RCRA Permit Appeal Fact Sheet **1987**

FACILITY: Hoechst Celanese Corporation (Hoechst Celanese)
Greer, South Carolina
SCD 097 631 691
RCRA Appeal No. 87-13

PETITIONER: Hoechst Celanese

PETITION FILED: July 1, 1987

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:
- RFI conditions are too vague
- RFI conditions are not justified
- Definition of solid waste management unit
- Due process
- Other corrective action issues (definition of "contamination")
- Procedural issue
- Level of detail

Summary of Petition:

The petitioner raised issues relating to the corrective action section of the permit and several general permit issues.

- **RFI Conditions are too Vague.** Hoechst Celanese believes that the RFI permit conditions in Part II of the permit are so broad, indefinite, and completely open ended as to make it impossible for the company to know how to comply with the permit. Consequently, Hoechst Celanese believes that it has been effectively denied due process; a permittee may challenge permit conditions within 90 days after permit issuance, but Hoechst Celanese contends that Part II is worded so generically that site specific permit conditions will not be known until after the 90 days has passed.

- **RFI Conditions are not Justified.** Hoechst Celanese contends that the RFI is not justified.

  - The petitioner believes that the Regional Administrator (RA) ignored the findings of the RCRA facility assessment (RFA) by failing to use them to focus more narrowly the scope of the RFI.

- The RFA concluded that only soil sampling should be required around the main waste oil tank; the RFI required investigation for all media pathways for this tank.

- Similarly, the permit requires Hoechst Celanese to conduct a full RFI for the portable waste oil storage tanks, while the RFA concluded that there was no release or threatened release to the environment from the tanks.

- **Definition of Solid Waste Management Unit.** Hoechst Celanese objects to the definition of solid waste management unit (SWMU) contained in the permit.

  - The petitioner argues that the definition of SWMU contained the in permit does not duplicate the language contained in the preamble to the July 15, 1985, codification rule or the RFI guidance document.

  - The petitioner argues that a chemical storage lagoon for which Hoechst Celanese certified closure on November l0, 1982, should be handled under a post-closure permit, rather than be included in the operating permit as a SWMU, subject to Section 3004(u) corrective action.

  - Hoechst Celanese also maintains that the permit fails to provide clearly that effluent discharges from an NPDES-permitted waste treatment plant cannot be defined as a SWMU in the receiving water.

  - Finally, the petitioner objects to defining each SWMU separately and requests that some units be grouped for the purposes of conducting the RFI.

- **Due Process.** Hoechst Celanese states that it is a violation of due process to require Hoechst Celanese to submit the final RFI report within 30 days after receiving the Region's comments on the draft report.

- **Definition of "Contamination."** The petitioner objects to a definition of "contamination" in the permit based on exceedance of background levels, rather than levels established as protective of human health and the environment (such as alternate concentration limits), as a trigger for corrective action under Section 3004(u).

- **Procedural Issue.** The petitioner raises a procedural issue when it states that the permit fails to allow Hoechst Celanese to substitute the list of constituents in the proposed Appendix IX for those in Appendix VIII, if the Appendix IX regulations are made final during the term of the permit.

- **Level of Detail.** The petitioner believes that the permit goes into too much detail and is not procedurally appropriate. The petitioner feels that the level of detail in the permit is excessive, for it specifies the use of SW-846 test methods, even when these analytical methods are inappropriate for some of the substances on Appendix VIII.

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

In the Matter of:	)	
	)	RCRA Appeal No. 87-13
Hoechst Celanese Corporation	)	
	)	
RCRA Permit No. SCD 097631691	)	

ORDER ON PETITION FOR REVIEW

Hoechst Celanese Corporation has petitioned for review of the federal portion of a permit issued in May 1987 by EPA Region IV under the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C.A. §§6901-6991i. The permit authorizes Hoechst Celanese to operate an onsite hazardous waste storage and treatment facility at its plant in Greer, South Carolina. The federal portion imposes corrective action requirements under the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, 98 Stat. 3221. The balance of the permit was issued by South Carolina, an authorized state under RCRA §3006. As requested by EPA's Chief Judicial Officer, the Region submitted a response to the petition, together with relevant portions of the administrative record (Region Response).

Under the rules governing this proceeding, the Region's permit decision is not subject to automatic review. See 40 CFR §124.19. [1/] 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. [2/] When the Agency issued Section 124.19, it stated that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is therefore on the petitioner.

In its Petition, Hoechst Celanese argues that: (1) the Region improperly treated a closed unit, the Chemical Storage Lagoon, as a unit subject to corrective action under the HSWA portion of the facility permit rather than through a separate post-closure permit; (2) the permit's corrective action provisions are vague, indefinite, and overbroad; (3) the permit definition of "contamination" is unduly broad; (4) the

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[1/] All citations to the Code of Federal Regulations are to the 1987 edition unless otherwise noted.

[2/] See In re Highway 36 Land Dev. Co., RCRA Appeal No. 87-5, at 2 (Sept. 2, 1987); In re Bryant Waste Management, Inc., RCRA Appeal No. 85-2, at 2 (June 23, 1986); In re Earth Indus. Waste Management, Inc., RCRA Appeal No. 84-3(a), at 2 (March 12, 1985).

investigation requirements for the portable waste oil storage tanks contradict prior Agency conclusions; (5) the permit definition of "solid waste management unit" (SWMU) is inconsistent with Agency rules and policies; (6) the permit erroneously fails to exclude NPDES discharges from coverage; (7) the permit improperly requires separate RCRA Facility Investigations (RFIs) for each SWMU; (8) the thirty-day period for submitting the Final RFI Report is unreasonably short; (9) the permit fails to allow for monitoring of the Appendix IX list of constituents as opposed to the Appendix VIII constituents; and (10) the permit improperly requires the use of analytic procedures specified in guidance document SW-846. For the reasons set forth below and in the Region Response, Hoechst Celanese has failed to meet its burden under 40 CFR §124.19 except for the final issue.

Issue 1: In 1985 Hoechst Celanese submitted a post-closure permit application for its Chemical Storage Lagoon, but that application is not currently being processed. Instead, Region IV has included the Lagoon as a unit subject to corrective action under the HSWA portion of the facility permit. Hoechst Celanese requests that corrective action for the Lagoon be accomplished through a separate post-closure permit for that unit rather than through the facility permit. Petition at 8.

The permittee is concerned that the time and effort already expended in applying for a post-closure permit will

be wasted if corrective action for the Lagoon is carried out under the facility permit. Petition at 18-19. The Region has stated, however, that any investigations or other work performed to date in connection with the 1985 application may be relied on and incorporated into the RFI plan required by the facility permit. See EPA Response to Comments on the Draft Permit, at 2 (May 22, 1987) (Attachment 6 to Region Response). The Region should take full advantage of the permittee's prior efforts to avoid unnecessary repetition of work and to minimize the permittee's paperwork obligations. Under the facility permit, Hoechst Celanese is required to prepare an RFI plan specifying actions "necessary" to determine the nature and extent of any releases. Permit Condition II.C.1. If, as Hoechst Celanese contends, only those actions identified in its post-closure permit application are necessary for the Lagoon, no substantial additional costs should be incurred.

The Region's decision to include the Lagoon in the HSWA portion of the facility permit is consistent with the applicable regulatory requirements. When Region IV issued the permit in May 1987, the rules in effect did not require post-closure permits for units (like the Lagoon) that closed prior to January 26, 1983. See 40 CFR §270.1(c)(1987). This provision has since been amended to require post-closure permits for units (like the Lagoon) that received waste after July 26, 1982. See 40 CFR §270.1(c)(1988); 52 Fed. Reg.

45,798 (December 1, 1987). The Region, however, properly applied the rules as they existed prior to permit issuance. See 40 CFR §270.32(c).

Hoechst Celanese misstates the Agency's position on the effect of RCRA §3005(i). Petition at 10-15. Corrective action for releases from a regulated unit to the uppermost aquifer must be conducted under 40 CFR §§264.91-.100. See RCRA §3005(i); 40 CFR §264.90(a)(2); 50 Fed. Reg. 28,714-15 (July 15, 1985). Other releases are governed by RCRA §3004(u) and 40 CFR §264.101. Id. The permit at issue makes clear, however, that the proper regulatory requirements will be applied to the Lagoon. [3/] Inclusion of these requirements in the facility permit here contravenes neither RCRA §3005(i) nor the Agency's preference for using a permit mechanism to implement corrective action. [4/]

[3/] See Permit Condition II.E.5 (requiring permittee to use 40 CFR §§264.91-.100 to establish corrective action for the Lagoon).

[4/] Hoechst also attacks a January 26, 1987 letter from Region IV regarding this issue as an unpublished rule that violates the Administrative Procedure Act (APA). Petition at 15-17. That letter, however, did not modify the Agency's rules, but merely set forth the plain meaning of the rules in force, and thus was not subject to the publication requirements of the APA.

Although Hoechst Celanese suggests that the Region's approach will delay corrective action at the Lagoon, nothing in the permit prohibits the permittee from complying with Sections 264.91-.100 while simultaneously going forward with corrective action under Section 264.101 for the other units. If corrective action at the Lagoon is unreasonably and unnecessarily delayed pending investigation of the other units,

(continued...)

Issue 2: Permit Condition II.C.1 requires Hoechst Celanese to prepare an RFI plan for six specified SWMUs. Hoechst Celanese asserts that Region IV failed to use the RCRA Facility Assessment (RFA) to tailor the scope of the RFI, but instead issued a generic, boilerplate permit that requires reexamination of all possible releases to all possible pathways. Petition at 20-26, 30-32. Although the permit identifies the SWMUs of concern, it does not specify the potential releases or media to be investigated during the RFI. Instead, the permittee must prepare an RFI plan delineating these details and then revise the plan as directed by the Region.

The issue raised by Hoechst Celanese involves competing concerns, namely the Agency's need to ensure that the corrective action process remains flexible and expeditious versus the permittee's interest in having its obligations identified as early and narrowly as possible. By necessity, corrective action is often a phased process because, at the time of permit issuance, there might not be sufficient information to identify the particular corrective action measures needed. See 50 Fed. Reg. 28,714 (July 15, 1985). If this is the case, the permit should establish a time frame under which

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4/(...continued)
Region IV should consider modifying the permit to include an accelerated schedule of compliance for the Lagoon.

the needed information will be obtained. Id. As the process advances -- from RFA to RFI plan to RFI report to a final decision on the specific corrective action measures required -- newly acquired data is used to refine each subsequent phase. Once all necessary information is acquired and appropriate corrective action identified, the permit is modified accordingly. Id.

The Region recognizes that the RFA should be used to tailor the RFI plan. Region Response at 4 and Attachment 6. The basic disagreement between the parties is procedural. Under the permit as written, future disputes as to the appropriate scope of the RFI would be resolved by the Region. The permittee, on the other hand, wants the Region to use the RFA now to establish more specific permit conditions regarding the RFI plan, conditions which would be subject to administrative and judicial review.

Hoechst Celanese invites the Agency to use this permit appeal as a vehicle for establishing nationwide policy on corrective action procedures. Petition at 5. I decline the invitation. EPA is currently drafting comprehensive corrective action regulations. The complex issues involved are best resolved in that rulemaking forum. Until these rules are promulgated, regional decisions in this area are entitled to deference for several reasons. First, even where (as here) an RFA has been completed, there still may be serious concerns about the quality of the RFA information or

analysis. The Regional Administrator is in the best position to determine the extent to which information from the RFA should be incorporated into the permit. [5/]

Second, Hoechst Celanese's due process arguments regarding the opportunity for review are unavailing. The Petition fails to show that due process requires administrative review for disputes regarding the scope of the RFI, and at all times Hoechst Celanese will be free to pursue whatever judicial review procedures are available. [6/] The permit requires that any specific corrective action measures be added to the permit through formal modification procedures (see Permit

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[5/] The Agency has recognized that in certain situations a permit should be issued before an RFA is completed, thereby initially resulting in a permit largely devoid of details as to the corrective action that will ultimately be required. See Memorandum from J. Porter to Hazardous Waste Division Directors, Region I-X, Implementation of RCRA Facility Assessments, OSWER Policy Directive No. 9502.00.4 (August 21, 1986).

[6/] The permittee's reliance on In re U.S. Nameplate Co., RCRA (3008) Appeal No. 85-3 (CJO, March 31, 1986), is unavailing. There the record failed to show that a source-specific waste listing in the rules -- "wastewater treatment sludges from electroplating sources" -- was sufficient to put generators on notice that etching waste was included. Id. at 6-7. Although a background document to the listing defined electroplating to include etching, the Chief Judicial Officer held that passing references to that document in the Federal Register were insufficient to cure the listing deficiency. Id. at 13. Here, however, there is no uncertainty as to the permittee's current obligation: to prepare an RFI plan. Unlike the respondent in U.S. Nameplate, at no point will Hoechst Celanese be subject to enforcement action based on vague or unclear obligations. As the corrective action process proceeds, the details of each subsequent requirement will come to light.

Condition II.G), which will present an opportunity for review at that time. [7]

Third, as the Regions press forward to meet various permitting deadlines imposed by RCRA, their resources are being seriously taxed, and they should be given sufficient flexibility in devising appropriate corrective action provisions. In short, Hoechst Celanese has failed to show that the Region's permit determination in this regard is based on clear legal or factual error or otherwise warrants review. [8]

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[7] Hoechst Celanese argues that the permit violates the APA because it was issued "without any explanation of how those [corrective action] provisions were derived * * *." Petition at 25 (emphasis in original) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 167 (1962)). The basis of this contention is not entirely clear. The permit requires Hoechst Celanese to prepare an RFI plan, conduct the RFI, and to prepare other plans and reports as necessary to ascertain what corrective action measures are necessary. This basic investigative framework is consistent with prescribed Agency policy for all RCRA facilities subject to EPA's corrective action program. See, e.g., RCRA Corrective Action Plan (Interim Final, June 1988); National RCRA Corrective Action Strategy, 51 Fed. Reg. 37,608 (October 23, 1986) (request for comments). Moreover, unlike the motor carrier application at issue in Burlington -- which required an adjudication -- a RCRA permit application is not subject to an APA adjudicative hearing. Once the Agency has reached a reasonable and legally proper permit decision based on the administrative record, it need not provide detailed findings and conclusions, but instead must reply to all significant comments on the draft permit or permit application as required by 40 CFR §124.17. The record shows that Region IV considered the comments made by Hoechst Celanese on this issue and adequately responded to them.

[8] Hoechst Celanese further contends that the permit violates EPA policy based on the following language from a 1986 guidance document:

(continued...)

Issue 3: The permit definition of "contamination" is based on background levels. Hoechst Celanese argues (Petition at 26-29) that this term is inconsistent with Section 264.101(a) of the rules, which requires corrective action only "as necessary to protect human health and the environment." The permit, however, does not use the term "contamination" or background levels as a trigger for corrective action. Instead, the RFI Report is to describe contamination at the facility, descriptions that will then be used by the Region to decide whether corrective action is necessary under the relevant statutory and regulatory standards. It is perfectly consistent with the statute to require a permittee to identify contamination based on background levels, leaving it to the Region then to specify the releases that require cleanup to protect human health and the environment. [9]

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[8] (...continued)

> In most cases, the conditions developed by the Regulatory Agency after the RFA and included in the * * * permit and accompanying fact sheet should allow the owner or operator to develop a sufficiently focused RFI.

Petition at 20 (quoting RCRA Facility Investigation Guidance (Oct. 1986)). The Region has made clear its willingness to accept an RFI plan developed in light of the RFA, and nothing in the permit precludes this result.

[9] Hoechst Celanese's reference to the definition of "decontaminate" in an unrelated portion of the rules (Petition at 28-29) is simply irrelevant to the meaning and propriety of the term "contamination" as defined in the permit.

Issues 4-8: The listing of the portable storage tanks as SWMUs to be considered in the RFI plan (issue 4) is based on the permittee's own statements regarding releases. See Region Response at 6-7. As noted above, the permit requires the RFI plan to identify only those actions "necessary" to address any releases, not necessarily a full-scale RFI as the permittee contends. Region IV has made clear its willingness to accept an RFI plan tailored in light of the RFA. The issue regarding the definition of "SWMU" (issue 5) was not sufficiently raised during the public comment period and thus is not cognizable on appeal. See 40 CFR §§124.13 and .19. [10/]

[10/] In any event, the permit definition of "SWMU" is not inconsistent with the preamble to Section 264.101 as the permittee suggests. The language in the preamble quoted by Hoechst Celanese merely describes some of the units that should be included as SWMUs. It does not purport to provide an all-inclusive definition of that term. See 50 Fed. Reg. 28,712 (July 15, 1985).

Moreover, a permit definition standing alone imposes no regulatory burden; it must be viewed in the context of the entire permit. Here, the particular corrective action requirements are more limited than Hoechst Celanese suggests. Assessment plans, for example, are required for a subsequently discovered SWMU only if it "is known or suspected to have releases of hazardous waste [or] constituents to the environment." Permit Condition II.B.2. A similar limitation appears regarding proposed schedules of implementation and completion (id.) and facility investigation plans. Permit Condition II.C.2. To be sure, EPA's corrective action authority under RCRA §3004(u) extends only to "releases of hazardous waste or constituents." This does not preclude the Agency, however, from requiring a permittee to identify and evaluate all SWMUs as a first step in determining the extent to which corrective action is required. See 52 Fed. Reg. 45,799 (Dec. 1, 1987) (owner/operator must identify and provide information for all SWMUs as part of Part B application; to be codified at 270.14(d)).

Some issues raised by Hoechst Celanese do not reflect any substantive dispute between itself and the Region, e.g., whether NPDES discharges are excluded from coverage (issue 6), and whether RFIs are required for each SWMU (issue 7). The Region agrees with the permittee on these issues (Region Response at 6-7), and the permit need not be revised to reflect these mutual understandings. Hoechst Celanese's unsupported assertion regarding the compliance schedule for the Final RFI report is insufficient to show that the schedule is unduly strict (issue 8). Id. at 8.

Issue 9: Region IV was also correct in defining the term "hazardous constituents" (Permit Condition I.G.2) by reference to the constituents listed in Appendix VIII to 40 CFR Part 261. For regulated units like the Chemical Storage Lagoon subject to Sections 264.91-.100, Appendix VIII was the list in effect prior to permit issuance (see 40 CFR §§264.98(h)(2), 264.99(f)) and was thus properly incorporated into the permit. See 40 CFR §270.32(c). Corrective action for non-regulated units is governed by RCRA §3004(u), which requires corrective action for "releases of hazardous waste or constituents." The Agency interprets the term "hazardous constituent" to mean those listed in Appendix VIII. See 50 Fed. Reg. at 28,713. In appropriate cases, however, the Region should narrow the scope of monitoring where detection of certain constituents is technically infeasible or where there is no likelihood of certain constituents being present

in view of the types of waste that have been placed in the SWMU at issue. The permit here allows for these adjustments in the corrective action program at the discretion of the Region by requiring the RFI plan to specify only those actions "necessary" to characterize the nature and extent of any releases. See Permit Condition II.C.1; see also Permit Conditions II.E.1-5.

Issue 10: Finally, the permit requires that laboratory methods for monitoring be conducted in accordance with either of two guidance documents: SW-846 (Test Methods for Evaluating Solid Waste: Physical/Chemical Methods) or EPA-600/4-79-020 (Methods for Chemical Analyses of Water and Wastes). See Permit Condition I.D.9.a. Hoechst Celanese objects to this condition based on statements by the Agency regarding analytical problems and uncertainties associated with SW-846. Petition at 36-37. Region IV responds that Hoechst Celanese should submit a petition under Section 260.21 authorizing the use of alternative testing techniques.

I agree with Hoechst Celanese that this permit term warrants further consideration. As the permittee points out, the Agency has recognized certain deficiencies in SW-846 and made clear that the specific analytical methods set forth in that document are not mandatory for groundwater monitoring under Part 264. See 52 Fed. Reg. 25,945 (July 9, 1987) (SW-846 not mandatory for monitoring of Appendix IX constituents); 51 Fed. Reg. 26,633 (July 24, 1986) (SW-846 not man-

datory for groundwater monitoring of Appendix VIII constituents). Even with respect to hazardous waste identification, the regulations refer to SW-846 as mere "guidance," not as an inflexible regulatory requirement. See 40 CFR Part 261, Appendix II(¶1); see also Order Denying Motions for Reconsideration and for Stay of Effective Date of Final Order, In re F&K Plating Co., RCRA (3008) Appeal No. 86-1A, at 2-3 (CJO, Nov. 24, 1987). The Region has failed to explain why compliance with SW-846 should be made mandatory here. Section 260.21, to which Region IV refers, simply authorizes petitions for regulatory amendments to add testing and analytic methods equivalent to those required by the regulations; it cannot be used to justify the unexplained imposition of non-mandatory methods.

The Region might well have valid reasons to require use of SW-846, but if so an explanation is necessary. SW-846 has been and remains the general RCRA analytical methods manual (52 Fed. Reg. at 25,945), and a permit may require that SW-846 be used as a primary reference. The Region's response here, however, fails to reconcile the permit as written with prior EPA assertions that use of SW-846 is not mandatory in all contexts.

Conclusion

The Petition is granted to the extent it challenges Permit Condition I.D.9.a, and Region IV is directed to recon-

sider this condition in a manner consistent with this opinion. This condition will remain stayed until formally reconsidered, and the Regional Administrator shall decide which additional conditions, if any, are non-severable and thus also subject to the stay under 40 CFR §124.16(a)(2). In all other respects, the petition is denied for the reasons set forth above and in the Region's response to the petition. The Region shall give public notice of this decision under 40 CFR §124.19(c). Due to the limited nature of the remand, appeal of the remand decision will not be required to exhaust administrative remedies under 40 CFR §124.19(f)(1)(iii).

So ordered.

Dated: FEB 28 1989

William K. Reilly
Administrator

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing order in the Matter of Hoechst Celanese Corporation, RCRA Appeal No. 87-13, have been served on the following persons in the manner indicated:

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Brenda H. Selden, Secretary
to the Chief Judicial Officer