

ARKANSAS POLLUTION CONTROL
AND ECOLOGY COMMISSION

LOCATION - SUBJECT _____
Interpretive Guidance Concerning
Request for Waiver by DuPont
Environmental Remediation Services
Docket No.

MINUTE ORDER NO. 97-24

PAGE 1 OF 1

In conjunction with a request for variance submitted to the Department by DuPont Environmental Remediation Services on March 24, 1997, the Department seeks interpretive guidance on how certain provisions of Regulation No. 23 should be construed in light of the statutory variance and waiver authority vested with the Commission by A.C.A. §8-7-211. Specifically, DuPont notes that Regulation No. 23, §270.14(b)(6) requires that any waiver from certain requirements of the Preparedness and Prevention Chapter of Regulation No. 23 must be submitted in a facility's permit application.

The Commission concludes that when promulgated regulations expressly state that certain variance or waiver requests should be submitted to the Department as part of a permit application under Regulation No. 23, the applicant need not separately apply to the Commission for the same variance or waiver.

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SUBMITTED BY: Weaver PASSED: APRIL 18, 1997

ARKANSAS DEPARTMENT OF POLLUTION CONTROL & ECOLOGY

TO: Commissioners

FROM: Steve Weaver; Policy Advisor to the Director

DATE: April 4, 1997

RE: Interpretive Guidance Concerning Request for Waiver by DuPont Environmental Remediation Services

AR. POLLUTION CONTROL
AND
ECOLOGY COMMISSION
FILED BY
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With this agenda item, the Department seeks interpretive guidance from the Commission concerning how specific provisions of Regulation No. 23 should be applied in light of A.C.A. §8-7-211. Attached for the Commission's review are copies of the relevant statutes and regulations, and a copy of DuPont's waiver request.

A.C.A. §8-7-211 gives the Commission the authority to grant a "variance, waiver, or extension" from application of or compliance with any provision of Regulation No. 23. Note that this "statutory waiver" only applies for one year, and any extension is subject to public notice. Established practice before the Commission requires the filing of a formal Petition For Waiver showing that abiding by the regulation "would cause undue or unreasonable hardship," and that granting a waiver would "not cause substantially adverse environmental effects."

In this situation, the regulations governing two of the waivers at issue in DuPont's request specifically state that the justification for the waiver should be presented as part of the permit application. See Regulation No. 23, §270.14(b)(6); parenthetical comments to §§264.32 and 35.

The question presented is whether the "waiver" allowed in the above regulations is a "statutory waiver" contemplated by A.C.A. §8-7-211. On their face, these regulations anticipate that the merits of the proposed waiver would be weighed and determined in the context of a permit application, a power vested by State statute with the Department. See A.C.A. §§8-1-202(b)(1); 8-7-215(a). Use of the term "waiver," however, led the permitting staff to seek a legal opinion concerning whether A.C.A. §8-7-211 was implicated.

The Department's legal opinion is that A.C.A. §8-7-211 does not apply in these circumstances. This "statutory waiver" provision applies to temporarily exclude an entity otherwise covered by a hazardous waste regulation from its application. The regulations at stake here, however, expressly allow the regulated entity to prove to the permit writer, in the context of a complete permit application, that she should not be covered by a particular regulatory requirement. "Application of, or compliance with" the regulation never becomes an issue if the permitting authority finds, given the totality of circumstances, that this regulatory stricture is not necessary to protect the public health or the environment.

Because this matter ostensibly impacts powers vested with the Commission by A.C.A. §8-7-211, the Department respectfully seeks the Commission's concurrence with this interpretation.

Text of Minute Order:

In conjunction with a request for variance submitted to the Department by DuPont Environmental Remediation Services on March 24, 1997, the Department seeks interpretive guidance on how certain provisions of Regulation No. 23 should be construed in light of the statutory variance and waiver authority vested with the Commission by A.C.A. §8-7-211. Specifically, DuPont notes that Regulation No. 23, §270.14(b)(6) requires that any waiver from certain requirements of the Preparedness and Prevention Chapter of Regulation No. 23 must be submitted in a facility's permit application.

The Commission concludes that when promulgated regulations expressly state that certain variance or waiver requests should be submitted to the Department as part of a permit application under Regulation No. 23, the applicant need not separately apply to the Commission for the same variance or waiver.