

Elf Atochem
2901 Taylor

JUL 23 1992

ATTORNEY GENERAL'S OFFICE
Ecology Div. - Lacey

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

STATE OF WASHINGTON DEPARTMENT OF ECOLOGY,)	No.	92 2 01756 1
)		
Plaintiff,)	CONSENT DECREE	
)		
v.)		
)		
ELF ATOCHEM NORTH AMERICA, INC.,)		
)		
Defendant.)		

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INTRODUCTION

In the Complaint being filed simultaneously with this Consent Decree, the Washington State Department of Ecology ("Ecology") has alleged that defendant Elf Atochem North America, Inc. ("Elf Atochem") is threatening to violate the effluent limitation for temperature set forth in its National Pollution Discharge Elimination System ("NPDES") Permit No. WA-000311-5.

To resolve the Complaint, and without admitting liability or any law or fact (except as required to enforce the terms of this Consent Decree) Elf Atochem and Ecology consent to the entry of this Consent Decree.

Ecology agrees that settlement of this matter is in the public interest and that entry of this Consent Decree without litigation is the most appropriate means of resolving this matter and avoiding protracted litigation costs and expenses.

NOW, THEREFORE, in consideration of the premises above, it is hereby ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter and over the parties pursuant to the Washington Water Pollution Control Act, Chapter 90.48.037 RCW, and WAC 173-220-230. The parties stipulate to venue in Thurston County.

1 II. PARTIES BOUND

2 This Consent Decree shall apply to and be binding upon the
3 parties hereto. The undersigned representatives of Ecology
4 and Elf Atochem certify that they are fully authorized to
5 enter into the terms and conditions of this Consent Decree and
6 to legally bind their respective principals to it.

7 III. STATEMENT OF FACTS

8 A. Elf Atochem owns and operates a chlorine and caustic
9 production facility located at 2901 Taylor Way, Tacoma,
10 Washington.

11 B. Elf Atochem discharges process water and non-contact
12 cooling water to the Hylebos Waterway through a single outfall
13 designated Outfall 001 pursuant to NPDES Permit No.
14 WA-000311-5.

15 C. On or about February 22, 1991, Ecology reissued the
16 facility's NPDES permit. Certain provisions of the reissued
17 permit were appealed by Elf Atochem to the Washington
18 Pollution Control Hearings Board ("PCHB") on or about
19 March 25, 1991. Elf Atochem and Ecology subsequently entered
20 into a stay of certain permit conditions.

21 D. The reissued permit contains a temperature limit of
22 77° F at Outfall 001. Elf Atochem's previous permit contained
23 a temperature limit of 84° F.

1 E. Elf Atochem will ~~at~~ times be unable to meet the 77° F
2 temperature limitation and the facility will at those times
3 violate the state water quality standard for temperature.

4 F. Ecology is filing a Complaint simultaneously with this
5 Consent Decree, in which it alleges that Elf Atochem is
6 threatening to violate the state water quality standard for
7 temperature.

8 G. Without admitting any liability for violations alleged
9 by Ecology, Elf Atochem has agreed to resolve the Complaint by
10 entering into this Consent Decree. Pursuant to this Decree,
11 Elf Atochem will achieve compliance with the state water
12 quality standard for temperature, pursuant to the compliance
13 schedule set forth in paragraph IV herein. The parties agree
14 that an interim daily maximum temperature limit of 84° F shall
15 be in effect during the compliance period set forth in
16 paragraph IV. The parties further agree that, upon entry of
17 this Consent Decree and issuance of a final NPDES permit, Elf
18 Atochem will withdraw its appeal before the PCHB.

19 **IV. COMPLIANCE SCHEDULE**

20 On or before December 31, 1993, or such later time as may
21 be established pursuant to the terms of this Consent Decree,
22 Elf Atochem shall make such changes to its technology,
23 processes or operations as are necessary to achieve full
24 compliance with the state water quality standard for
25 temperature. The parties presently anticipate that this shall

1 be accomplished by installation of a new or modified diffuser,
2 to be constructed in conformance with the schedule and terms
3 set forth below:

4 <u>DATE</u>	<u>MILESTONES</u>
5 June 15, 1992	Submit work plan for 15 day Ecology review
6 September 15, 1992	Submit preliminary design to Ecology for 15 day review, if work plan is timely reviewed
7	
8	
9 November 15, 1992	Submit permit applications if preliminary design is approved by Ecology
10	
11 May 14, 1993	Submit final design to Ecology for 15 day review
12	
13 June 15, 1993	Award construction contract
14 July 15, 1993	Begin construction
15 November 1, 1993	Complete construction
16 November 30, 1993	Submit performance evaluation report to Ecology for 15 day review
17 December 31, 1993	Startup

18 The performance evaluation referenced above shall be
19 conducted to determine whether a new or modified diffuser is
20 capable of achieving a temperature limit of 77° F. If not,
21 then the results of the evaluation shall constitute "new
22 information" within the meaning of 40 CFR 122.62(2) and the
23 temperature limit in the permit will be recalculated pursuant
24 to WAC 173-201-045(3)(c)(iv). Any modification of the permit
25

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1 shall be appealable pursuant to chapter 43.21B RCW (consistent
2 with 40 CFR Parts 122 and 124).

3 The due dates for each of the deliverables required above,
4 and the Parties' understanding that construction of the new or
5 modified diffuser can be completed by December 31, 1993, are
6 based upon an assumption that Ecology will complete its review
7 of drafts, or of previous submissions by Elf Atochem which are
8 contingent upon completion of subsequent submissions, within
9 fifteen (15) days from receipt of such drafts or submissions.
10 In the event that Ecology is unable to complete its reviews
11 within fifteen (15) working days of receipt by Ecology, any
12 subsequent milestones will be extended by the additional time
13 required for Ecology's review.

14 **V. INTERIM EFFLUENT LIMITATION**

15 Until December 31, 1993, or such later time as may be
16 established pursuant to the terms of this Consent Decree, the
17 effluent discharge at Outfall 001 shall not exceed 84° F
18 (daily maximum).

19 Any violation of this limitation shall be subject to
20 Ecology's enforcement authority under the Washington Water
21 Pollution Control Act, chapter 90.48 RCW and shall not be
22 limited by the terms of this Consent Decree.

23 **VI. FORCE MAJEURE**

24 A force majeure event is defined as: (1) Circumstances
25 beyond the reasonable control and despite the due diligence of

1 the permittee, including ~~and~~ (without limitation) delays caused by
2 unrelated third parties, third parties under contract with
3 Ecology, or Ecology, such as (but not limited to) delays by
4 Ecology in reviewing, approving, or modifying documents
5 submitted by permittee; (2) Delays resulting from permit
6 conditions such as (without limitation) seasonal construction
7 restrictions in the Hylebos Waterway, or delay in issuing or
8 refusal to grant any permit or approval by any agency needed
9 to implement the requirements of this schedule, provided Elf
10 Atochem has filed a timely and complete application for the
11 permit and timely responded to any requests for additional
12 information; (3) Delays caused by labor disruptions;
13 (4) Judicial review of the issuance, non-issuance, or
14 reissuance of a permit necessary for the continuation of work;
15 (5) Acts of God, including fire, flood, earthquake, blizzard,
16 extreme temperatures, storm, wave or water conditions, or
17 other unavoidable casualty; or (6) Other circumstances deemed
18 exceptional or extraordinary by Ecology or this Court.

19 The permittee may not claim the existence of a force
20 majeure event unless it has provided Ecology with written
21 notice of the event within thirty (30) days of the date it has
22 knowledge of the event.

23 If there is a good faith dispute about whether the
24 compliance schedule should be extended based on a force
25 majeure event, the daily maximum for temperature shall remain

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1 84° F until the matter is finally resolved through the dispute
2 resolution process. Elf Atochem shall not invoke the dispute
3 resolution process frivolously merely to postpone compliance
4 with any milestone.

5 VII. PROGRESS REPORTS

6 Elf Atochem will submit to Ecology quarterly progress
7 reports on the 15th of the month following the close of the
8 quarter (i.e., April 15th, July 15th, October 15th, and
9 January 15th). The first progress report shall be due on
10 ~~July 15,~~ ^{OCTOBER 15} 1992. The report will summarize Elf Atochem's
11 progress in meeting any milestones during the reporting
12 period. If any milestone has not been met, Elf Atochem shall
13 include an explanation of the circumstances and state when it
14 expects such step will be achieved. If Elf Atochem claims
15 that its failure to meet a schedule date is excused pursuant
16 to a force majeure event as defined in Section VI of this
17 Consent Decree, the report will document that contention.

18 Progress reports will be sent to Dom Reale, his designee,
19 or his successor by certified mail at the following address:

20 State of Washington
21 Department of Ecology
22 Southwest Regional Office
23 7272 Cleanwater Lane
24 Mail Stop 7775
25 Olympia, WA 98504-7775

1 **VIII. CIVIL PENALTIES**

2 Elf Atochem agrees to pay a stipulated civil penalty of
3 \$1,500.00 per day for any unexcused failure to meet milestones
4 listed in Section IV of this Consent Decree. Ecology shall
5 impose civil penalties pursuant to RCW 90.48.144. All
6 disputes pertaining to whether the failure to meet a milestone
7 was due to a force majeure event, within the meaning of
8 Section VI herein, shall be resolved pursuant to the dispute
9 resolution provisions of Section X. Ecology may at its
10 discretion waive or reduce any penalty but may not increase
11 the amount of any penalty beyond \$1,500.00 per day.

12 **IX. ENTRY AND INSPECTION**

13 During the term of this Consent Decree, Ecology and its
14 duly appointed agents shall have authority under RCW 90.48.090
15 to enter Elf Atochem's Tacoma facility at reasonable times and
16 upon reasonable notice for the purpose of inspecting and
17 investigating conditions relating to Elf Atochem's compliance
18 with the terms of this Consent Decree.

19 **X. DISPUTE RESOLUTION**

20 If Elf Atochem claims a force majeure event for any
21 failure to meet a compliance schedule milestone, Elf Atochem
22 shall provide a concise statement of the force majeure event
23 to Ecology within thirty (30) days of the date Elf Atochem has
24 knowledge of the event. Ecology shall have fifteen (15) days
25 following the receipt of the concise statement to deliver a

1 written response. The written response shall state whether
2 Ecology accepts or disputes Elf Atochem's claim. If Ecology
3 accepts Elf Atochem's claim, Elf Atochem shall be relieved of
4 any sanctions for not meeting the milestone, including but not
5 limited to any obligation to pay monetary penalties, and
6 subsequent milestones shall be modified accordingly. If
7 Ecology disputes Elf Atochem's claim, the parties shall have
8 fifteen (15) days after receipt of Ecology's written response
9 to meet, negotiate, and attempt to arrange a mutually
10 acceptable resolution. If no mutually acceptable resolution
11 is achieved within fifteen (15) days, either party shall have
12 the right to submit the dispute to the Court for resolution
13 forty-five (45) days from receipt of Ecology's written
14 response. Invoking the dispute resolution process shall not
15 automatically extend the compliance schedule in paragraph IV,
16 but either party may apply for an extension which may be
17 granted by the Court for good cause.

18 Any other disputes that arise under this Consent Decree
19 shall be resolved by the same process.

20 **XI. AMENDMENT OF CONSENT DECREE**

21 A. With the exception set forth in Section XI.B below,
22 this Decree may only be amended by a written stipulation that
23 is entered by the Court between the parties to this Decree.
24 Such amendment shall become effective upon entry by the Court.

1 B. Written stipulation~~ion~~ by the Parties is not needed for
2 schedule extensions granted pursuant to the force majeure
3 provisions in Sections VI and X herein. Any such extension
4 shall become effective on the date on which Ecology issues its
5 written approval.

6 XII. EFFECTIVE DATE

7 This Decree is effective upon the date it is entered by
8 the Court.

9 XIII. EFFECT OF DECREE

10 This Consent Decree represents a compromise agreed to by
11 the Parties after extensive good faith negotiations. The
12 Parties agree that this Consent Decree shall serve to settle
13 the allegations made in Ecology's Complaint.

14 Insofar as this Consent Decree establishes a compliance
15 schedule for meeting the state water quality standard for
16 temperature, Ecology shall not seek any court or
17 administrative order requiring compliance earlier than that
18 agreed upon in this Consent Decree. This Consent Decree
19 reflects the Department of Ecology's exercise of prosecutorial
20 discretion. It does not relieve the permittee of any
21 liability or obligations contained in the facility's NPDES
22 permit except with respect to the temperature limit, and only
23 provided the permittee meets the terms of this Consent Decree,
24 including paragraphs IV and V.

XIV. DURATION OF DECREE

This Consent Decree shall remain in effect until December 31, 1993, unless extended by a force majeure event pursuant to paragraph VI or by dispute resolution pursuant to paragraph X; provided that if the temperature limit is recalculated pursuant to paragraph IV, and the recalculated limit is appealed by a third party, this Consent Decree shall remain in effect until any such appeals of the recalculated temperature limit are exhausted.

This Court shall retain jurisdiction to enforce the terms and conditions of this Consent Decree until its termination.

DATED this 20th day of July, 1992.

CAROL A. FULLER

JUDGE

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