RCRA Permit Appeal Fact Sheet **1990**

FACILITY: LCP Chemicals - North Carolina, Inc. (LCP)
Riegelwood, North Carolina
NCD 991 278 631
RCRA Appeal No. 90-4

PETITIONER: LCP

PETITION FILED: February 7, 1990

STATUS OF PETITION: See Permit Appeal Status Report

ISSUE: RFI conditions are not justified

Summary of Petition:

LCP is petitioning for review of a single issue, which arises in several terms included in the HSWA portion of the permit for its Riegelwood, North Carolina facility. Specifically, the petitioner objects to the inclusion of the Old Oil Spill Area as an "area of concern" in the RFI. The petitioner argues that because Congress has enacted specific statutory provisions to address investigatory and corrective action requirements for non-regulated units, and because Region 4 has specifically defined the scope of that investigatory and corrective action program to exclude areas like the Old Oil Spill Area, it is arbitrary, capricious, and beyond the Region's and State's authority to create another category of areas to be subject to these requirements.

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

In the Matter of:	)	
LCP Chemicals - North Carolina, Inc.	)	RCRA Appeal No. 90-4
RCRA Permit No. NCD 991 278 631	)	

ORDER DENYING REVIEW

By petition dated February 1, 1990, LCP Chemicals - North Carolina, Inc. ("LCP") seeks review of a RCRA permit authorizing operation of a chemical plant located in Riegelwood, North Carolina. The permit was jointly issued by U.S. EPA Region IV and the North Carolina Department of the Environment, Health and Natural Resources ("NCDEHNR"). Pursuant to the request of the Agency's Chief Judicial Officer, the Region filed a response to the petition dated March 23, 1990, defending the permit as written.

Under the rules that govern this proceeding, there is no right to a review of the Region's permit decision. Ordinarily, a RCRA permit determination will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is on the petitioner. See 40 CFR §124.19. Upon

consideration of the petition and the response, I conclude that LCP has failed to show that the Region's permit decision is clearly erroneous or otherwise warrants review.

In 1973, a one-time release of transformer oil spilled into the Old Oil Spill Area of LCP's facility. During the permit application process the Region requested information from LCP pursuant to RCRA §3007 on the nature of the waste released in the 1973 spill. LCP responded that the waste was "non-PCB containing transformer oil," but provided none of the requested analytical data about either the transformer oil or the contaminated soil.

Because the Region's concerns about this area of contamination were not resolved by LCP's response, the draft permit designated the Old Oil Spill Area as a solid waste management unit ("SWMU") subject to corrective action under RCRA §3004(u). [1/] In response to LCP's comments on the draft permit, the Region acknowledged that the Old Oil Spill Area was improperly characterized as a SWMU. [2/] The Region, however, concluded that further investigation of the Old Oil Spill Area is necessary to determine if there are any hazardous constituents present

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[1/] 42 U.S.C. §6924(u) ("[A] permit * * * shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility * * *.")

[2/] The term "SWMU" includes areas into which solid waste has been routinely and systematically released, but it does not include a one-time spill, such as the 1973 spill in the Old Oil Spill Area. See In re American Cyanamid Co., RCRA Appeal No. 88-22 (Oct. 31, 1989); 55 Fed. Reg. 30808-30809 (July 27, 1990).

that may pose a threat to human health or the environment. [3/] Accordingly, in the final permit the Region exercised its RCRA §3005(c)(3) [4/] omnibus authority and designated the Old Oil Spill Area as an "Area of Concern" subject to soil sampling requirements. [5/]

LCP contends that corrective action can be imposed only under RCRA §3004(u), which by its terms is limited to SWMUs, and that the Region is without statutory and regulatory authority to create a new category -- "Area of Concern" -- subject to corrective action. [6/] To the contrary, the Agency's RCRA corrective action authority is not limited to SWMUs. Under RCRA §3005(c)(3), the Agency can require corrective action to address releases from non-SWMU areas when necessary to protect

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[3/] See Region's Response to Comments, p.6.

[4/] 42 U.S.C. §6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator * * * determines necessary to protect human health and the environment."). This statutory omnibus provision is implemented by 40 CFR §270.32(b)(2).

[5/] The soil sampling requirement is part of the RCRA Facility Investigation ("RFI") required by the permit. Based upon a review of the completed RFI, the Regional Administrator will notify LCP whether further investigative actions or a Corrective Action Study are needed. See Permit section II.E.1.

[6/] LCP also contends that the NCDEHNR made the same mistake in its portion of the RCRA permit. The State-issued portions of the RCRA permit, however, are not subject to federal administrative review under 40 CFR §124.19(a), which limits federal administrative review to RCRA permit decisions made by EPA Regions under 40 CFR §124.15. See RCRA §3006(b), 42 U.S.C. §6926(b) (authorized State program operates "in lieu of" federal program); In re BP Oil Co., RCRA Appeal No. 89-13 (July 25, 1989) (and cases cited therein).

human health and the environment. [7/] Specifically, §3005(c)(3) "provides a sufficient legal predicate for requiring soil sampling for a suspected release from a non-SWMU." In re Amerada Hess Corp., RCRA Appeal No. 88-10, p.3 (Aug. 15, 1989). The Region concluded that soil sampling of the Old Oil Spill Area is necessary to protect human health and the environment, and therefore properly exercised its §3005(c)(3) authority in this case. The Region's characterization of the spill area as an "Area of Concern" has no bearing on whether that authority was properly exercised.

Accordingly, for the reasons set forth above and in the Region's response to the petition, review is denied.

So ordered.

Dated: FEB 14 1991

William K. Reilly
Administrator

[7/] See In re American Cyanamid Co., RCRA Appeal No. 88-22 (Oct. 31, 1989); In re Amerada Hess Corp., RCRA Appeal No. 88-10 (Aug. 15, 1989); 55 Fed. Reg. 30809 (July 27, 1990).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of LCP Chemicals - North Carolina, Inc., RCRA Appeal No. 90-4, were sent to the following persons:

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Dated: FEB 19 1991

Brenda H. Selden
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