

Attachment H

9524.1989(02)

ECOLOTEC PERMIT REMAND ORDER AND USE OF THE OMNIBUS PROVISION

MAR 2 1989

MEMORANDUM

SUBJECT: Ecolotec Permit Remand Order and Use of the Omnibus Provision

FROM: Joseph S. Carra, Director
Permits and State Programs Division

TO: B. G. Constantelos, Director
Waste Management Division, Region V

This memorandum is in response to your request of January 9, 1989 for guidance on the use of the Agency's omnibus authority under section 3005(c)(3) of RCRA and 40 CFR 270.32(b)(2). As you stated in your memorandum, the Administrator signed a Remand Order on the Ecolotec RCRA permit appeal that directs the Region to reconsider its decision in light of the Agency's omnibus authority. You expressed concern that the Remand Order could have significant implications for the RCRA permitting process by broadening substantially what the Agency must consider in connection with permit issuance. You then posed several questions about use of the omnibus authority in light of the Ecolotec appeal decision.

We understand your concerns about the uncertainty that omnibus authority creates in the permit process. However, we believe that the Remand Order of the Ecolotec permit appeal should not have any substantial impact on what the Agency must consider in connection with permit issuance. The Remand Order instructs the Region to reconsider the Ecolotec permit because the Region failed, in making the original permit decision, to recognize the Agency's authority under the omnibus provision to deny a permit. As stated in the decision, "[t]he Region is simply directed to reconsider the facility and the permit under the proper legal perspective, i.e., one that includes denial of the permit..." We do not believe that the Order should be interpreted to criticize the manner in which the Region used the

omnibus authority to impose permit conditions. In fact, the Order specifically states that Region V recognized and properly exercised its discretion under the omnibus provision to impose permit terms on Ecolotec beyond those required by EPA regulations. Nor does this order reduce the ability of the Region to rely on the Federal regulations as establishing the appropriate level of human health and environmental protection, as long as there are no site-specific circumstances that indicate otherwise.

We address below the questions that your memorandum raises about the omnibus authority.

1. How broad is the Agency's authority to gather information not required by the regulations?

Under §270.10(k) of the RCRA regulations, the Agency has broad authority to require information from permit applicants concerning permit conditions issued under §270.32(b)(2) (the omnibus provision) when necessary to protect human health and the environment. The Agency discussed the extent of this authority in the preamble of the Final Codification Rule published on December 1, 1987 (53 45788). That preamble states that, while the authority to collect information under §270.10(k) should be used sparingly and not for random and unjustified fishing expeditions or for conditions unrelated to hazardous waste activities, it can otherwise be used in specific circumstances where existing regulatory requirements may require supplementation to ensure that human health and the environment are adequately protected.

2. Will we be required to conduct risk assessments at every site prior to permit issuance?

The omnibus provision does not impose an obligation on the Agency to conduct risk assessments at every site. Further, as discussed above, we do not believe that the Remand Order on the Ecolotec appeal requires the Agency to routinely gather additional information when issuing a permit or to routinely go beyond the regulatory standards. The Agency continues to be required to examine all relevant data and information that are available when issuing a permit. If, based on this normal quantum of data, the Agency determines that site-specific

circumstances exist that require further investigation, then additional information may be gathered from the applicant under the authority of §270.10(k).

3. When is use of the omnibus provision appropriate?

As a rule, the Agency's position is that EPA's regulations are protective of human health and the environment and that permits implementing these regulatory standards will also be protective. As you know, however, there may be site-specific environmental circumstances in which regulatory requirements may need supplementation and use of the omnibus provision may be appropriate. The decision to invoke omnibus authority must be made on a case-by-case basis and only when the Agency, after examining all relevant data supplied during the permitting process, determines that such circumstances exist. The most obvious use of the omnibus authority is to impose additional permit conditions reflecting standards that have been proposed but are not yet in effect. Another use of the omnibus might be to impose permit conditions not required by the regulations but detailed in guidance documents issued by the Agency. This latter example is not, however, a broad directive to turn guidance into regulatory requirements. Rather, it would be most appropriate when guidance specifically identifies particular situations where current generic regulations might need to be supplemented. In any case, while there will be other circumstances in which the omnibus authority can and should be used to impose permit conditions or deny permits, such situations should be uncommon.

4. What are the legal limits of the omnibus provision i.e., do we have authority to deny a permit even though the facility has submitted a complete and technically adequate application?

In the preamble of the July 15, 1985 Codification rule, the Agency clearly stated that in order for the omnibus authority to accomplish its intended effect, the authority to issue permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to deny permits as well. The Agency further discussed the legal limitations of our omnibus authority in the preamble of the December 1, 1987 Second Codification rule. There, the Agency pointed out that the intent of the provision includes authorization to impose

permit conditions beyond those mandated by the regulations. Thus even if a facility submits a permit application that is complete and technically adequate as defined by EPA regulations, if due to environmental circumstances at the facility, compliance with the regulations will not assure the protection of human health and the environment, and the Agency cannot impose additional conditions that will provide adequate protection, then the Agency can and should invoke omnibus authority to deny the permit.

I hope this answers any questions you might have about the effect of the Ecolotec Remand Order on use of the omnibus provision. If you have any further questions, please contact Barbara Foster at FTS 382-4751.

cc: Tina Kaneen
Lisa Pierard
Waste Management Division Directors, Regions I-IV, VI-X
Barbara Foster