RCRA Permit Appeal Fact Sheet **1992**

FACILITY: Brush Wellman Inc. (BWI)
Elmore, Ohio
OHD 004 212 999
RCRA Appeal No. 92-17

PETITIONER: BWI

PETITION FILED: May 5, 1992

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- RFI conditions are not justified
- Other corrective action issues (schedule of compliance; additional solid waste management units; permit completeness)

Summary of Petition:

BWI is petitioning for review of the HSWA permit issued by Region 5 to Brush Wellman's facility in Elmore, Ohio. The petitioner maintains that the permit was incomplete and that its comments regarding the solid waste management units (SWMUs) identified as requiring corrective action were not addressed. In addition, BWI contends that the time periods for developing the RFI and corrective measures study (CMS) work plans and conducting the RFI and CMS are restrictive and unnecessarily burdensome.

- **RFI Condition are not Justified.** BWI maintains that Attachment II of the permit, "Summary of Solid Waste Management Units," contains several inaccuracies and misconceptions. The petitioner contends that several of the units listed as active are actually inactive, and that other units should be removed from the list entirely. BWI also contends that its comments regarding Attachment II were never addressed by the Agency.

- **Schedule of Compliance.** BWI objects to the time periods proposed for developing the RFI and CMS work plans and implementing the RFI and CMS. The petitioner believes that these time frames (i.e., 90 days to prepare each work plan and 30 days to implement each plan) are restrictive and unnecessarily burdensome. In addition, BWI argues that work plans developed under these short time frames may lack quality and detail. Therefore, the petitioner believes that the 90 day work plan submission requirements should be extended to 120 days and that the 30 day implementation requirements should be extended to 45 days. BWI contends that the expanded time periods will result in higher quality work plans and improved planning efforts.

- **Additional Solid Waste Management Units.** To avoid a possible duplication of efforts, the petitioner believes that 17 additional SWMUs should be addressed in the permit. BWI maintains that if these units are addressed at a later date, BWI will incur an unnecessary financial burden when it develops separate RFI and CMS work plans for these units. To be efficient, the petitioner maintains that only one RFI and CMS work plan, addressing all of the facility's units of concern, should be developed.

- **Permit Completeness.** BWI contends that Attachments I, II, and III were not included with the permit documents received by the facility. Since these attachments list the SWMUs requiring further investigation and define the scope of work for the corrective action plan, the petitioner maintains that the RFI work plan can not be developed until these attachments are received.

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
Brush Wellman, Inc.	)	RCRA Appeal No. 92-17
Elmore, Ohio Facility	)	
	)	
Permit No. OHD 004 212 999	)	

Decided August 25, 1992

ORDER DENYING REVIEW

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Nancy B. Firestone.

BRUSH WELLMAN, INC., ELMORE, OHIO FACILITY

RCRA Appeal No. 92-17

ORDER DENYING REVIEW

August 25, 1992

Syllabus

Brush Wellman has petitioned for review of a permit issued to its Elmore, Ohio facility by USEPA Region V covering certain hazardous waste management activities. Brush Wellman raises three substantive concerns: The Region's alleged failure to consider comments on the status of certain solid waste management units ("SWMUs"); the failure to include in the final permit additional SWMUs identified by Brush Wellman to Region V; and the allegedly overly restrictive time periods allowed for certain activities.

Held: The final permit does reflect the Petitioner's comments on the status of the SWMUs. As to the lack of inclusion of the additional SWMUs and the time periods cited in the permit, Petitioner has failed to demonstrate that review is warranted. Accordingly, the Petition is denied.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Nancy B. Firestone.

Opinion of the Board by Judge Reich:

Brush Wellman, Inc. has submitted an Appeal and Petition to Review ("Petition") to the Environmental Appeals Board in accordance with 40 CFR §124.19; 57 Fed. Reg. 5335 (Feb. 13, 1992). The Petition seeks review of certain conditions in a permit issued by USEPA Region V to Brush Wellman's Elmore, Ohio facility under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) and the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §6901 *et seq.* Region V issued the portion of the RCRA permit incorporating the requirements of HSWA for which the State of Ohio is not yet authorized. The Region V permit, and a permit issued by the State covering RCRA requirements for which

it is authorized, together constitute the RCRA permit for this facility.

Initially, it should be noted that under the rules that govern this proceeding, a permit ordinarily 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.

Region V does not contest the timeliness of the Petition. Region V also does not dispute that Petitioner satisfied the requirements of 40 CFR §§124.13 and 124.19(a) by raising its concerns during the comment period on the draft permit.

In this instance, Petitioner raises three substantive objections to the permit. [1] The first issue relates to alleged inaccuracies and misconceptions relative to the status of several solid waste management units ("SWMUs") addressed in the permit. In its comments on the draft permit, [2] Brush Wellman identified nine SWMUs listed in Attachment II of the draft permit which Petitioner asserts were not accurately described as to current status. The Petition states that these comments were not addressed in the Agency's response to comments document.

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[1] Petitioner also raises a concern that it did not receive a complete copy of the final permit; Attachments I, II and III were missing from the copy it received. Region V disputes this, indicating the Brush Wellman received by certified mail one copy of the permit with the attachments and one without. In any event, after receipt of a copy of Brush Wellman's Petition, the Region sent an additional copy of the Attachments to Brush Wellman by overnight mail. We assume this resolves this concern.

[2] Letter from Larry Chako, Environmental Control Department, Brush Wellman to Thomas Manning, RCRA Permitting Branch, Region V dated January 30, 1992.

Petitioner is correct that the Response to Comments document summarizing the comments on the draft permit and the Region's response does not address these comments. [3] However, the final permit does reflect the input provided by Brush Wellman as discussed below. The listing of SWMUs is contained in Attachment I to the final permit. Since Brush Wellman indicates that it did not receive a copy of Attachment I (see note 1, *supra*), it would not have known that this was the case. For purposes of this appeal, we will assume that Petitioner continues to object to the Region's treatment of its comments and proceed to address the adequacy of the Region's actions in this regard.

At the request of the Board, Region V submitted a Response to Brush Wellman's Petition on June 22, 1992. In its Response, the Region summarizes the changes it made in the final permit to incorporate Brush Wellman's comments, as reflected in Attachment I. [4] For five of the SWMUs, Brush Wellman indicated that they were inactive and the final permit so designates them. [5] Brush Wellman further indicated that one SWMU should be removed because corrective action would be taken under the NPDES program. The Region changed the designation to "active, NPDES." Finally, the company indicated that three SWMUs listed as active in the draft permit should be designated as inactive since two had been cleaned in accordance with an Ohio EPA-approved closure plan and were awaiting closure reports and the third was converted to a drum storage facility which was addressed in the Part B application. The final permit continues to list these units as active but states that "[t]wo of the three units (35-37) have been clean-closed. The Ohio Environmental Protection Agency is currently awaiting a closure report." Permit, Attachment I at I-2.

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[3] *See* Attachment E to Region V Response to the Petition.

[4] Response at 5-6.

[5] We note that designating a SWMU as inactive does not obviate the need for investigating whether there have been releases from the SWMU which require corrective action.

As for the reason for listing these three units, the permit indicates "[t]he facility should verify the integrity of these units." *Id.* [6]

Thus, Region V clearly did consider Brush Wellman's comments and made what it determined to be appropriate modifications to the status designations of the SWMUs. After evaluating the Region's response to those comments, we see no error or abuse of discretion in the Region's actions which warrants review and accordingly review of this issue is denied.

The second substantive issue raised in the Petition is that it does not include 17 additional SWMUs identified in a November 25, 1991, letter from Brush Wellman to Region V. Petitioner expresses a concern that it will incur "an unnecessary financial burden in the event work must be duplicated in the preparation of additional RFI and CMS workplans" for these SWMUs if they are added to the permit later. Petition at 2.

Region V, in its Response to the Petition, details the history of correspondence between the Region and the company concerning these additional SWMUs. Response at 6-8. The Region was first notified of these SWMUs by telephone on November 22, 1991, and subsequently by letter of November 25, 1991. That letter included only the names of the potential SWMUs, with no technical documentation. To obtain the additional information necessary to determine whether some or all of these SWMUs should be added to the final permit, the Region sent an Information Request letter to the company on January 30, 1992. After requesting and receiving a delay in providing a response, Brush Wellman provided the additional information on March 20, 1992. The final permit was issued on March 31, 1992, before the additional information could be fully analyzed.

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[6] While the Region's Response does not discuss the unit converted to a drum storage facility addressed in the Part B application, the permit allows the corrective action workplans and reports to incorporate Part B information by reference. Permit, Attachment II at 1.

Region V argues that if Brush Wellman had submitted the requisite information by the original due date, perhaps the data could have been reviewed before final permit issuance. In any event, it indicates that it is currently evaluating the information on the 17 potential SWMUs and if it determines that any of these SWMUs should be incorporated into the permit, it will do so as soon as practicable.

The Region's approach seems technically sound and fully responsive to Brush Wellman's concerns, given the receipt of the additional information so late in the permit process. Presumably, Region V could have delayed issuance of the final permit until after it completed its review of the additional information but it certainly was reasonable not to delay issuance of the final permit for this purpose. Petitioner's hypothetical concerns about possible duplication of effort, especially when mitigated by Region V's commitment to amend the permit as soon as practicable after completing evaluation of the additional data, do not warrant review, and review is accordingly denied. [7]

The final substantive concern raised by Brush Wellman relates to the time periods specified for certain activities. Brush Wellman argues that the time periods "are restrictive and unnecessarily burdensome. The relatively short time allowances would likely result in the Agency receiving workplans lacking the proper detail and of questionable quality." Petition at 2. Brush Wellman proposes extending the submission requirements for both the RCRA Facility Investigation ("RFI") Workplan and the Corrective Measures Study ("CMS") Workplan from 90 days to 120 days for each submission. It further suggests extending the dates for both RFI Implementation and CMS Implementation from 30 days to 45 days.

Region V, in its Response to the Petition, quotes its responses to the company's comments on the draft permit which

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[7] While not a consideration in this decision, we have been advised that Region V completed its analysis and notified Brush Wellman on June 29, 1992, that 8 of the 17 potential SWMUs should be included in its RCRA Facility Investigation.

raised similar concerns. [8] These responses indicate that the time periods are "fair and reasonable" and that the time periods will not be modified "unless Brush Wellman can justify the need for additional time through a permit modification request." Attachment E to Region V Response to the Petition at 3-4. The Region asserts in its Response to the Petition that the schedules are suitable for the Brush Wellman facility and that the proper method to raise such questions is through a permit modification request addressed to the Regional Administrator.

We believe that Brush Wellman is free to challenge on appeal the timeframes in the final permit, rather than seeking additional time only through a permit modification request. In this instance, however, the Petition fails to establish that the time periods established by the Region are based on a finding of fact or conclusion of law which is clearly erroneous or that they are based on an exercise of discretion or important policy consideration which warrants review. There is no support provided for the concerns Petitioner asserts or any justification for the extended timeframes. There are only unsubstantiated assertions that the time periods will result in products of questionable quality. While the Region's rebuttal is equally conclusory, Petitioner has the burden of demonstrating that review is warranted. Petitioner has not met this burden and review of this issue is accordingly denied. [9]

For all of the foregoing reasons, review of the Petition is hereby denied.

So ordered.

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[8] In its comments on the draft permit, Brush Wellman suggested a 210-day period for both the RFI and CMS Workplans and a 90-day period for RFI Implementation. It did not suggest an alternative timeframe for CMS Implementation since the draft permit, apparently in error, provided for 90 days for CMS Implementation.

[9] This denial is obviously without prejudice to the company's ability to seek additional time through a permit modification request.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Brush Wellman, Inc., Elmore Ohio Facility, RCRA Appeal No. 92-17, were sent to the following persons in the manner indicated:

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Dated: AUG 25 1992

Johnnese R. Wilson for
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