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RCRA Permit Appeal Fact Sheet

1990

FACILITY: Morton International, Inc. (Morton)
Moss Point, Mississippi
MSD 008 186 587
RCRA Appeal No. 90-17

PETITIONER: Morton

PETITION FILED: June 28, 1990

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES:

- RFI conditions are not justified
- Definition of solid waste management unit

Summary of Petition:

Morton petitions for review of the HSWA permit issued by Region 4 to its chemical manufacturing plant in Moss Point, Mississippi. Morton requests review of the permit conditions relating to the definition of a solid waste management unit (SWMU). In addition, the petitioner contests the Agency's interpretation of the RCRA "omnibus provision" in so far as EPA has determined that it has authority to require corrective action at areas not identified as SWMUs.

- **RFI Conditions are not Justified.** The petitioner objects to the inclusion of the "area of concern" in Appendix A-1 as a unit requiring a facility investigation. The petitioner argues that the "omnibus provision" (RCRA Section 3005(c)(3)) only authorizes corrective action for "areas of concern" that are SWMUs. Morton believes that the Region's interpretation of RCRA Section 3005(c)(3) as authorizing corrective actions not related to hazardous waste management units is contrary to EPA's long-standing interpretation of Section 3004(u) as the only provision in Subtitle C that reaches beyond the universe of hazardous waste. The petitioner contends that Section 3005(c)(3) does not grant new substantive powers or extend Agency jurisdiction, but only allows conditions within the scope of the permit as delineated by other statutory provisions.
- **Definition of Solid Waste Management Unit.** The petitioner objects to the permit's definition of a SWMU and the applicability of that definition to the latex process recovery pit and the formalin truck unloading area listed in Appendices A-1 and A-2. Morton argues that the permit definition of SWMU is inconsistent with the statutory definition of solid waste management, since the permit definition could include units that are not used for systematic



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administration of solid waste management activities, but are, at most, incidentally or accidentally related to solid waste activity.

- Morton argues that the latex process recovery pit should not be classified as a SWMU because there have been no releases of hazardous waste or hazardous constituents, and the pit does not manage solid waste. The petitioner believes that the Region has neither authority nor justification to require a facility investigation without any evidence of a release of hazardous waste or constituents.
- Morton states that EPA also incorrectly classified the formalin truck unloading area as a SWMU, arguing that the formalin truck unloading area is a process area designed to minimize or eliminate endangerment of human health and the environment, and is not a waste management area.

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

In the Matter of:

Morton International, Inc.
(Moss Point, Mississippi)

RCRA Permit No. MSD 008 186 587

RCRA Appeal No. 90-17

ORDER DENYING REVIEW

Morton International, Inc. seeks review of the federal portion of a permit issued by Region IV under the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA") for Morton's chemical manufacturing plant in Moss Point, Mississippi. ^{1/} Specifically, Morton seeks review of the permit's definition of a solid waste management unit ("SWMU"), the designation of two areas as SWMUs, and the designation of one area as an "Area of Concern" subject to corrective action. As requested by the Agency's Judicial Officer, Region IV submitted relevant portions of the administrative record and a response to the petition. ^{2/} For the reasons set forth below, I conclude that Morton has failed to show that review of the permit is warranted under 40 CFR §124.19, and therefore review is denied.

^{1/} The non-HSWA portion of the permit was issued by Mississippi, an authorized State under RCRA §3006(b), 42 U.S.C. §6926(b).

^{2/} Morton filed a reply to the Region's response without first obtaining leave.

Discussion

Under the rules that govern this proceeding, a RCRA permit determination 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 on the petitioner. See 40 CFR §124.19.

The Region contends that it is not necessary to determine if Morton has met this standard because Morton's petition was not filed in a timely manner, and is therefore procedurally barred. Under 40 CFR §124.19(a), which governs appeals from RCRA permit decisions, a petition to review a final permit decision must be received by the Administrator within 30 days after the permit decision is issued. In re Georgetown Steel Corporation, RCRA Appeal No. 91-1, p.3 n.3 (June 10, 1991); In re Bethlehem Steel Corporation, UIC Appeal No. 90-4, p.4 n.9 (June 11, 1991). "The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice." 40 CFR §124.19(a). The notice in this case specified that the 30-day period would begin on a later date, namely, upon receipt of the notice. Morton received the notice on March 20,

1990, and therefore, pursuant to 40 CFR §124.20, the last day of the filing period was April 19, 1990. ^{3/} The petition was not received by EPA Headquarters until April 23, 1990. Under normal circumstances, the petition would be deemed untimely, and therefore dismissed. In this case, however, Morton apparently relied upon erroneous advice provided in the Region's notice, namely that the petition would be timely if sent by certified mail within the 30-day filing period. Morton complied with this advice, sending its petition by certified mail to the Administrator on April 18, 1990, one day prior to the expiration of the 30-day filing period. Accordingly, Morton's petition for review will be considered under §124.19. ^{4/}

Morton seeks review of permit section I.G.3, which provides a definition of the term "SWMU." This section provides that "[a] 'solid waste management unit' for the purposes of this permit includes any unit which has been used for the treatment, storage, or disposal of solid waste at any time, irrespective of whether the unit is or ever was intended for the management of solid waste." (Emphasis supplied.) Morton contends that "[t]his definition is inconsistent with the statutory definition of solid

^{3/} Section 124.20(d) adds three days to the filing period where the period commences with the Region's service by mail of notice of the final permit decision. This section is inapplicable here, where the filing period commenced with receipt (not service) of the notice.

^{4/} See, e.g., In re Tecrone, Inc., UIC Appeal No. 87-4 (Nov. 2, 1988) (petition to review a permit not dismissed for untimeliness where petitioners complied with erroneous advice on filing requirements contained in Region's notice).

waste management" because it includes "units that are not used for the systematic administration of solid waste management activities, but are at most incidentally or accidentally related to solid waste activity." Petition for Review, p.5. In addition, Morton argues that as a result of this faulty definition, the Region "improperly classified at least two areas of the manufacturing plant as [SWMUs]." Petition for Review, p.6. ^{5/}

At present, there is no unitary definition of the term "SWMU" in the statute or regulations. The terms "solid waste management" and "unit" are, however, defined. RCRA defines "solid waste management" as "the systematic administration of activities which provide for the collection, source separation, storage, transportation, transfer, processing, treatment, and disposal of solid waste." 42 U.S.C. §6903(28). The term "unit" refers to any contiguous area of land on or in which waste is placed. See 47 Fed. Reg. 32,289 (July 26, 1982). Based upon these definitions, the term "SWMU" plainly includes any unit (contiguous area of land on or in which waste is placed) used for solid waste management (the systematic collection, source separation, storage, transportation, transfer, processing, treatment or disposal of solid waste).

Morton's suggestion to the contrary notwithstanding, a determination that waste management activities are "systematic"

^{5/} Although Morton does not specifically identify those areas, it is assumed that the two areas are those challenged in issues two and three of Morton's petition, namely the latex recovery pit and the formal truck unloading area, which are discussed infra.

need not be based on a finding that the permittee subjectively intended or deliberately sought to manage the waste. Rather, operations or activities that inevitably lead to routine waste handling are sufficiently "systematic" to constitute "solid waste management" as defined in RCRA. The legislative history of RCRA §3004(u), which requires corrective action for SWMUs, ^{6/} emphasizes that the term "SWMU" "embraces any unit in which solid waste management actually occurred, regardless of whether such management was intended." In re Shell Oil co., RCRA Appeal No. 88-48, p.5 n.5 (Mar. 12, 1990) (citing H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983)). The definition of "SWMU" contained in permit section I.G.3 is consistent with the statutory definition of "solid waste management" and with the legislative history concerning the units intended for regulation under RCRA §3004(u). ^{7/}

^{6/} Section 3004(u) provides that permits issued after November 8, 1984

shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit.

42 U.S.C. §6924(u).

^{7/} The permit definition of "SWMU" also appears consistent with the proposed regulatory definition of the term "SWMU" in the Subpart S corrective action proposal, which is "[a]ny discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous wastes." 55 Fed. Reg. 30,808 (July 27, 1990).

In addition, a permit definition by itself imposes no burden, and therefore does not by itself provide grounds for review. Instead, a permit definition must be viewed in the context of the entire permit. In re Hoechst Celanese Corp., RCRA Appeal No. 87-13, p.11 n.10 (Feb. 28, 1989). In other words, the permit's definition of the term "SWMU" can provide a basis for review only if, as applied to the facility in conjunction with other permit provisions, it is inconsistent with law. For the reasons stated below, the permit does not improperly classify any areas as SWMUs, and thus review of the permit's definition of the term "SWMU" is denied.

Morton contends that "the permit erroneously classifies a latex recovery pit as a [SWMU] requiring investigation." Petition for Review, p.6. Morton argues that the latex recovery pit does not manage solid waste, but is instead part of a continuous production process because it captures upsets of latex and returns them to the production process. Morton also argues that even if the latex recovery pit is a SWMU, no corrective action is required because there has been no release of hazardous waste or constituents from the pit.

The Region responds that the latex recovery pit is a SWMU "because it is designed and intended to not only recover latex but store and discard process wastewater; therefore, it manages solid waste and was designed to do so." Region's Response, p.9.

The RCRA Facility Assessment ("RFA") supports the Region's determination. ^{8/} The RFA notes that the latex recovery pit receives wastewater containing latex from the processing areas, and that after the latex in the wastewater is recovered, the remaining wastewater is pumped from the pit for treatment into one of the process wastewater tanks. RFA, p.31. Thus, the record shows that the latex recovery pit is a unit used for solid waste management, i.e., the systematic collection, source separation, and transfer of a solid waste (wastewater from the processing areas). ^{9/}

Morton also argues that even if the latex recovery pit is a SWMU, there have been no releases of hazardous wastes or constituents from the pit, and therefore the Region had no authority under RCRA §3004(u) to require a RCRA Facility Investigation ("RFI") for the pit. ^{10/} Morton, however, misreads the permit,

^{8/} The RFA is the first step in the corrective action process. In the RFA, the Agency attempts to identify actual and suspected or potential releases from solid waste management units that require corrective action. In re American Cyanamid Co., RCRA Appeal No. 89-8, p.2 n.3 (Aug. 5, 1991). Generally, "[t]he permit writer uses the information gathered in the RFA to develop the scope of the investigatory work to be completed by the permittee in the next step of the corrective action process * * *." Id. at p.8.

^{9/} Morton argues that the Region erroneously determined that the latex recovery pit is a SWMU because it generates wastewater. Petition for Review, p.6. Morton correctly argues that the mere generation of solid waste does not constitute solid waste management. The Region determined that the latex recovery pit is a SWMU, however, because it stores (manages) wastewater, not because it generates wastewater.

^{10/} The RFI is the second step in the corrective action process. During this step, the permittee assesses the releases of hazard-
(continued...)

which does not necessarily require an RFI for the latex recovery pit. According to permit section II.C.I, Morton is required to submit a workplan for determining whether there has been a release of hazardous waste or constituents from the latex recovery pit that requires corrective action. Only if such a release has occurred is Morton required by the permit to prepare an RFI for the latex recovery pit. See Permit Section II.D.1.

These permit conditions are well within the Region's authority under RCRA §3004(u). "The RCRA corrective action authority is not limited to known or detected releases, but also extends to likely or suspected releases." In re American Cyanamid Co., RCRA Appeal No. 89-8, p.14 n.28 (Aug. 5, 1991). "To require an owner/operator to conduct further investigation of a SWMU [pursuant to §3004(u)], the Region need not have conclusive evidence of a release, but instead only evidence of a likely or suspected release." In re Shell Oil Co., p.6 n.6. "Consequently, a permit may require soil sampling or other preliminary detection activities necessary to determine whether a suspected or likely release requires further corrective action." In re American Cyanamid Co., p.14 n.28; In re Amerada Hess Corp., RCRA Appeal No. 88-10, p.5 (Aug. 15, 1989); cf. 40 CFR §270.14(d)(3) (a RCRA permit applicant may be required to conduct soil sampling if necessary

10/ (...continued)

ous wastes or constituents identified in the RFA by characterizing their nature, extent, and rate of migration. See In re American Cyanamid Co., p.2, n.3.

to determine whether a suspected release requires a more complete investigation).

Here, the RFA supports the Region's determination that there is a suspected release that requires preliminary detection efforts to determine if further corrective action is warranted: the RFA notes that "[d]ue to the small freeboard maintained at the unit [approximately four inches], and from latex observed coated on the concrete/asphalt and graveled surfaces surrounding the Pit, releases to the soils may also have occurred due to past overtopping." RFA, p.31. The RFA also recommends soil sampling around the latex recovery pit to determine if releases of hazardous wastes or constituents have occurred. RFA, p.37. Accordingly, review of this permit condition is denied.

Morton maintains that the permit also "erroneously classifies the formal truck unloading area as a SWMU." Petition for Review, p.7. Morton asserts that the formal truck unloading area "is a processing area designed to minimize or eliminate the endangerment of human health and the environment, and not a waste management area." Id. 11/

In response, the Region relies upon the RFA to support its determination that the formal truck unloading area is a SWMU. According to the RFA, the formal truck unloading area "consists of a concrete-lined surface, and is graded towards an opening of

11/ At the time of permit issuance, there was no known or suspected release from this SWMU, and thus the permit requires only that Morton notify the Region of any release of a hazardous waste or constituent from this SWMU within 15 days of discovery, and then proceed to develop an RFI. See Permit Section II.D.3.

an underground pipe. Spills and leaks from product transfer operations are received by the unit and discharged via underground piping to the Formal Sump [another SWMU]." RFA, p.33. This finding supports the Region's conclusion that the formal truck unloading area is a unit which engages in solid waste management. In other words, the RFA sufficiently demonstrates that the formal truck unloading area provides for the systematic collection and transfer of solid waste, namely, product spilled or leaked during transfer operations.

The association of the formal truck unloading area with a process area does not prohibit its designation as a SWMU. SWMUs include areas associated with production processes that have been contaminated as a result of routine and systematic releases of hazardous wastes or constituents. In re American Cyanamid Co., pp.5-6. Routine and systematic releases may include regular leakage and spillage from product transfer operations. See In re Chevron USA, Inc., RCRA Appeal No. 89-26, pp.6-7 (Dec. 31, 1990). ^{12/} I am not persuaded by Morton's arguments that the formal truck

^{12/} See also 55 Fed. Reg. 30,808-30,809 (July 27, 1990). This portion of the preamble to the proposed regulatory definition of the term "SWMU" provides that an example of an area contaminated by routine and systematic releases "might be a loading/unloading area at a facility, where coupling and decoupling operations, or other practices result in a relatively small but steady amount of spillage or drippage, that, over time, results in highly contaminated soils." Id.

unloading area was erroneously classified as a SWMU, and therefore review of this permit condition is denied. ^{13/}

Finally, Morton argues that "the permit erroneously includes a so-called 'area of concern' as requiring [an RFI]." Petition for Review, pp.7-8. The permit does not necessarily require an RFI for the area of concern ("AOC"). Instead, the requirements for the AOC are similar to those imposed for the latex recovery pit: Morton is required to submit a workplan for determining whether there has been a release of hazardous wastes or constituents from the AOC that requires corrective action. Only if such a release exists must Morton prepare an RFI for the AOC. See Permit Sections II.C.1, II.D.1.

Morton contends that this permit requirement is in error because RCRA §3005(c)(3) ^{14/} "does not authorize corrective action requirements for 'areas of concern' that are not SWMUs."

^{13/} The Region also argues that "Morton did not address this issue in their comments to the March 1989 RFA which had identified the Formal Truck Unloading Area as a SWMU," and therefore review is barred by 40 CFR §124.19. Region's Response, p.11. Section 124.19 provides that issues raised in a petition for review must have been raised during the public comment period to the extent required by the regulations. The applicable regulations, 40 CFR §§124.10-124.14, provide for a public comment period on the draft permit, not the RFA. The regulations did not require Morton to comment on the RFA in order to preserve this issue for review. Instead, the regulations required only that Morton raise this issue in its comments on the draft permit. Morton's November 2, 1989 comments on the draft HSWA permit did raise this issue, and therefore there is no merit to the Region's argument.

^{14/} See 42 U.S.C. §6925(c)(3) ("Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.").

Petition for Review, p.8. Specifically, Morton argues that only §3004(u) expressly authorizes corrective action beyond hazardous waste management units by requiring corrective action for releases from SWMUs. Morton maintains that §3005(c)(3), the RCRA "omnibus provision," does not extend this authorization, that is, that §3005(c)(3) "only allows conditions within the scope of the permit as delineated by other statutory provisions." Petition for Review, pp.8-9. ^{15/} In other words, Morton argues that the Administrator's ability to impose permit conditions necessary to protect human health and the environment is limited to those conditions expressly authorized by other Subtitle C provisions, in this case §3004(u).

I am not persuaded by Morton's argument that §3004(u) (or any other Subtitle C provision) expressly or implicitly limits the broad grant of authority contained in §3005(c)(3). Such an interpretation would render §3005(c)(3) superfluous in the corrective action context. Moreover, §3004(u) is not the only provision in Subtitle C allowing corrective action beyond hazardous waste management units; §3008(h)(1) allows corrective action for any release of hazardous waste at an interim status facility

^{15/} Quoting from 54 Fed. Reg. 41,011 (Oct. 4, 1989), Morton also argues that "section 3005(c)(3) * * * merely preserved preexisting authority * * *" to impose corrective action, and therefore §3005(c)(3) does not authorize corrective action independent of §3004(u). Petition for Review, p.8. This Federal Register notice, however, concerns a portion of §3005(c)(3) not relevant to this proceeding, namely, the Administrator's authority to modify permits, and in full states that this portion of §3005(c)(3) "merely preserved preexisting authority to modify permits." (Emphasis added.) Consequently, this citation provides no authority for Morton's argument.

if necessary to protect human health and the environment regardless of whether the release is from a SWMU or non-SWMU area. ^{16/} As pointed out in In re Amerada Hess Corp., as a matter of statutory interpretation, it makes little sense to allow corrective action for non-SWMU areas at interim status facilities pursuant to §3008(h)(1), but not to allow such corrective action at a permitted facility pursuant to §3005(c)(3). In re Amerada Hess Corp., p.4 n.7. Section 3004(u) is best read not as a limit on §3005(c)(3), but as a mandatory minimum requirement that the Agency must fulfill. Id. The legislative history of §3005(c)(3) shows an intent to authorize the Administrator to impose permit conditions beyond those mandated by the applicable regulations (i.e., those implementing §3004(u)) as required to address situations at each permitted facility that threaten human health or the environment. ^{17/} Accordingly, the Agency has repeatedly held that §3005(c)(3) authorizes corrective action permit requirements, such as soil sampling or other preliminary detection activities, for non-SWMU areas when necessary to

^{16/} Beyond Subtitle C, RCRA §7003 also allows corrective action from non-SWMU areas by authorizing the Administrator to initiate a suit against any person who has contributed to the handling, storage, treatment, transportation or disposal of any solid or hazardous waste that presents an imminent and substantial endangerment to health or the environment.

^{17/} See 55 Fed. Reg. 30,809 (July 27, 1990). The proposed Subpart S corrective action rule preamble provides that for areas beyond the scope of §3004(u), the Agency intends to use the 3005(c)(3) omnibus authority to protect human health and the environment.

protect human health and the environment. In re American Cyanamid Co., p.13; In re LCP Chemicals-North Carolina, Inc., RCRA Appeal No. 90-4, pp.3-4 (Feb. 14, 1991); In re Amerada Hess Corp., pp.3-5.

Although §3005(c)(3) provides authority to require corrective action for non-SWMU areas, this authority is not unlimited. The statutory context of RCRA "makes clear that the omnibus provision should not be used as a blank check for unbridled regulation without an adequate nexus to solid or hazardous waste." In re BP Chemicals America, Inc., RCRA Appeal No. 89-4, p.7 (Aug. 20, 1991). By its own terms, §3005(c)(3) authorizes only those permit conditions necessary to protect human health and the environment. Unwarranted uses of this provision are checked on a case-by-case basis through petitions for review of final permit decisions. ^{18/} For these reasons, there is no merit to Morton's contention that the Region's interpretation of §3005(c)(3) will allow unbridled regulatory access to production processes. The Region has not attempted to use §3005(c)(3) to

^{18/} See 56 Fed Reg. 7145 n.8 (Feb. 21, 1991), which provides:

EPA notes that permit writers choosing to invoke the omnibus permit authority of [§3005(c)(3)] to add conditions to a RCRA permit must show that such conditions are necessary to ensure protection of human health and the environment and must provide support for the conditions to interested parties and accept and respond to comment. In addition, permit writers must justify in the administrative record supporting the permit any decision based on the omnibus authority.

regulate Morton's production processes, but to require corrective action for releases associated with those production processes that threaten human health and the environment.

Because §3005(c)(3) authorizes corrective action for non-SWMU areas, the Region's characterization of the area as an "area of concern" is not determinative of whether corrective action is appropriate. Rather, the issue is whether the Region's decision to require the type of corrective action detailed in the permit for this AOC meets the test detailed in §3005(c)(3), that is, whether it is necessary to protect human health and the environment.

In this case, the Region's exercise of the authority granted by §3005(c)(3) is appropriate. As described in the RFA, the AOC encompasses

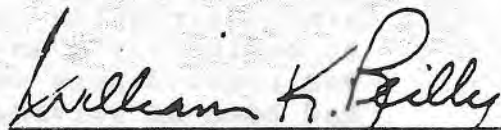
all process areas * * * where storage and manufacturing operations take place. Prior to approximately 1975, these areas lacked any secondary containment, or contained inadequate secondary containment * * *. Prior to this date, wastewater was carried by Ditches (SWMU 10) interlacing this AOC. Additional ditches, trenches, and sumps may have existed (some presumably in the present-day concreted areas) since the [Morton] plant started operation in 1955. An old underground pipe * * * was removed from service in 1983 or 1984. It had been in service for 18 years; the facility could not provide information/documentation on the structural integrity of the pipe when it became inactive.

RFA, pp.33-34. Accordingly, the RFA recommended "[s]urficial and subsurface soil sampling * * * around the four process areas in the [AOC]. The samples should be collected from the immediate vicinity around the concrete pads; in the case of the former

underground ditch in the Formal Area, subsurface soil sampling is suggested." RFA, p.37. These findings and recommendations in the RFA support the limited type of corrective action immediately required by the permit, namely, the preparation of a workplan to confirm the existence of a suspected release of hazardous wastes or constituents requiring corrective action. See In re American Cyanamid Co., p.14. The RCRA omnibus provision "may be used to address a suspected release of solid waste, regardless of its source, where necessary to protect human health and the environment." In re Amerada Hess Corp., p.4. ^{19/} In addition, the workplan requirement is flexible enough to allow Morton to tailor the workplan to the specific concerns addressed in the RFA, and thus does not require Morton to perform requirements unauthorized by the omnibus provision.

For the reasons set forth above, Morton has failed to meet its burden of demonstrating that review of the permit is warranted, and therefore review is denied.

So ordered.



William K. Reilly
Administrator

Dated: FEB 28 1992

^{19/} Morton does not argue that the permit condition for the AOC is not necessary to protect human health and the environment. Rather, it argues that §3005(c)(3) does not authorize corrective action for non-SWMU areas.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Morton International, Inc., RCRA Appeal No. 90-17, were sent to the following persons in the manner indicated:

First Class Mail:

John Harleston
Taft, Stettinius & Hollister
1800 Star Bank Center
Cincinnati, Ohio 45202

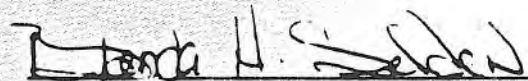
Joyce Catrett
Office of Regional Counsel
U.S. EPA, Region IV
345 Courtland St.
Atlanta, Ga. 30365

Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland St.
Atlanta, GA. 30365

Hand Delivery:

Bessie Hammiel
U.S. EPA Hearing Clerk
EPA Headquarters
401 M Street, S.W.
Room 3708

Dated: 3/3/92



Brenda H. Selden
Legal Staff Specialist