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Roy T. Gottesman
Executive Director

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July 1, 1985

WLM, let's discuss this. I think Hammer et al. need to be made aware of the implications of this.

I very much agree WLM

*New File
Manufacture
VCM-MDC*

To: Vinyl Institute Legal Committee
Vinyl Institute Manufacturing Practices Committee
Subject: Natural Resources Defense Council v. EPA Brief

I attach a letter from Peter de la Cruz dated June 24 which reviews the brief filed by the Natural Resources Defense Council challenging EPA's withdrawal of the 1977 proposal to amend the VCM emission standard, provides information on the current briefing schedule and proposes a strategy for the Vinyl Institute's response in this matter. As Peter requests, please treat the latter information as confidential.

If you have any questions or comments, please contact Meredith Scheck or me.

Roy T. Gottesman
Roy T. Gottesman

cc: Meredith Scheck
Peter L. de La Cruz (w/o attach.)

A Division of

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*ADMITTED IN NEW YORK AND VIRGINIA ONLY

June 24, 1985

Roy T. Gottesman, Ph.D.
The Society of the Plastics
Industry, Inc.
355 Lexington Avenue
New York, New York 10017

Re: Natural Resources Defense Council v. EPA

Dear Roy:

The Natural Resources Defense Council (NRDC) has filed its brief challenging the Environmental Protection Agency's (EPA) withdrawal of the 1977 proposal to amend the vinyl chloride standard. This letter briefly reviews the NRDC brief and our current thinking regarding a response. The NRDC brief is a matter of public record and can be freely distributed. Members of the Vinyl Institute Legal Committee and Manufacturing Practices Committee would likely be interested in both this letter and the NRDC brief. Since the letter does discuss our litigation strategy, we ask that recipients treat the letter with appropriate confidentiality.

A. NRDC Brief

The NRDC brief consists principally of NRDC's view of EPA's statutory authority under Section 112 of the Clean Air Act which governs hazardous air pollutants. NRDC argues that in setting emission limitations under Section 112, EPA may only consider the protection of the public health and that the Agency is precluded from considering technological or economic feasibility in establishing those standards. NRDC bases this argument on its review of the statutory language, legislative history, case law, and public policy considerations. It argues that there is no safe threshold for carcinogens so that the "ample margin of safety" standard of Section 112 requires a

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zero emission limitation even if this would require closing the industry. NRDC maintains that EPA improperly based the standard on technological and economic feasibility in both setting the original standard in 1976 and in its 1985 withdrawal of the 1977 proposed amendments. NRDC requests that the withdrawal of the 1977 amendments be vacated and that the matter remanded to EPA for further rulemaking proceedings within 180 days.

B. Briefing Schedule

Under the current briefing schedule, EPA's brief is due July 17, 1985 and the Vinyl Institute's brief is due August 1, 1985. NRDC's reply brief and the joint appendix would then be due on August 15, 1985. There is some possibility that EPA may seek an extension of the date on which its brief must be filed. This, in turn, would postpone the dates for the filing of our brief.

C. Proposed Vinyl Institute Response

The single issue presented in this litigation is whether EPA's withdrawal of the 1977 proposal was arbitrary, capricious, or otherwise contrary to law. After some deliberation, we suggest that the following approach be taken in briefing the case. The statement describing the history of the vinyl chloride standard would be drafted to emphasize the substantial amount of work EPA has performed in reviewing the standard generally as well as the efforts made by industry and the cost of compliance.

The argument portion of our brief supporting the propriety of EPA's withdrawal of the 1977 proposal will begin by noting that NRDC may not challenge the validity of the current standard promulgated in 1976. You undoubtedly recall that the Environmental Defense Fund (EDF) filed a timely petition seeking court of appeals' review of the 1976 rule. That litigation, from which industry was excluded, led to a settlement agreement, which, in turn, led to the 1977 proposed amendments. NRDC notes in its brief that the present case does not involve the EDF settlement or the new proposal. Because it did not file a timely challenge, NRDC may not contest the

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adequacy of the 1977 proposal. Moreover, the court must view the 1976 standard as satisfying the statutory demands of Section 112.

Having established that the current standard satisfies existing statutory requirements, the remaining issue is whether EPA's withdrawal of the 1977 proposal was arbitrary or capricious. At this point, our brief will review the basis for EPA's action. In particular, EPA conducted a new health risk and concluded that there was no reason to change the risk projected during the proceedings leading to the 1976 standard. Since the 1976 standard satisfies the Section 112 criteria of an "ample margin of safety," the absence of any change in the risk means that there is no reason for amending the standard's emission limitations. In addition, EPA's found that there was no new technology to reduce emissions since the 1976 standard was promulgated and that plants were generally performing better than the standard required. Thus, the Agency's health-based decision was further supported by industry performance.

This approach provides the court of appeals with a simple basis for deciding that EPA's withdrawal was proper. It would also avoid difficult statutory questions concerning EPA's authority to consider technological and economic factors, although we will support EPA's right to consider such factors and anticipate that EPA will argue that it has the authority to consider technological and economic factors. While no case has decided this particular question with regard to Section 112, portions of the legislative history and cases analyzing similar statutory provisions could be read to support NRDC's view. We will also want to summarily address NRDC's confused statements on carcinogens and the industry's effort to minimize emissions. However, it is our opinion that the court would be receptive to an argument that EPA acted properly even if NRDC's characterization of Section 112 was correct.

Rob Brager of Beveridge and Diamond and I will be discussing this approach with EPA and Justice Department attorneys handling this case. We also plan on providing EPA with draft copies of our brief to avoid any conflicting representations to the court.

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We currently plan on having a draft brief available for review by interested Vinyl Institute members no later than July 12. In the interim, we would be happy to receive any comments on NRDC's brief or our initial thoughts on the structure of our own brief. If you have any comments or questions, please feel free to contact us.

Cordially yours,



Peter L. de la Cruz

Enclosure

cc: Gary Baise, Esquire (w/o enc.)
Robert Brager, Esquire (w/o enc.)

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