

VC - Kelly Palmer

November 26, 1979

MEMORANDUM TO THE
PVC SAFETY GROUP

Re: Choosing a Circuit in Which to Challenge
the DSSE Memoranda

In a draft memorandum dated September 26, 1979, we concluded that there are reasonable grounds for challenging a series of memoranda issued by the EPA's Division of Stationary Source Enforcement (DSSE) relating to vinyl chloride relief valve discharges. In short, we concluded that the DSSE memoranda may be procedurally invalid because they were issued without notice and an opportunity for comment. This memorandum considers in which circuit^{1/} SPI might bring an action challenging the DSSE memoranda.

^{1/} We have recommended to SPI that an action challenging the DSSE memoranda be filed initially in a federal district court (see our draft memorandum on "Proper Judicial Forum" dated September 28, 1979). Notwithstanding that recommendation, this memorandum focuses on circuit court alternatives because:

- (a) As explained in our September 28 draft memorandum, a district court might reasonably find that exclusive jurisdiction to review the DSSE memoranda lies in the circuit courts of appeals under Section 307 of the Clean Air Act, in which case SPI would be forced to seek judicial relief at the appellate level.
- (b) Any district court decision, of course, may be appealed to a circuit court.
- (c) District courts often rely most heavily on legal precedents from its own circuit.
- (d) SPI's member companies may have a better understanding of the attitudes of their local district court judges than we can acquire from a review of the cases.

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Conclusion

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Based on the locations of industry facilities ^{2/} and a review of some principal judicial decisions, SPI should bring an action challenging the DSSE memoranda in a district court in the 5th Circuit. We reach this conclusion pending (a) receipt of information from SPI's member companies regarding local district courts and (b) finding an appropriate^{3/} member company in the 5th Circuit interested in joining SPI.

Discussion

For several reasons, it is advisable to challenge the DSSE memoranda in a district or circuit in which a large number of industry facilities are located. First, a court is most likely to be sympathetic to SPI's position if the industry makes a substantial contribution to the economy of the jurisdiction. Second, bringing an action where a number of facilities are located enables SPI to avoid the appearance of forum-shopping. Third, a court may be more easily persuaded that the industry is being seriously affected, and that prompt resolution of the issues is therefore required - i.e., that the issues are

^{2/} "Industry facilities" means plants engaged in the production of vinyl chloride, polyvinyl chloride, and/or ethylene dichloride.

^{3/} An "appropriate" company would be one that has a good record on relief valve discharges, and can document that it has taken significant preventive measures.

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"ripe" for judicial review - if SPI can point to a number of industry plants within the court's jurisdiction.

An additional reason for SPI to bring an action where there is a high concentration of facilities is that a district court may dismiss the action for lack of jurisdiction, based on the exclusive review provisions of the Clean Air Act (see (a), n.1, supra). The Agency may then argue that the memoranda are "of nationwide scope and effect", and that accordingly, jurisdiction to review them rests with the D.C. Circuit (Clean Air Act, §307(b)(1)). If SPI brings an action where a substantial proportion of the industry's facilities are located, it will be in a better position to maintain that the DSSE memoranda are "locally or regionally applicable" (§307(b)(1)), and thereby avoid the D.C. Circuit.

Based on the tables contained in the Standard Support and Environmental Impact Statement^{4/} that accompanied the originally-proposed vinyl chloride emission standard, most of the circuits contain few, if any, industry facilities. There are no plants located in the D.C. or the 8th Circuit; the 10th Circuit

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^{4/} Standard Support and Environmental Impact Statement: Emission Standard for Vinyl Chloride, EPA-450/2-75-009 (October 1975), pp. 3-28 through 3-34.

contains a single facility; the 2nd and 7th ^{5/} Circuits each contain only two small plants; three facilities are scattered around the 4th Circuit; and the 1st Circuit likewise contains three facilities, the largest of which is located in Puerto Rico. There is a small cluster of facilities in southern California in the 9th Circuit; but as the PVC Safety Group is aware, California is currently seeking to adopt state vinyl chloride regulations to supplement the federal regulations, and bringing an action in the 9th Circuit is thus not advisable.

The remaining circuits - the 3rd, 5th and 6th - have the highest concentrations of industry facilities.

3rd Circuit

The 3rd Circuit contains a large cluster of industry facilities. Furthermore, a number of companies in the 3rd Circuit have received compliance orders^{6/} from EPA's Region II following relief valve discharges from their facilities. Accordingly, SPI's position that the issues raised by the DSSE memoranda are "ripe" for review may be strongest if it files in the 3rd Circuit, joining with one of the companies that has received an order.

^{5/} Further, in a very recent environmental case in the 7th Circuit, that court issued a strong opinion upholding Agency action procedurally and substantively. *United States Steel Corp. v. EPA*, slip opinion No. 78-1563 (7th Cir. 1 August 1979).

^{6/} At least some of these orders, however, have now been withdrawn.

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There are, however, two difficulties with this alternative. First, a court may question why SPI and the joining company are bringing an action for pre-enforcement review while they did not bring an action challenging the compliance order.^{7/} Second, and perhaps more importantly, if the Agency now files a civil action against a company in the 3rd Circuit^{8/}, an action by SPI might be consolidated with the government action, or stayed pending resolution of the government action. To the extent that SPI (a) wants to ensure full litigation of certain issues and (b) guarantee that it will be able to control the course of the litigation, the 3rd Circuit may not be the best circuit in which to file.

In light of these potential difficulties, case law in the 3rd Circuit has not been researched in detail. It should be pointed out, however, that one of the leading early cases striking down agency action for failure to comply with notice and comment procedures is *Texaco, Inc. v. FPC*, 412 F.2d 740 (3rd Cir. 1969). Another early (and still influential) case to the same effect was decided by a district court in the 3rd Circuit (*Pharmaceutical Manufacturers Association v. Finch*, 307 F. Supp.

^{7/} We assume that SPI would not be joining with Tenneco or Hooker, the two companies who challenged the Region II compliance orders and then had their orders withdrawn.

^{8/} We have been informally advised by EPA enforcement officials that the government is considering filing civil actions, under Section 113 of the Clean Air Act, in lieu of the compliance orders.

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858 (D.Del. 1970)). In both of these cases, the courts invalidated agency action based on the "substantial impact" of the action on the affected industry.

5th Circuit

The 5th Circuit has the highest concentration of industry facilities and, at least initially, seems the appropriate place for SPI to bring an action challenging the DSSE memoranda (see pp. 2-3, supra).

An important case in the 5th Circuit involving a challenge to agency action based on the agency's failure to comply with notice and comment procedures is Shell Oil v. FPC, 491 F.2d 82 (5th Cir. 1974). The Shell case involved an industry challenge to a Federal Power Commission Opinion relating to gas pricing. The court upheld the FPC's action, reasoning that although the Opinion represented a change in the FPC's regulatory approach, compliance with notice and comment procedures was not required since the Opinion was not "a basic modification of FPC regulations" (491 F.2d at 87-88).

No subsequent case in the 5th Circuit has focused on the precise procedural issues that SPI intends to raise, and the Shell holding is still good law in that circuit. For several reasons, however, the Shell case is not sufficient reason for SPI to avoid the 5th Circuit:

(1) The court in Shell focused primarily on substantive issues and treated the procedural issue in a cursory fashion. Furthermore, a number of cases in other jurisdictions

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decided subsequent to Shell have elaborated upon and helped clarify the procedural issues that SPI intends to raise. See, e.g., Guardian Federal Savings and Loan Association v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978); National Helium Corp. v. FEA, 569 F.2d 1137 (Em. Ct. App. 1977); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974); St. Francis Memorial Hospital v. Weinberger, 413 F.Supp. 323 (N.D. Cal. 1975). The 5th Circuit is likely to employ the analytical framework evolving from these more recent decisions, rather than its own sketchy analysis in Shell, to decide procedural issues raised by SPI. In this connection, note that at least one district court in the 5th Circuit recently has taken such an approach. Dow v. CPSC, 459 F.Supp. 378 (W.D. La. 1978).

(2) In a very recent environmental case, United States Steel Corp. v. EPA, 595 F.2d 207 (5th Cir. 1979), the 5th Circuit set aside an EPA ruling based on the Agency's failure to comply with notice and comment procedures, construing a statutory exception to notice and comment requirements very narrowly. The procedural issue in United States Steel was somewhat different from the issue that SPI intends to raise, but the case demonstrates that the 5th Circuit is not totally unsympathetic to procedural challenges to agency action.

The United States Steel decision is also significant in that although EPA did not contend that the issues there were not "ripe" for review, the court explained at length the "substantial injury" to industry that even a "preliminary step" by the Agency can cause.

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(3) In several recent cases challenging administrative action on substantive grounds, the 5th Circuit has carefully scrutinized the factual basis for the agency action. In Aqua Slide 'n' Dive Corp. v. CPSC, 569 F.2d 831 (5th Cir. 1978), for example, the court invalidated consumer safety regulations on the ground that the regulations were not supported by "substantial evidence". See also, American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978), cert. granted, 99 S.Ct. 1212 (1979); Gulf Oil Corp. V. EPA, 548 F.2d 1228 (5th Cir. 1977). Compare Transcontinental Gas Pipe Line Corp. v. FERC, 589 F.2d 186 (5th Cir. 1979) and Superior Oil Co. v. FERC, 563 F.2d 191 (5th Cir. 1977) (upholding agency action supported by substantial evidence).

(4) In recent cases where ripeness or finality has been an issue, the 5th Circuit has not been reluctant to hear cases brought by industry. See, e.g., United States Steel Corp. v. EPA, supra; Transcontinental Gas Pipe Line Co. v. FERC, supra.

6th Circuit

The 6th Circuit contains two clusters of industry facilities - one in western Kentucky and one in northern Ohio - and based on the considerations outlined above (see pp. 2-3, supra), might also be an appropriate circuit in which to file an action challenging the DSSE memoranda.

Buckeye Power, Inc. v. EPA, 481 F.2d 162 (6th Cir. 1973), cert. denied, 425 U.S. 934 (1976), remains a leading judicial precedent on the notice and comment issue. The court in Buckeye

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Power vacated EPA's approval of state implementation plans, based on the Agency's failure to comply with the procedural requirements of the Administrative Procedure Act. To the same effect, see Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974).

More recently, however, the 6th Circuit has consistently upheld EPA action challenged on either substantive or procedural grounds. In Big Rivers v. EPA, 523 F.2d 16 (6th Cir. 1975), for example, the court upheld EPA's disapproval of a state of Kentucky air quality plan. The Agency's action in that case was based on its view that the state plan gave too much latitude to industry in meeting emission limitations. Similarly, in Cleveland Electric Illuminating Co. v. EPA, 572 F.2d 1150 (6th Cir. 1978), cert. denied, 99 S. Ct. 278 (1979), the 6th Circuit rejected the state of Ohio's suggestion that the court reject EPA's plan to control sulfur dioxide emissions in favor of the state's promise to promulgate a suitable substitute plan in the future. In a careful and lengthy opinion, the court also rejected a procedural challenge to the Agency's action.

Two other recent environmental cases in which the 6th Circuit upheld administrative action are Republic Steel Corp. v. Costle, 581 F.2d 1228 (6th Cir. 1978) (upholding the Administrator's veto of Ohio's issuance of a water pollution permit) and Ohio Environmental Council v. EPA, 593 F.2d 24 (6th Cir. 1979) (upholding Agency action challenged by an environmental group).

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As a rule, the 6th Circuit has been reluctant to overturn agency action as arbitrary and capricious. See, e.g., B.F. Goodrich v. Department of Transportation, 592 F.2d 322 (6th Cir. 1979) (agency conclusions based on "reasonably fair and reasonably reliable" test procedures held not arbitrary and capricious); Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976) (Commissioner's action upheld since supported by substantial evidence).

A final 6th circuit case worth noting is Lubrizol Corp. v. Train, 547 F.2d 310 (6th Cir. 1976). In that case, a statutory exclusive review provision was construed broadly by the court to prohibit district court adjudication sought by the industry.^{9/}

While the 6th Circuit has thus consistently upheld administrative action in recent cases, a district court decision last year in the 6th Circuit deserves mention. In Standard Oil Co. v. FEA, 440 F.Supp. 329 (N.D. Ohio 1978), and the connected case Standard Oil Co. v. FEA, 453 F.Supp. 203 (N.D. Ohio 1978), the district court for the Northern District of Ohio analyzed in detail issues similar to those SPI intends to raise. The court ruled in favor of the industry on all of the issues raised and invalidated the Agency's action in an elaborate and well-reasoned opinion.

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^{9/} See (a), n.l., supra.

Although arguments exist for challenging the DSSE memoranda in the 3rd or 6th Circuits, we believe that, on balance, the 5th Circuit is the most appropriate circuit in which SPI might bring an action challenging the memoranda.

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