



RCRA Permit Appeal Fact Sheet

1990

FACILITY: Atochem North America, Inc. (Atochem)
Calvert City, Kentucky
KYD 000 370 159
RCRA Appeal No. 90-23

PETITIONER: Atochem

PETITION FILED: October 26, 1990

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- Procedural issues
- Joint permitting

Summary of Petition:

Atochem petitions for review of the HSWA permit issued by Region 4 to its facility in Calvert City, Kentucky. The petitioner objects to Region 4's issuance of a final HSWA permit without addressing all of Atochem's comments. Atochem also objects to the issuance of two inconsistent HSWA permits by EPA and the State of Kentucky.

- **Procedural Issues.** Atochem objects to Region 4's issuance of the HSWA permit without addressing all timely significant comments submitted by Atochem, as required under 40 CFR Sections 124.11 and 124.17. Atochem also notes that EPA responded to certain comments and made changes to the draft Federal permit, which were not incorporated in the HSWA provision of the Kentucky permit. Because the two permits as issued are substantially different, Kentucky will not be able to administer the HSWA permit requirements upon receipt of authorization without going through a conforming permit modification.
- **Joint Permitting.** Atochem objects to the issuance of inconsistent HSWA permits by both EPA and the State of Kentucky and notes that neither permit specifies that the Federal HSWA permit will be binding and administered by Region 4 until such date as Kentucky receives authorization to administer the HSWA corrective action program. Atochem maintains that the two corrective action permits are duplicative and do not adequately define the respective roles of each agency. Inconsistencies between the two permits issued include provisions addressing the following requirements:
 - Notice of sampling activity;
 - Determination of the need for corrective action;



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- Interim measures work plan;
- Notification of need for corrective measures study;
- Modification of corrective action schedule of compliance;
- Submissions;
- Alternate dispute resolutions; and
- Schedule of compliance.

Atochem believes that concurrent application of the two permits would prejudice Atochem's due process rights, jeopardize Atochem's ability to comply with directions from the agencies, and subject Atochem to responding to potentially conflicting directions and schedules of compliance. Atochem maintains that having two HSWA permits is contrary to public policy as set forth in various Agency documents, including the proposed corrective action rule.

Michael
7-11

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

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In the Matter of:)	
)	
Atochem North America, Inc.)	RCRA Appeal No. 90-23
Calvert City, Kentucky)	
)	
RCRA Permit No. KYD 006 370 159)	
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REMAND ORDER

By petition dated October 26, 1990, Atochem North America, Inc. seeks review under 40 CFR §124.19(a) of a RCRA permit issued by EPA Region IV for Atochem's chemical production facility in Calvert City, Kentucky. As requested by the Agency's Judicial Officer, Region IV filed a response to the petition on December 27, 1990.

Atochem's petition raises several procedural and substantive issues, but only one needs to be addressed at this time. Section 124.17(a)(2) of the Agency's rules requires the Region, at the time of final permit issuance, to "[b]riefly describe and respond to all significant comments on the draft permit * * * raised during the public comment period, or during any hearing." 40 CFR §124.17(a)(2). Atochem asserts, and Region IV concedes, that Atochem submitted two sets of written comments on the draft permit, but the Region responded only to the second set of comments. Region IV attributes this failure to "administrative error." Region Response at 2. The Region argues that subsequent review of Atochem's first set of comments has revealed that

consideration thereof would not have altered its permit determination. Region IV contends that its response to the petition on appeal fully addresses Atochem's concerns and that its failure to respond to all of Atochem's significant comments on the draft permit was harmless error.

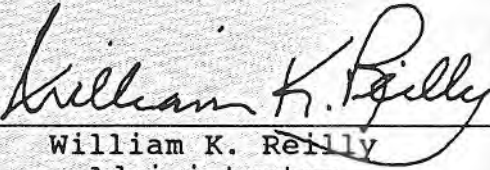
The Region's position is rejected. The rules require that the response to comments be issued by "the Director" (§124.17(a)), which is defined as the Regional Administrator or his authorized representative (§124.2). The Region's response to the petition on appeal is signed by an Assistant Regional Counsel, and there is no indication that this official has delegated authority to prepare a response to comments under §124.17 in lieu of the Regional Administrator. Moreover, by failing to respond to Atochem's comments at the time of final permit issuance, the Region has deprived Atochem of an opportunity to take the Region's responses into account in preparing its petition on appeal. Although this deficiency could arguably be cured by giving Atochem leave to file another submission that addresses the Region's response to the petition, such an approach would be undesirable here. One purpose of requiring the Region to issue a response to comments at the time of permit issuance is to ensure that such comments are given serious consideration during the course of the permit-writing process. If the Region prepares a response to comments after it has already made its final permit decision, it runs the risk that the comments will not be considered with an open mind but instead

with an eye toward defending the decision. Given the nature and scope of the procedural deficiency in this case, the parties' submissions on administrative appeal will not be relied on as a substitute for the public participation requirements imposed by the rules. ^{1/}

Accordingly, the Region's final permit decision is vacated, and this proceeding is remanded to the Region for preparation of an adequate response to comments and reissuance of the permit. The Region shall give public notice of this decision under §§124.10 and 124.19(c). An administrative appeal of the remand decision will be required to exhaust administrative remedies under §124.19(f)(1)(iii). ^{2/}

So ordered.

Dated: JAN 24 1991


 William K. Reilly
 Administrator

^{1/} See *In re Pennzoil Exploration and Production Co.*, UIC Appeal No. 87-3, at 4-5 (Feb. 28, 1989) (remanding proceeding to the Region for preparation of an adequate response to comments); *In re John W. McGowan*, UIC Appeal No. 86-7, at 4-5 (Aug. 10, 1988) (same); *cf.* *In re Certaineed Corp.*, PSD Appeal No. 81-2, at 8-9 (Dec. 21, 1982) (remanding proceeding to the Region due to procedural errors during the comment process "to ensure fairness and eliminate any confusion as to what comments were actually considered by the Region.").

^{2/} This remand relates only to the federal portion of the permit, which implements the Hazardous and Solid Waste Amendments of 1984. It does not affect the portion of Atochem's permit issued by the State of Kentucky, which is authorized under RCRA §3006(b) to administer its state program in lieu of the non-HSWA portion of the federal program. On remand, Region IV need not solicit additional public comment, but it has the discretion to do so if it determines that further comment would enhance the permit-writing process.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of Atochem North America, RCRA Appeal No. 90-23, were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

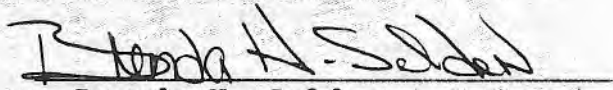
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A-110 Room 3708

Dated: JAN 28 1991


Brenda H. Selden
Legal Staff Assistant