existed prior to the 1977 Amendments, we believe that after Adamo a court could be persuaded to declare invalid the fugitive emission portion of the Standard.

Two questions remain, however. First, did the 1977 Amendments cure any defect in the original regulation? Second, can the matter be raised in an enforcement proceeding?

C. 1977 Clean Air Act Amendments

In August 1977 Congress enacted a series of amendments to the Clean Air Act. The amendments included:

1. Subsection (e) to Section 112 which specifically authorizes work practices, design standards and other non-numerical means of reducing pollution to acceptable levels in those instances where numerical limitations are not feasible. ^{21/}

^{21/} This amendment was the subject of a report by the Senate Committee on Environment and Public Works of the U.S. Senate, S. Rep. No. 95-127 (May 10, 1977). At page 44 the Committee reported:

Section 112 of the existing law has been interpreted by some courts as only allowing the use of numerical emission standards. While the committee has a strong preference for numerical emission limitations, it recognizes that in a very few limited cases, other approaches may be necessary

(^{21/} continued on next page)

(21/ continued from page 23)

Design standards are not to be used where no margin of safety exists for a pollutant. This provision should not be used for such pollutants as a means of avoiding numerical emission standards where such standards can be applied.

The accuracy of the Committee Report is subject to question on this point. Section 112(e) was intended to permit work practice and design standards for the asbestos industry for which no known safe level exists. Senator Muskie, the sponsor of the bill, had this to say:

There has been concern expressed that design standards cannot be used when there is no margin of safety for a hazardous pollutant. However, as the report's discussion of asbestos shows, such a blanket rule is not intended. Indeed, such a rule could lead to EPA avoiding use of Section 112 to regulate pollutants which have no apparent threshold of effects. Where numerical emission standards can be used, they are required. But, wherever they are impossible or infeasible, the use of design, equipment, and operational standards, even for pollutants such as asbestos--where EPA has concluded that no margin of safety exists--is appropriate. (123 Cong. Rec., S. 9175 (daily ed. June 8, 1977))

2. A redefinition of "emission standards" in Section 302 as follows:

(k) The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction. (Emphasis supplied)

3. A modification of Section 307(b)(1), which had limited judicial review to emission standards, to read as follows:

(b)(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under Section 112 . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia (Emphasis supplied)

Effect of Section 112(e)

Subsection 112(e) of the Clean Air Act provides that, "if in the judgment of the Administrator, it is not feasible to prescribe or enforce an emission standard . . . he may instead promulgate a design, equipment, work practice, or operational standard, . . . which in his judgment is adequate to protect the public health." Furthermore, whether it is "not feasible" turns on very specific findings required of the Administrator, i.e., that "(A) a hazardous pollutant or pollutants cannot be

emitted through a conveyance designed and constructed to emit or capture such pollutant . . . or (b) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." Therefore, it can be seen that work practices are to be used only in the unusual case where in the judgment of the Administrator emission standards (quantitative limits) are not feasible.^{22/}

^{22/} Senate Report No. 95-2, February 1977, of the Subcommittee on Environmental Pollution of the Committee on Environment and Public Works of the U.S. Senate, states at page 12:

Section 112 of the existing law requiring control of hazardous air pollutants has been interpreted by some courts as only allowing the use of numerical emission standards. While the Committee has a strong preference for numerical emission limitations, it is recognized that in a very few limited cases, other approaches may be necessary.

This provision is intended to be available only when it is not possible or feasible to measure hazardous emissions or capture them through appropriate devices for control.

The only real issue of controversy here is the extent to which this provision would allow sources to avoid more stringent numerical emission limits where they are feasible. The language clarifies this intent not to provide such a loophole.

The Conference Report, No. 95-564, August 3, 1977, states:

The Senate Amendment amends Section 112 of existing law to specify design, equipment, or operational standards for the control of a source of hazardous emissions, where an emission limitation is not possible or feasible to measure hazardous emissions or to capture them through appropriate devices for control.

The House concurred in the Senate provision.

The initial question is whether Section 112(e) cures the defect previously discussed in the fugitive emission part of the Standard. As a general matter statutes are normally interpreted prospectively. See Reynolds v. United States, 292 U.S. 443 (1934); United States v. Perry, 431 F.2d 1020 (9th Cir., 1970), (as amended in denial of rehearing). However, it is also clear that Congress has the power to cure legislative and regulatory errors, and unless vested rights are disturbed, a court will give effect to Congressional intent to cure a previous defect.

Although it is difficult to reach an absolutely certain conclusion, the strongest argument, in our opinion, is that Section 112(e) cured any existing defect in the Vinyl Chloride Standard. This appears to be the position taken by the Agency at least with respect to the Asbestos Standard.^{23/}

Congress clearly had before it the problem facing EPA in regulating pollutants for which numerical emission limitations are not feasible.^{24/}

The Senate also specifically stated in Report 94-717 that it intended to authorize design or work practice standards whose validity was subject to doubt:

^{23/} See 43 Fed. Reg. 26372 (1978).

^{24/} Letter from EPA Administrator Russell E. Train to Senator Jennings Randolph, February 3, 1976.

Summary

This provision amends Section 112 of existing law by adding a new Subsection(e). The Administrator is allowed to specify design, equipment, or operational standards for the control of a source of hazardous emissions, where an emission limitation is not possible or feasible.

Discussion

Section 112 of the existing law has been interpreted by some courts as only allowing the use of numerical emission standards. While the Committee has a strong preference for numerical emission limitations, it recognizes that in a very few limited cases, other approaches may be necessary.

Asbestos is an example which has been demonstrated as requiring other than a direct numerical emission limitation. The problem occurs when activity such as demolition of existing buildings causes asbestos fibers to escape into the ambient atmosphere. Work practice and other design characteristics may be the only means available for controlling such pollutants. While the ability to measure and capture the pollutant is the key criteria, the Agency should also consider the extent to which capture of all emissions might have an adverse health consequence for workers.

This provision is intended to be available only where it is not possible or feasible to measure hazardous emissions or capture them through appropriate devices for control.

This limited provision would fully authorize the present EPA regulations governing asbestos. The present regulations include a prohibition on the use of certain materials such as spray-on asbestos fire proofing materials. Such regulations would be appropriate within the meaning of this provision. (Emphasis supplied.) Sen. Rep. 94-717, 94th Cong., 2d Sess., p. 33.

Finally, in National Association of Demolition Contractors v. Costle, supra, counsel for NADC conceded that Section 112(e) cured any defect in the asbestos standard relating to a non-numerical

limitation. This concession may have been incorrect, but it will undoubtedly be seized upon by the Agency in defending the Standard.^{25/}

The counterargument is that Section 112(e) permits the Administrator to promulgate a design or operational standard only if in his judgment "it is not feasible to prescribe or enforce an emission standard"; that the Administrator has made no such finding with respect to the Vinyl Chloride Standard; therefore, the section does not cure any defect in the fugitive emission limitations. Although the argument is tenable, it is not as strong, in our opinion, as the arguments in favor of the Standard and we believe a court would probably reject it.

^{25/} Another argument which might be advanced is that the new definition of an "emission standard" in Section 302(k) cures any defect. That section provides:

The terms 'emission limitation' and 'emission standard' mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation of a source to assure continuous emission reduction.
(emphasis supplied)

The argument would be that the fugitive emission limitations are "operational" and some of them, at least, are intended to achieve "continuous emission reduction." Therefore, the fugitive emission limitations are an emission standard under Section 302(k) and Section 112(c).

The argument belies the legislative history of the amendment. The record shows that Section 302(k) was added because Congress was concerned with problems created by intermittent controls and dispersion techniques, and was bent on requiring continuous controls. See Senate Report, No. 95-2, February 1977, by the Subcommittee on Environmental Pollution, at page 32. The Conference Report No. 95-564, August 3, 1977, p.172. The legislative history of Section 302(k) does not suggest any Congressional purpose to validate non-numerical emission standards.

Our judgment is in part influenced by our belief that a court will not be constrained to extend Adamo much beyond the facts of that case. Adamo involved the criminal prosecution of a demolition company which may not have known regulations were being developed, did not have a Washington representative and even if it did, could not have been reasonably expected to incur the financial burden of challenging the regulation. On the other hand, if violations of the Vinyl Chloride Standard involve a major chemical company, with Washington representation, which has been involved in the development of the Standard, the attitude of a court may be far different.

D. Challenges to the Standard in Enforcement Proceedings

Section 307(b)(1) provides that any petition for review of an emission standard promulgated under Section 112 must be filed in the U.S. Court of Appeals for the District of Columbia. A petition for review of any order under Section 112(c) which "is based on a determination of nationwide scope or effect" must also be filed in that court. Finally, Section 307(b)(2) provides:

Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

On its face, Section 307(b)(2), which was unchanged by the 1977 Amendments, indicates a strong Congressional policy not to permit challenges to emission standards in enforcement proceedings. Nevertheless, in Adamo the court held that in criminal enforcement proceedings a defendant could challenge a purported "emission standard" as not being an "emission standard." Although Adamo was a criminal case we doubt whether the distinction between a criminal and civil enforcement proceeding would lead to different results and we believe the holding equally applicable to civil proceedings. Therefore, a defendant could under Adamo challenge enforcement of the fugitive emission portion of the Vinyl Chloride Standard under Section 112(c) in a civil or criminal proceeding.

This would be true even if the Agency defended the Standard on the ground that it was a design or operational standard under Section 112(e). Section 307(b)(2) limits its applicability to "actions with respect to which review could have been obtained under paragraph 1." Since Section 112(e) was not enacted until after the Vinyl Chloride Standard had been promulgated, it could not have been subject to review under that section.

However, Section 307(b)(2) on its face appears to bar an argument that the numerical portion of the Standard was not based on the statutory criteria of an "ample margin of safety." Such a defense does not attack the Standard as not being a standard but the adequacy of the Standard. Although Justice Stewart in dissent suggested that under the majority's holding it might be open for a defendant to raise such an argument, it may be difficult to persuade a court to permit such a challenge because, if it did so, Section 307(b)(2) then would be virtually meaningless.

E. Enforceability of Section 112(c) and (e)

As Justice Stevens pointed out in dissent in Adamo, the structure of the Clean Air Act presents a number of enforcement problems. As previously discussed, Section 113 is the principal enforcement mechanism for Title I of the Clean Air Act. Section 113(b) and (c) imposes civil and criminal penalties respectively for violations of Section 112(c).

For some reason not divulged in the legislative history, when Section 112(e) was added by the 1977 Amendments, there was no corresponding amendment to Section 113(b) or (c). Thus, on the face of the statute violators of an emission standard under Section 112(c) are subject to civil or criminal penalties, but violators of work practice or operational standards under Section 112(e)

^{26/} are not. The question remains whether courts will regard the omission of Section 112(e) from Section 113(b) and (c) as a mere legislative oversight curable by judicial fiat, or whether the Sections will be construed strictly since they are penal in character. There are cases on both sides of the issue. On the one hand, there is a line of cases supporting strict scrutiny which hold that courts will not use the guise of interpreting a statute to add or eliminate words from the language used by Congress. See Crooks v. Harrelson, 282 U.S. 55 (1930); Porter v. Nowak, 157 F.2d 824 (1st Cir., 1946); De Soto Securities Company v. Commissioner of Internal Revenue, 235 F.2d 409 (7th Cir., 1956).

On the other hand, there is another line which holds that amendatory acts must be read in connection with earlier acts to give effect to the intent of Congress. Baxter v. McGee, 82 F.2d 695 (8th Cir., 1936), cert. den., 298 U.S. 680; Kirchner v. Kansas Turnpike Authority, 336 F.2d 222 (10th Cir., 1964). And in Westinghouse Electric Corporation v. Pacific Gas and Electric Co., 326 F.2d 575, 580 (9th Cir., 1964), the court specifically

^{26/} Violators of Section 112(e) would still be subject to general equity jurisdiction and courts could issue injunctions barring violation of the section. However, this would be a cumbersome procedure.

noted:

Remedial statutes should be liberally construed and should be interpreted when possible in a manner tending to discourage attempted evasions by wrongdoers.^{27/}

Furthermore, curative statutes are usually given liberal interpretations^{28/} even to the extent of a court supplying language to correct an unmistakable legislative oversight.^{29/}

^{27/} See also *International Union, UAW v. Marshall*, No. 76-1554 P.13-14 (D.C. Cir., June 8, 1978).

^{28/} *Goddard v. Frazier*, 156 F.2d 938 (10th Cir., 1946), cert. den., 329 U.S. 765; *Bowles v. Strickland*, 151 F.2d 419 (5th Cir., 1945).

^{29/} The words "per annum": read into a statute fixing judicial salaries. *Crawford v. Payne*, 55 P.2d 1240 (Cal., 1936); right to peremptory challenges by the State read into a statute; *People v. Hudson*, 263 N.E.2d 473 (Ill., 1970); the word "whoever" read into a statute to achieve legislative intent, *People v. Spencer*, 268 N.E.2d 192 (Ill., 1971); the words "or their descendants" read into a statute establishing rules for disposition of property in cases where deceased died intestate, *Graves v. Burns*, 106 S.W.2d 602 (Ark., 1937); the word "or" supplied by the court, *State v. Chicago Mill & Lumber Company*, 45 S.W.2d 26 (Ark., 1931). But in *Metropolitan Life Insurance Company v. Jacobs*, 1 A.2d 603 (Del., 1938), the court refused to supply the word "not" even though the statute would read more smoothly if this were done. In each instance the court accepted the general proposition that such judicial legislation was impermissible unless there was an unmistakable conclusion that the court was accomplishing the legislative intention.

To add to the problem, it is evident that under amended Section 307(b), work practice rules now are subject to judicial review in the Court of Appeals. Therefore, it is possible that a work practice regulation is subject to judicial review but not enforceable under Section 113.

It will be difficult to persuade a court that Congress intended enforcement of emission but not other types of authorized standards. When Congress expressly provided for the enforcement of similar sections of the Clean Air Act it can be argued that Congress must have intended like enforcement of Subsection 112(e).

On the other hand, because Section 112(e) was part of the Clean Air Act Amendments of 1977 which were under consideration by Congress for at least two years, it seems unlikely that Congress simply overlooked the inclusion of that section among those covered by Subsection 113(b). It is certainly arguable that Congress recognized the problems involved in protecting public health through work practices, and elected not to subject violations of this nature to the exceedingly heavy penalties provided in Subsection 113(b), preferring that the courts fashion equitable decrees based upon the individual circumstances. For example, in the case of fugitive emissions, it is not self-evident that Congress intended to authorize a \$25,000-a-day penalty for a plant's failure to maintain a certain pressure, or to return

a sample to process. Such violations might have little if any impact on the ambient air, and may not be the type of violation contemplated by Section 113(b), for as the majority opinion in the Adamo case pointed out, Congress was rather selective when designating violations subject to the penalties of Section 113(b), 46 U.S.L.W. at 4064. The court noted that Congress attached "stringent sanctions to the violation of an emission standard in contrast to the violation of various other kinds of orders that might be issued by the Administrator," and that Congress "attached a peculiar importance to compliance with emission standards." Supra at 4065. Both the majority opinion and the dissent of Justice Stevens took note of the fact that Section 112(e) had not been included in the enforcement provision. Supra at 4066-71. In fact, Justice Stevens stated flatly that the work practice rules are unenforceable (supra at 4068, 4071) and this statement was not challenged by the majority.

F. Conclusion

In summary we think:

- (1) That the numerical portion of the Vinyl Chloride Standard would be difficult to challenge in an enforcement proceeding, and, if it were challenged, would be upheld and enforced.

(2) Although an argument against the non-numerical portions of the Standard can be raised in an enforcement proceeding, most likely the Standard will be upheld on the authority of Section 112(e).

(3) A strong argument exists that the non-numerical portions of the Standard, although valid, cannot be enforced under Section 113(b) and (c) of the Act.