UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)
	)
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR	)
	)
OCCIDENTAL CHEMICAL AGRICULTURAL PRODUCTS, INC.	)
	)
NPDES NO. FL0000655	)

INITIAL DECISION

Pursuant to 40 CFR §124.81, the undersigned was designated on May 17, 1983 to preside in this proceeding. Following a prehearing conference and pursuant to 40 CFR §124.84, three legal questions were submitted to the Court for decision. These questions are:

1. Was EPA authorized to divide an NPDES permit application into two parts, such that one part concerned re-issuance of the permit for existing discharge points, and the other part concerned whether to permit a new discharge point?

2. Did the State of Florida wave certification (under Section 401 of the Federal Clean Water Act) of the proposed new discharge point (into Roaring Creek) because no final action was taken by the State within one year of EPA's request for certification?

3. Did issuance of a draft permit require EPA to issue the final permit as drafted substantially without alteration, unless the changes are suggested in the record and the basis set forth in the final permit decision?

Issue No. 2 appearing in the Public Notice of Evidentiary Hearing, which had to do with whether or not the State of Florida has waived certification under §401 of the Clean Water Act, is now moot since all parties agree that it has, in fact, been waived. Initial and reply briefs were filed by Occidental and the Environmental Protection Agency. The other parties filed no briefs.

Factual Background

Since the permittee's brief contains a well-presented chronology of the facts surrounding this matter, I will use their version here, deleting, of course, their editorial comments on the events.

Occidental operates two adjacent phosphate mines and chemical plants in Hamilton County, Florida. Wastewater from the complexes discharges into two tributary creeks to the Suwannee River. Occidental has been issued NPDES permits for each of these operations. One, FL0036226, governs discharges from the Swift Creek Mine and Chemical Plant into Swift Creek and plays no part in this case. The second, FL0000655, regulates the discharges from the Suwannee River Mine and Chemical Plant into both Swift and Hunter Creeks. Initially issued in 1974, this permit was modified in 1978, and Occidental applied for the renewal at issue here in March 1979. (R.66). The renewal application encompassed not only existing outfalls 001[1] which discharges into Swift Creek and 002

[1] Outfall 001 actually designates an instream monitoring point in Swift Creek. The several discharge points comprising outfall 001 have been designated as 001-2, -7, -8, and -17. Outfall 001-4 is an in-plant pH monitoring point.

which discharges into Hunter Creek, but it also requested authorization to discharge from an additional outfall designated as 003 into Roaring Creek. The request for this outfall was added as a necessary and usual part of the eastward expansion of mining operations.

A phosphate mine moves from one area of its reserves to another as the ore is depleted. As a consequence of the continual expansion of the mine, greater area for settling is required to provide sufficient settling capacity for the clays and distributed area runoff. Additional outfalls are then necessary as the area for settling expands to accomodate the increased volume of water and to avoid the expense of pumping water uphill or long distances to another discharge point. Additionally, if no new outfalls are authorized, the existing outfalls must carry an increasing volume of water which will cause flooding and aggravate system stress in the receiving streams.

This excess wastewater is largely due to rainfall which exceeds the re-circulating water requirements of the mine. It contains trace amounts of suspended solids, phosphorous and fluoride compounds. The wastewater for outfalls 002 and 003 will come from the same source; thus, the discharge components are expected to be essentially identical. Although the wastewater will come primarily from the phosphatic clay settling areas, some water may also come from the mine pits, and from runoff from both disturbed and undistrubed areas. No water will come from the chemical plant. Thus, outfall 003 will operate simply as an additional release point for discharges from the mine and is merely a normal and expected additional discharge point consistent with accepted phosphate mining practice.

1979-1980

After receipt of Occidental's March 1979 renewal application, EPA initially issued a draft permit in October 1979 which contained authorization for all

three requested outfalls. (R.10). A public hearing on this draft permit was held January 17, 1980. (R.18, 25, 26, 27). A number of commentors questioned whether outfall 003 constituted a "new source" and therefore required an Environmental Impact Statement. Eight months later, on September 12, 1980, EPA issued a decision agreeing with these comments and ruling that outfall 003 constituted a new source. (R.45). Thereafter, on November 17, 1980, EPA issued a new draft permit which contained discharge authorization for outfalls 001 and 002 only. (R.46). Almost immediately, on November 26, 1980, FDER certified this draft.[2] (R.48).

1981-1982

After further consideration, on June 16, 1981, EPA withdrew its new source determination and ruled that outfall 003 was an existing source. (R.52). Nearly seven months later, and a full two years after the public hearing, on January 21, 1982, EPA issued another draft containing all three outfalls along with a public notice and fact sheet. (R.56, 57, 58). Although this draft was sent to FDER for certification, FDER did not respond to the request other than to indicate that while it was prepared to certify discharges from outfalls 001 and 002, it needed more time to address the certification of outfall 003. (R.63).

On May 4, 1982, EPA staff recommended to the Regional Administrator (RA) that a permit for outfalls 001 and 002 be issued and consideration of outfall 003 be deferred. Apparently, this recommendation was based on the staff's conclusion

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[2] Certification issued by the State pursuant to §401 of the Clean Water Act, 42 U.S.C. §1251, et seq.

that FDER had validly certified the permit for outfalls 001 and 002 and information from FDER that it did not intend to certify outfall 003 within the allowed one year. The staff recommendation went on to point out:

> [I]t may be unlikely that EPA would ever permit the Roaring Creek discharge so long as the State and the public object to it. The company can apparently continue mining the area and discharge to Swift or Hunter Creek. (R.67).[3]

On June 1, 1982, without prior notice to Occidental, EPA reissued NPDES Permit No. FL0000655 authorizing discharge from outfalls 001 and 002 only. (R.70,71). Before taking this action, EPA did provide prior notice to FDER and one of the interested environmental groups. (R.67).

After FDER issued its November 26, 1980 certification letter, Occidental filed with FDER its request for extension of time to file a state law challenge to the certification. These requests, as well as numerous others, were granted by FDER (R.50A-D, 55A-H), and thereby under state law, Occidental's rights to challenge the certification were preserved. Finally, after much correspondence, on March 5, 1982, FDER committed itself to take "formal written action" in response to the EPA notice of January 21, 1982, and stated that:

> [U]pon taking final action, the Department will provide Occidental with the opportunity for a 120.57, Florida Statutes, hearing to challenge the Department's action in regard to the EPA notice of proposed reissuance, if necessary. (R.65).

This agreement obviated the need to file additional requests for extension of time. However, despite these assurances, FDER did not take "formal written action" before the RA's decision. Instead, prior to EPA's June 1983 permit decision, upon phone contact by EPA, FDER merely told EPA that the November 1980 certification was still valid.

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[3] Occidental was not made aware of this memo until July 1983 upon examination of the Administrative Record submitted by EPA to the ALJ.

Shortly after EPA's June 1 decisions, in response to inquiries by Occidental and EPA, FDER wrote to EPA explaining that it deemed the November 26, 1980 certification "fully applicable to the new NPDES permit." (R.76). By separate correspondence, on June 30, 1982, FDER notified Occidental that the Department regarded "the November 26, 1980 certification as final and binding on Occidental". The letter went on to point out:

> [T]he status of that certification can be changed, however, by the filing of a petition for hearing. Such a petition would render the certification proposed Agency action for purposes of a 120.57 proceeding. (R.83).

FDER wrote a second letter dated July 2, 1982, confirming its position on certification. (R.85). Occidental filed its state law petition challenging the November 1980 certification on July 13, 1982, within the time allowed by FDER. That matter is before the Florida Department of Administrative Hearings (DOAH), but has been stayed pending the outcome of this Hearing. Occidental filed its request for Evidentiary Hearing on July 6, 1982. (R.87).

1982-1983

After issuing the final permit for outfalls 001 and 002, EPA reopened the comment period for the remaining portion of the draft permit dealing with outfall 003 on July 28, 1982. This issue had already been addressed during the prior public comment periods in 1980 and at the Public Hearing. Reserving its rights, Occidental conditionally agreed to the reopening of the comment period in order to avoid further delay.[4] (R.91).

[4] Despite representations in the public notice, Occidental's agreement to allow the comment period reopened was subject to its express reservation of rights to challenge the propriety of this action.

After the close of the comment period, on January 5, 1983, FDER issued an Intent to Deny Certification. (R.112). However, because this proposed action was not finalized prior to January 21, 1983, the one year period allowed for certification ran and FDER was deemed to have waived certification. (R.116,119). On February 2, 1983, almost four years after Occidental filed its renewal application, EPA finally reached a determination and denied the permit for outfall 003. Occidental filed this request for Evidentiary Hearing to challenge the denial on March 4, 1983. (R.123).

The NPDES System

In essence, the Clean Water Act, requires that any person who discharges pollutants into the waters of the United States have a permit therefore issued either by the U.S. Environmental Protection Agency or a state to which such authority has been delegated in accordance with the requirements of the Act. Florida is not such a state and, therefore, the permit in this case was issued by the EPA.

The Act set up a process whereby the conditions of a permit are based either upon: (1) effluent limitations determined to be achievable by the application of some identified technology, or (2) more stringent limitations necessary to meet applicable state water quality standards.

In order to insure, in those cases where EPA issues a permit, that the effluent limitations are stringent enough to meet state water quality standards, the Congress wisely provided a mechanism which would allow the state to review the permit before it is finalized. This review process is set forth in §401 of the Act and results in what is usually referred to as the "State 401 Certification Letter". 40 C.F.R. §124.22 sets forth what this letter must contain. In

many cases, the technology based permit limits proposed by EPA will be sufficient to meet state water quality standards. However, if they are not, the letter must include terms and conditions which the state deems necessary to be placed in the permit in order to insure that its water standards will be met. EPA is required to place such conditions in any permit it issues. If a permittee wishes to contest these state-mandated conditions, it must challenge them in a state forum not a Federal one.

At the end of the permit issuing process, EPA must issue a permit containing effluent limitations or other conditions which will assure that state water quality standards are met. The permit may not specify or mandate how the permittee is to meet these limits or conditions. If he fails to meet them, the Act authorizes the imposition of a variety of civil and criminal sanctions, including revocation of the permit.

The Legal Issues

The practical effect of EPA's action in dividing the permit issuance into two parts was to deny the permit for outfall 003 while leaving the existing permit intact. The statutes envision the issuance of permits to the end that the economy of this Nation could grow and prosper and the quality of its water be improved, if not to pristine levels, at least to levels where it could be safely and freely used for its intended purposes, i.e., the sustenance of mankind. The denial of permits by EPA, although contemplated in the Act and the regulations, is an activity which is severely limited. 40 CFR §122.4 sets forth the only circumstances under which a permit can be denied. The only one apparently applicable here is subsection (d) which states that no permit shall be issued:

"When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States."

In its briefs, the Agency makes much of the permittee's failure to include a state certification along with its permit application in March 1979. Although §401 states that an applicant must include this certification, my experience with this program since 1972, indicates that in almost no case does the Agency follow this requirement. This Agency practice is codified in 40 CFR §124.53. This section establishes a procedure to deal with situations where EPA receives an application without a state certification. Obviously, the Agency would not have set up such a system unless they believed that established Agency practice dictates the necessity therefore. Accordingly, the Agency's arguments that Occidental's failure to include a state certification in some way caused the unconscionable delays evident in this matter are not well founded. Also throughout its briefs, the Agency argues that the permittees failure to provide the State of Florida with additional information also contributed to the delays involved. The Agency points out that, under Florida law, a facility is supposed to file for a state permit contemporeously with its application to EPA and this state filing is supposed to provide the state agency with the information it needs to determine its posture on the certification question. Whether or not this is true is of no concern to EPA and is irrelevant to the issues before me. EPA's only concern is its own permitting process, not Florida's. Much was made of the company's failure to provide the State of Florida with information it allegedly requested on numerous occasions. No where in the Administrative Record in this case is there a letter from the state agency to the Company requesting specific information. Allusions to such requests are contained in letters to EPA but I found none to the Company in the Record. The Company asserts that no such requests were made and if informal requests were made they were promptly complied with.

40 CFR §124.53, alluded to above, requires that if no state certification has accompanied the permit application, the Regional Administrator shall forward the application to the certifying state agency with a request that certification be granted or denied. I find no evidence that this was done. Additionally, if no state certification has been received by the time the draft permit is prepared, the Regional Administrator shall send a copy thereof to the state agency stating, inter alia, that if no certification is received within 60 days, state certification will be deemed to have been waived, unless the Regional Administrator finds that unusual circumstances require a longer time. The Record does not reflect that this was done. The Record does show that the draft permit was prepared on October 25, 1979 and no state certification was made until some eight months later on June 27, 1980. Even that certification was not final, it evidenced an intent to certify to outfalls 001 and 002 but as to 003 it stated that it lacked sufficient information to determine the impact on the receiving waters of that outfall. It requested that EPA split off 003 and issue a revised draft permit containing only outfalls 001 and 002.

Apparently EPA acceded to that request and issued a revised draft permit on November 17, 1980 without outfall 003. This action by the Agency is highly questionable, but could possibly be excused by its belated decision that 003 may constitute a new source. It is unusual, at best, that this possibility never occurred to the Agency until some citizens at the public hearing pointed it out to them. As stated above, EPA first ruled that it was a new source and then changed its mind. More delays. Not even EPA argued that this exercise and the attendant delay was the Company's fault.

Now, almost three years after Occidental filed its application, EPA issued a third draft once again including outfall 003. Apparently, during this period, the State of Florida still does not know what to do about 003. (See Document

No. 76). Florida continued to insist that its November 26, 1980 letter of certification was still valid and applied to this new draft even though the November letter only applied to a draft permit that did not include outfall 003.

My problem with this whole certification process is that EPA keeps asking the state to interpret EPA's own regulations on the subject. The §401 Certification process is a creature of Federal law and regulations. The requirements for what such a certification letter must contain is clearly spelled out in the Federal regulations and yet EPA apparently defers to the state as to the sufficiency and meaning of the certification letters. Clearly a state certification letter dated November 26, 1980 can not suffice to address a draft permit issued over a year later which contains an outfall not mentioned by the earlier letter.

The State of Florida continued, almost three years after the application, to say that they do not have enough data available to made a decision on outfall 003, yet I find no formal requests from them to the Company demanding this information. Nothing in this Record indicates any reluctance on the part of the Company to provide to any government agency all the information it possesses or can generate.

It is curious that the state agency has no problem certifying to two existing outfalls which contain the same constitutents as 003 and yet as to 003 they plead insufficient data. I realize that 003 will discharge into a stream which has experienced no previous pollutant input. However, we are dealing with state regulations and state streams about which the state agency apparently possesses no information. The state is required to generate water quality data concerning waters within their jurisdiction and yet they demand that the applicant provide them with such data. The state has the responsibility to translate their own water quality requirements into permit requirements, yet they seem unable to do so as to 003.

The state's certification letter dated November 26, 1980 as to outfalls 001 and 002 does not contain any effluent limitations but merely a recitation of water quality standards which the Company must meet. I see no reason why they could not do the same thing as to 003. This precisely is what EPA did in its Notice of Denial dated February 2, 1983 (Document No. 119), only in a opposite fashion. The Notice of Denial stated that the denial was based upon EPA's "expected failure" of the discharge to comply with State of Florida's Water Quality Standards. They then go on to list four standards which they suspect the Company will not be able to meet. Some of them are the same ones contained in the state's certification letter as to outfalls 001 and 002. I see no reason why these standards could not be included in a permit applicable to 003. My reading of the several draft permits in the file shows that no attempt to translate state water quality standards into effluent limitations was made, but rather the permits simply state that the specific effluent limitations set forth in the permit, applicable to each outfall, may be more stringent based upon the requirements set forth in the attached state certification letter. As indicated above, these letters do not contain effluent limitations but merely a recitation of state water quality standards.

Apparently, what EPA did was to analyze the constitutents of outfalls 001 and 002 and extrapolate these parameters to Roaring Creek and conclude that if 003 looks like 001 and 002 and you put that discharge in Roaring Creek it will probably violate state water quality standards. To come to this dubious conclusion EPA must have assumed that the Company will subject its effluent from 003 to exactly the same treatment as it does the effluent from 001 and 002. I do not believe that EPA may indulge in such speculation to justify a permit denial.

As stated above, EPA has the responsibility to prepare a permit which contains limitations sufficient to meet the applicable technology-based requirements and any other conditions or limitations necessary to meet state water quality standards. Once that is done, the permittee has the duty and responsibility to obey the terms of the permit or face severe legal sanctions. There is nothing in the Record to indicate that the Company would not comply with whatever limitations or conditions EPA deemed necessary in order to meet Florida water quality standards even if such action would require it to subject the effluent from outfall 003 to additional treatment. It may turn out to be the case that the Company would decide that it would be cheaper to pump the waste water to outfalls 001 and 002 rather than treat it to the degree required by the permit. However, that is a decision that the Company alone is entitled to make based upon its own evaluation of the economics involved. EPA, based upon its own assumptions and speculation may not deny the permittee the opportunity to make its own decision on this matter.

Conclusion

As one can discern from even a casual scrutiny of this matter, it is complex, labyrinthesque and almost byzantine in its convolutions, twists and turns. Despite the Agency's protestations to the contrary, it and its handmaiden, the State of Florida, must bear the bulk of the responsibility for the delays and confusion inherent in this case.

The Agency's own rules and regulations establish a straight-forward and orderly process in the NPDES permit issuing system. The rules contemplate prompt action on the part of EPA in processing applications and issuing final permits and the regulated community has a right to nothing less from its government.

Here we have a delay of almost four years from application to final Agency action. Such performance is unconscionable and reflects poorly upon an Agency still in the process of polishing its tarnished public image.

Although not clearly enunciated by the Agency in its public pronouncements on this permit, its rationale for denying the permit for outfall 003 appears to be some spinoff of 40 CFR §122.4, supra. Essentially, that subsection says that you should not issue a permit when, no matter what limitations or conditions one puts in a permit, the Agency cannot ensure compliance with applicable state water quality standards. No such showing is found in this Record. When EPA first issued the permits for outfalls 001 and 002 what assurance did it have that water quality standards would be met other than to recite those standards in the permit and require the Company to meet them. No apparent reason exists to suggest that the same limitations historically made applicable to outfalls 001 and 002 could not also be made to apply to outfall 003, plus any additional water quality standards peculiarly applicable to Roaring Creek. One would assume that these standards are the very ones set forth by EPA in its Notice of Denial.

As to the legal questions posed, I will treat them briefly here.

Issue No. 1: When EPA issued its first draft permit on the application, it included all three outfalls. Apparently, based on comments received at the public hearing as to whether or not outfall 003 constituted a new source and Florida's ambiguous "certification" letter, the Agency eliminated 003 from its next draft permit. Once the "new source" issue was resolved in Occidental's favor, a third draft was issued which once again involved all three outfalls. I find no authority in the Act or the regulations to support this action. Much of the time, delays and confusion which ultimately evolved from this choice of action on the part of the Agency could have been avoided if the Agency had taken

a more forthright stand on Florida's first substantive letter which appears as Document No. 42 in the Administrative Record. This letter advised, in essence, that Florida had no problem with outfalls 001 and 002 and could certify to them, but did not have sufficient data to make a decision on 003. The State then suggested that the permit be re-drafted to eliminate 003 or that the State would have no option but to deny the whole permit. At this point in time and in conformity with applicable regulations, EPA should have insisted that the State either certify as to 003, deny it, or waive certification. If the State denied certification as to 003, the Agency could have issued the permit as to 001 and 002 and denied 003 and let Occidental battle this issue with the State in its own forum, which is precisely what the rules envisioned and what EPA ultimately did in February 1983, some three years later, except that now EPA is in Court and not the State.

Issue No. 4: This issue is essentially moot since EPA has ruled that the State has waived certification as to the third draft permit. The November 26, 1980 state certification was clearly valid as to the second draft which included only outfalls 001 and 002. It was certainly not valid as to the third draft which included 003, for the reasons stated above.

Issue No. 5: It is difficult to rule on the validity of agency actions following its first deviation from the requirements of the regulations. As is usually the case, once one deviates from the true path, a trail of confusion, obfuscation and delay inevitably results. In view of my ultimate decision on this matter, I find it unnecessary to delve into the morass which this Record presents and will not address this issue except to observe that EPA's actions following the issuance of the first draft did not follow either the regulations or past Agency practice. Whether or not these deviations rose to the level of illegality or impermissible Agency action, I need not address.

In accordance with the discussions above, I am of the opinion that the action of the EPA in denying the appellant, Occidental Chemical Agricultural Products, Inc., a permit for outfall 003 in its notice of February 2, 1983 (Documents Nos. 118 and 119), was improper and not in accordance with applicable law and the regulations promulgated pursuant therefore and I so find. In making this decision, I have considered the entire record in this case and the briefs submitted by EPA and Occidental and the representations of counsel at the prehearing conference. Any conclusions, suggestions or arguments contained therein which are inconsistent with this opinion are hereby rejected.

ORDER[5]

Pursuant to the provisions of the Clean Water Act, as amended and the regulations promulgated pursuant thereto (40 CFR §124.84) the following Order is issued:

1. The Agency shall forthwith issue a final permit to the Applicant which includes provisions, conditions and limitations applicable to outfalls 001, 002, and 003, consistent with this opinion.

2. By Motion dated November 10, 1983, counsel for the EPA moved for summary judgement on whether or not the Court will allow testimony to be presented at the trial on Issues 1, 4, and 5, supra. Since this decision makes that question moot, no ruling will be made thereon.

Thomas B. Yost
Administrative Law Judge

DATED: November 28, 1983

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[5] Unless appealed in accordance with 40 CFR 124.91 or unless the Administrator elects, sua sponte, to review the same as therein provided, this Decision shall become the Final Decision of the Administrator in accordance with 40 CFR 124,89(b).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

IN THE MATTER OF	)	
	)	
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR	)	
	)	INITIAL DECISION
OCCIDENTAL CHEMICAL AGRICULTURAL PRODUCTS, INC.	)	
	)	
NPDES NO. FL0000655	)	

CERTIFICATION OF SERVICE

In accordance with 40 CFR 124.89(a), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, along with the entire record of this proceeding was served on the Administrator, c/o Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460; and that true and correct copies were served on: John W. Wilcox, Esquire, Holland & Knight, (for Occidental), Post Office Box 1288, Tampa, Florida 33601; Joel C. Selph, Chairman, Hamilton County Board of Commissioners, Post Office Box 312, Jasper, Florida 32052; and Helen M. Hood, Vice President, Florida Defenders of the Environment, Inc., 626 North Main Street, Gainesville, Florida 32601; all service by Certified Mail Return Receipt Requested. A true and correct copy was hand-delivered to William R. Phillips, Esquire, U.S. Environmental Protection Agency, 345 Courtland Street, N.E., Atlanta, Georgia 30365. Dated in Atlanta, Georgia this 28th day of November 1983.

Sandra A. Beck
Regional Hearing Clerk
FTS: 257-2681, Comm: 404/881-2681