



RCRA Permit Appeal Fact Sheet

1990

FACILITY: Romic Chemical Corporation
East Palo Alto, California
CAD 009 452 657
RCRA Appeal No. 90-21

PETITIONER: Palo Alto Park Mutual Water Company (PAPMWC)

PETITION FILED: October 4, 1990

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- Procedural issues
- Joint permitting
- Miscellaneous other issues (impact of facility expansion on the environment in general; impact of facility expansion on groundwater; inconsistencies in the permit and supporting documentation)

Summary of Petition:

The Palo Alto Park Mutual Water Company petitions for review of the HSWA permit issued by Region 9 to Romic Chemical Corporation in East Palo Alto, California. The petitioner requests review of the final permit in regards to the impact of facility expansion on the environment and procedural issues associated with the permitting process and consideration of joint permitting issues.

- **Procedural Issues.** The petitioner objects to the confusion and inconsistency in the various public notices regarding dates of the hearing and time of appeal, as well as conflicting information on the permits considered final and the scope of the project. The petitioner also objects to EPA's failure to consider the effect of the lawsuit filed by Charles Brewer against the City of East Palo Alto challenging the City's compliance with the California Environmental Quality Act for the subject project. The petitioner maintains that EPA should consider the merits of the case and the probable outcome before granting the final permit.
- **Joint Permitting.** The petitioner objects to EPA's failure to consider the effects of the project as approved or under consideration by the City of East Palo Alto, as relates to the project as approved or under consideration by EPA and the California Department of Health Services (DHS). The petitioner maintains that the project lacks specificity and should be redefined and reconsidered when the scope of the actual project is determined.



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- **Impact of Facility Expansion on the Environment in General.** The petitioner contends that EPA failed to consider the cumulative effects upon the environment of the additional buildings in the expansion of the hazardous waste facility. The petitioner maintains that the cumulative impacts of the additional buildings and the proposed use of replaced old buildings should be considered as part of the expansion of the facility, because cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time. The petitioner objects to EPA's failure to complete a supplemental negative declaration or complete an environmental impact report based upon updated information.
- **Impact of Facility Expansion on Groundwater.** The petitioner states that EPA did not consider and analyze the potential effect of the project on the quality of water of the recently reactivated Shallow Well No. 2 and new Deep Well No. 7. The petitioner maintains that the data used in earlier studies to determine the effect of the proposed project upon shallow wells used for monitoring and deep wells used for municipal purposes is out of date. The petitioner also asserts that the Description of Current Conditions Report does not consider the effect of the project upon these wells.
- **Inconsistencies in the Permit and Supporting Documentation.** The petitioner objects to inconsistencies in the number of new buildings in the expansion and number of monitoring wells, as well as EPA's failure to consider the use of replaced buildings.
 - EPA's comment response #20 refers to the construction of one new storage building and the enclosing of existing storage. This comment conflicts with the City of Palo Alto's approved permit for the construction of five buildings. The petitioner further maintains that comment #23 is confusing, because it identifies the buildings as permitted/regulated and nonpermitted/nonregulated buildings without identifying the number of buildings and the designated purpose of new and old, replaced, used buildings.
 - The petitioner also contends that EPA did not account for two shallow on-site monitoring wells. The petitioner asserts that page 6 of the Administrative Order On Consent indicates a total of 13 on-site monitoring wells. Table 2 of the Description of Current Conditions Report identifies 13 on-site wells. Appendix C incorporated into the Report lists 15 wells, with two wells apparently unaccounted for in the text. The petitioner maintains that the two wells should be located, identified, and considered in a subsequent report and hearing.

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

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In the Matter of:)
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Romic Chemical Corporation)
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RCRA Permit No. CAD 009 452 657)
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RCRA Appeal No. 90-21

REMAND ORDER

By Petition dated September 13, 1990, Palo Alto Park Mutual Water Company seeks review under 40 CFR §124.19 of a RCRA permit issued by Region IX to Romic Chemical Corporation. The permit authorizes hazardous waste treatment and storage at Romic's solvent recycling facility in East Palo Alto, California. As requested by EPA's Judicial Officer, Region IX filed a response to the Petition dated November 16, 1990 ("Region Response").

Under the rules that govern this proceeding, a RCRA 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 thus on Petitioner.

For the most part, Petitioner has failed to satisfy this standard for review for the reasons set forth in the Region's response to the Petition. One issue, however, warrants a remand to the Region for further proceedings. Although the permit does not allow Romic to expand its hazardous waste storage capacity, it does authorize Romic to build two storage buildings at the facility so that its existing drum storage capacity may be spread across an enlarged area. The total number of storage drums allowed at the facility will remain unchanged under the permit, but the drums will be stacked two high, as opposed to the three-high stacking now used. Petitioner contends, and the Region acknowledges, that the two Fact Sheets accompanying the draft permit incorrectly stated that the facility proposed to construct only one new storage building to accommodate the shift from three-high to two-high stacking.

The Region argues that other interested persons were able to recognize the error based on other documents in the record and to comment on the draft permit with an accurate understanding of the proposed changes. Region IX also states that Petitioner has failed to indicate on appeal what issues it would raise if it were given an opportunity for additional public comment with the correct information in hand. For these and other reasons, the Region argues that the mistake in the Fact Sheets regarding the number of drum storage buildings authorized by the permit does not rise to the level of error that warrants review.

On the other hand, the Region candidly recognizes that "the opportunity for public comment is an important aspect of the RCRA

permit process and even minor errors should not be overlooked if they led to misdirection of the public." Region Response at 9. It also states that due to the error in the Fact Sheets, "the Petitioner may have been disadvantaged in commenting on the permit because of a misunderstanding regarding [the extent of new building] construction." Id. On balance, the Region contends that the Petition should be denied in its entirety, but if the Petition is accepted it suggests that the proceeding be remanded for additional public comment to cure any deficiencies in the original comment process.

Based strictly on the facts in this case, the Region's suggestion to remand the proceeding for additional public comment is accepted. Preparation of an adequate Fact Sheet or Statement of Basis under 40 CFR §124.7 and §124.8 is important to informed public participation in the permit-writing process. Although a truly inconsequential error in a Fact Sheet or other record document would not vitiate a notice and comment period,^{1/} the error in this case -- one concerning the number and location of hazardous waste units authorized under the permit -- causes concern regarding the adequacy of public participation. Although other interested persons evidently avoided confusion due to clarifying material in other portions of the record, there is no evidence in the submissions before me to suggest that Petitioner

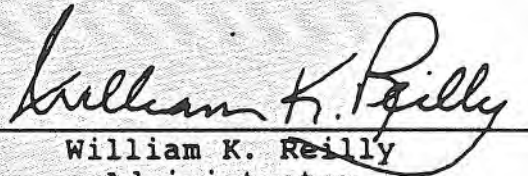
^{1/} Cf. American Iron and Steel Institute v. EPA, 568 F.2d 284, 295 (3d Cir. 1977) (though language in an Advanced Notice of Proposed Rulemaking (ANPR) was "hardly a model of clarity," ANPR fairly apprised the public as to the issues upon which comment was invited).

had actual notice of the true proposal. The Region is correct that Petitioner has failed to articulate with precision any specific issue that it would have raised had the Fact Sheets been accurate, but it is not Petitioner's burden to do so on appeal. Based on the record before me, I am reluctant to conclude that the error in the Fact Sheets was harmless.

Accordingly, the proceeding is remanded to Region IX for additional notice, comment, and response to comment on the draft permit. The Region suggests that the remand be limited to the drum storage building not mentioned in the Fact Sheets (West Building No. 1). While this unit should be the focus of the remand, the scope of the additional comment period should be broad enough to include any issue that might not have been raised due to the error in the Fact Sheets. The Region shall give public notice of this remand and the additional public comment period under 40 CFR §124.10. The notice shall include a specific reference to, and correction of, the error contained in the original Fact Sheets. Review is denied on all other issues for the reasons set forth in the Region's response to the Petition. No appeal of the remand will be necessary to exhaust administrative remedies under 40 CFR §124.19(f)(1)(iii).

So ordered.

Dated: MAR 21 1991



William K. Reilly
Administrator

CERTIFICATE OF SERVICE

I hereby certify that copies of the Remand Order in the matter of Romic Chemical Corporation, RCRA Appeal No. 90-21, were mailed to the following in the manner indicated:

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Postage Prepaid:

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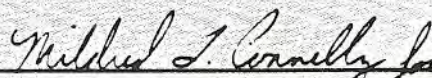
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By Hand-delivery:

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Dated: March 25, 1991


Brenda H. Selden
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