RCRA Permit Appeal Fact Sheet **1989**

FACILITY: W.R. Grace & Company - Conn. (W.R. Grace)
Nashua, New Hampshire
NHD 048 724 173
RCRA Appeal No. 89-28

PETITIONER: W.R. Grace

PETITION FILED: October 30, 1989

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- RFI conditions are too vague
- Due process
- Other corrective action issues (schedule of compliance)
- Procedural issues

Summary of Petition:

W.R. Grace is appealing corrective action conditions in the HSWA permit issued to its tank and drum storage facility. The petitioner challenges those conditions that allow EPA to modify the permit unilaterally.

- **RFI Conditions are too Vague.** The petitioner states that the permit contains unduly vague language with respect to EPA's authority to impose additional obligations on the facility. For example, the list of tasks required under Phases II, III, and IV of the corrective action process are prefaced with the phrase, "without limitation."

- **Due Process.** The petitioner contends that the permit improperly allows EPA to modify corrective action submissions and make the modified documents binding without providing the facility with a hearing or an opportunity for judicial review, and without complying with EPA's regulations governing permit modifications. W.R. Grace argues that the permit denies the facility its constitutional right to due process.

- **Schedule of Compliance for Corrective Action.** The petitioner contends that certain dates in the schedule are unreasonable and have been set arbitrarily. W.R. Grace suggests that this schedule can not be justified without any information regarding what activities the facility is going to have to perform during the relevant periods. In addition, the petitioner asserts that the schedule imposed is much more onerous than those imposed in permits issued to other

facilities. For example, the facility is being requested to submit concurrently certain submissions that it considers to be mutually dependent.

- **Procedural Issues.** The petitioner states that the final permit does not contain all of the changes to the draft permit agreed to by EPA in its Responsiveness Summary.

BEFORE THE ADMINISTRATOR
U.S ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
W.R. Grace & Company	)	RCRA Appeal No. 89-28
RCRA Permit No. NHD 048 724 173	)	

ORDER ON PETITION FOR REVIEW

W.R. Grace & Company has petitioned for review of a RCRA permit issued by Region I for Grace's chemical production facility in Nashua, New Hampshire. Among other things, the permit establishes a corrective action program under RCRA §3004(u). As requested by the Agency's Chief Judicial Officer, the Region has submitted a response to the Petition.

Grace's main objection to the permit concerns conditions that allow the Region to revise, or to require Grace to revise, interim proposals and reports prepared by Grace during the corrective action process. [1/] The purpose of any such revisions by the Region would be to ensure that the submissions comply with the permit. The permit also requires Grace to implement some of these interim submittals, including any revised portions, upon approval by the Region. [2/] Although any ultimate corrective

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[1/] The permit requires Grace to submit the following interim proposals and reports: a RCRA Facility Investigation (RFI) Proposal, a Phase I Interim Report, a Phase II Proposal, an RFI Report, a Media Protection Standards (MPS) Proposal, a Corrective Measures Study (CMS) Proposal, and a CMS Report.

[2/] The permit requires Grace to implement the approved RFI Proposal (Special Permit Condition II) and to use the approved

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measures will be added to the permit under the Agency's permit modification rules (40 CFR Parts 124 and 270), revisions by the Region to the interim submittals are not subject to those procedures. Grace argues that these permit conditions violate the Agency's permit modification rules, and deprive it of its right to judicial review and due process.

Under the Agency's rules, review of a permit is not ordinarily granted unless the Petitioner shows that the permit is based on clear error or involves an important policy matter or exercise of discretion. See 40 CFR §124.19; 45 Fed. Reg. 33412 (May 19, 1980). The Agency's most comprehensive expression of its policies regarding RCRA corrective action is contained in the July 1990 Subpart S rulemaking proposal under RCRA §3004(u). These proposed rules provide that a Region may revise (or direct the permittee to revise) interim proposals or reports submitted in the corrective action process, and that any requirements contained in the interim proposals become an enforceable part of the permit after the Region's review, revision, and approval. See 55 Fed. Reg. 30875 (July 27, 1990) (proposed §264.512(b) and §264.513(c)); id. at 30812. [3/] Although the proposed Subpart S

[2/](...continued)
MPS as "guidelines" (Conditions VII-VIII). It also provides that any requirements in the approved Phase I Interim Report and Phase II Proposal shall be considered as permit requirements. See Special Permit Condition IV.

[3/] Although the Subpart S proposal provides a set of streamlined procedures for modifying schedules of compliance in a corrective action program, these procedures would apply to interim submittals only after such submittals become part of the permit
(continued...)

rules do not yet have legal force, Grace has failed to show that the approach reflected therein (and in its permit) is based on clear error. Such Regional revision of interim submissions does not conflict with the Agency's permit modification rules because such submissions are not part of the permit at the time of the Region's review and revision. [4/] The permit does not purport to deprive Grace of any available judicial review, nor could it effectively eviscerate any such review. Although Grace invokes the constitutional due process clause, the permit on its face provides an opportunity for adequate process because Grace will be able to make its views known through its initial submissions as well as any subsequent communications with the Region, and it should receive a reasoned response to those views from the Region. [5/]

[3/](...continued)
upon approval by the Region. See 55 Fed. Reg. at 30883 (proposed §270.34(c)); id. at 30847.

[4/] Contrary to Grace's contention (Petition at 9-10), use of the term "modification" in the permit to describe Regional revisions to Grace's interim submissions does not constitute a determination or concession that such revisions are permit modifications. If the Region decides to alter any term actually contained in the permit, the permit requires the Region to proceed under the Agency's permit modification rules. See Special Permit Condition XVIII.

[5/] Cf. Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1483-85 (D.C. Cir. 1989) (informal procedures for reviewing corrective action orders issued under RCRA §3008(h) do not, on their face, violate constitutional due process guarantees). The Agency recognizes the significance of this issue to the regulated community and other interested parties, and it will continue to consider the matter in the ongoing Subpart S rulemaking. In the interim, it is expected that the Regions will apply the relevant permit terms in a manner that assures, where necessary, that the

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For the reasons set forth above, in the preamble to the Subpart S proposal, and in the Region's Response to the Petition, Grace has failed to show that the permit is based on clear error or otherwise warrants review, and its petition is therefore denied. [6/]

So ordered.

Dated: MAR 25 1991

William K. Reilly
Administrator

[5/](...continued)
permittee receives an adequate opportunity to be informed of, and to respond to, any Regional revisions to the interim submissions prior to Regional approval.

[6/] Grace also challenges certain deadlines in the permit's schedule of compliance, but it has failed to show that the deadlines are arbitrary or an abuse of discretion. The deadlines are subject to modification if future circumstances so warrant. Grace further objects to the wording of certain permit conditions as vague, but the Region's response to the Petition contains a limiting construction of the disputed terms which shall be considered authoritative and binding and which thus renders the issue moot. Grace also seeks review due to Region I's failure to make certain changes from the draft to the final permit that the Region had previously agreed to make, but the Region has again agreed to make those changes (and it is hereby ordered to do so prior to reissuing the final permit decision under 40 CFR §124.19(f)(i)). These issues are therefore moot as well.

CERTIFICATE OF SERVICE

I hereby certify that copies of the Order on Petition for Review in the matter of W.R. Grace & Company, RCRA Appeal No. 89-28, were mailed to the following in the manner indicated:

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Dated: March 27, 1991

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