IN RE CAVENHAM FOREST INDUSTRIES INC.

RCRA Appeal No. 93-2

ORDER DISMISSING APPEAL

Decided March 7, 1995

Syllabus

Petitioner Cavenham Forest Industries Inc. submitted a petition for review challenging four conditions of a permit issued to it by U.S. EPA Region VI under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act. The HSWA permit, issued in tandem with a State-issued RCRA permit for post-closure care, sets forth corrective action requirements for a 79-acre parcel of property owned by Cavenham near Urania, Louisiana. A portion of the property was formerly occupied by a wood treatment operation, and the remaining portions of the property are used for oil exploration and production.

One of the permit provisions challenged in Cavenham's petition is a table that lists five "oil pits" (surface impoundments containing drilling and production wastes) as solid waste management units (SWMUs) for which Cavenham is required to perform a RCRA Facility Investigation (RFI). In the petition, Cavenham argues that the five oil pits should be deleted from the permit's list of "SWMUs Requiring an RFI" because Cavenham does not control the oil drilling activity on its property. Cavenham reasons that because the oil pits are allegedly not within its control, they are not located within the RCRA "facility" to which this permit applies, as that term has been interpreted for purposes of RCRA § 3004(u), and therefore cannot be SWMUs for which it can be held accountable.

While this appeal was pending, the parties appeared to have reached an agreement resolving all of the issues raised in Cavenham's petition. Three of the issues have, in fact, been resolved to the satisfaction of both parties. As to the general question of Cavenham's responsibility for addressing oil field wastes on its property, however, the parties continue to disagree. Region VI has offered to delete the five existing oil pits from the permit's list of "SWMUs Requiring an RFI," but that offer is based on information specific to the five units; the Region does not, in other words, concede the validity of Cavenham's broader argument that the oil pits, and all other oil-related conditions on the property, cannot be classified as SWMUs. Absent such a concession, Cavenham insists, it will not have obtained the "complete relief" that it requested in its petition because future releases from the five oil pits, or from other oil pits created or discovered on the property at some future time, might still trigger corrective action responsibilities that Cavenham should not have to bear.

Held: The Region's decision to delete the five oil pits from the HSWA permit's list of "SWMUs Requiring an RFI" renders this appeal moot. Cavenham did not challenge any of the permit conditions authorizing Region VI to require corrective action with respect to future releases from known SWMUs, or with respect to newly discovered or newly created SWMUs. Rather, Cavenham challenged only the permit condition designating the five existing oil pits as units that are subject to an immediate RFI requirement. That objection has now been

resolved in precisely the manner requested by Cavenham in its petition. Cavenham cannot now broaden its appeal by attacking other permit conditions that it did not challenge in the petition for review, even if the arguments advanced in support of the new challenges are the same as or similar to arguments that do appear in the petition. If, at some future time, the Region seeks to impose corrective action requirements with respect to newly discovered or created oil-related SWMUs, the terms of the permit are broad enough to allow Cavenham to reassert, at that time, its argument that such other oil field units are not properly part of its "facility" for HSWA purposes. Cavenham's current challenge is dismissed as moot.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

This proceeding was initiated by a petition for review filed by Cavenham Forest Industries Inc. (Cavenham) on January 19, 1993. Cavenham challenged four conditions in a permit issued to Cavenham by U.S. EPA Region VI for corrective action under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* (RCRA). Before the Region filed a response, and pursuant to the parties' joint request, the Environmental Appeals Board remanded this matter to Region VI on October 5, 1993, based on the parties' representation that they had reached a settlement with respect to all issues raised in the petition for review. The appeal was reinstated in part, however, on January 4, 1995, at Cavenham's request, based on Cavenham's assertion that the parties had ultimately not been able to resolve one of the issues raised by Cavenham in its petition.[1]

Responding to the reinstated portion of Cavenham's appeal, Region VI contends that it has agreed to resolve the reinstated issue in precisely the manner requested in Cavenham's petition, and that the reinstated issue is therefore moot. We conclude that the Region is correct, and we therefore dismiss the appeal on grounds of mootness. The basis for our conclusion is as follows.

I. *BACKGROUND*

In 1986, Cavenham acquired 79 acres of land overlying an oil field near Urania, Louisiana. A portion of the site, referred to by Cavenham as

[1] The parties agree that the other three issues have been resolved.

the "Process Area," was occupied by a wood treatment operation,[2] and the remainder of the site was used for oil exploration and production.

In the petition for review, Cavenham states that it has closed off an 11-acre portion of the Process Area within a slurry wall. The enclosed area includes "most of the former [wood treatment] operating areas" as well as "five surface impoundments and a sludge drying bed used in treating wastewater from the wood treatment process." Pursuant to requirements imposed by the State of Louisiana, Cavenham has treated contaminated liquids and sludges associated with the five surface impoundments,[3] is completing a cap over part of the Process Area to minimize rainwater infiltration, and has begun a treatment program that will address "known ground water contamination" located within (or originating within) the area encompassed by the slurry wall. Petition for Review at 3-5. The dispute that gives rise to this appeal, however, concerns the question of Cavenham's responsibility for corrective action on the 68-acre portion of the property outside of the slurry wall.

According to the petition for review, Cavenham owns only the "surface rights" associated with its Urania property, and "has never owned any of the mineral rights associated with any portion" of the property. Petition for Review at 3.[4] Cavenham argues that its rights are "subservient" to those of the holders of the mineral rights and that therefore, as a matter of Louisiana law, Cavenham has no power to limit or prohibit the oil exploration and production activity conducted by others on the property, even though Cavenham derives no economic benefit from that activity. Because its rights are limited in that manner, Cavenham asserts that it does not "control" the portions of the property where oil drilling occurs. Thus, Cavenham argues, those areas

---

[2] Cavenham states that by the time it acquired the property from the previous owner, Crown Zellerbach Corporation, a decision to close the wood treatment operation had already been reached. Indeed, during 1987—the year after its acquisition of the property — Cavenham submitted a closure plan to the State of Louisiana with respect to the wood treatment areas. By 1988 Cavenham was implementing the closure plan: It began the "decommissioning and removal of structures" associated with the wood treatment operation, and "constructed an on-site bioremediation system for the treatment of contaminated liquids and sludges found there." Petition for Review at 4.

[3] It is unclear whether any remedial action has been or will be required by the State with respect to the sludge drying bed.

[4] The mineral rights were severed from the surface rights through two transactions that occurred before Cavenham acquired its interest in the property: In 1968, approximately 70% of the mineral rights were transferred to individual investors by Georgia-Pacific Corporation; and in 1974, Louisiana-Pacific Corporation, having acquired the surface rights and the remaining 30% of the mineral rights from Georgia-Pacific, transferred the surface rights (to Crown Zellerbach Corporation) but retained its 30% share of the mineral rights. Petition for Review at 3.

do not fit within the applicable definition of a RCRA "facility" appearing at 40 C.F.R. § 260.10,[5] and cannot be SWMUs for this facility.[6]

In December 1992, Region VI and the Louisiana Department of Environmental Quality issued to Cavenham a RCRA permit for post-closure care of the Urania property.[7] The corrective action provisions of the permit, as issued by Region VI, appear in Section VII of the permit document, wherein Cavenham is directed to perform a RCRA Facility Investigation (RFI) to "address releases of hazardous waste or hazardous constituents to all media from those SWMUs [*i.e.*, solid waste management units] listed in Table 2." Permit § VII.K.1, at 13.

In its petition for review, Cavenham raised objections concerning seven of the ten units listed in Table 2 of Section VII of the permit as "SWMUs requiring an RFI." Two of the challenged units previously functioned as drainage ditches running along the east and west sides of a wood treatment building on the property. *See* Petition for Review at 27 n.48. Those units lie almost entirely within the area now encompassed by the slurry wall. *Id.* Exhibit F. The other five challenged units are "oil pits"—surface impoundments into which, according to Cavenham, oil well operators "dispose of drilling wastes (including fluids or 'muds' used to lubricate the drills) and production wastes

---

[5] According to the regulation, "*Facility* means: * * * (2) For the purpose of implementing corrective action under § 264.101, all contiguous property *under the control of the owner or operator seeking a permit* under subtitle C of RCRA." (Emphasis added.) The regulation did not actually become final and effective until April 1993, but a proposed regulation defining "facility" (for corrective action purposes) with reference to an element of "control" had already been issued as of the date of the final permit decision at issue in this appeal. *See* Petition for Review at 9-11 (citing proposed rule at 55 Fed. Reg. 30,797, 30,874 (1990)). The Region has not disputed that this definition is applicable, although it does dispute Cavenham's arguments on how it applies to the facts of this case.

[6] The provisions of RCRA § 3004(v), under which a RCRA permittee can be required to undertake corrective action beyond the boundary of the permitted facility, are not at issue here. Cavenham's contention is not that it should not be responsible for releases originating on its own property that subsequently migrate onto someone else's property. Rather, Cavenham asserts that any releases from oil field activities that are admittedly conducted on Cavenham's property would, despite Cavenham's ownership of the property, nonetheless have originated outside of the RCRA "facility" to which this permit applies.

[7] At all times relevant to the permit decision under review, the State of Louisiana was not authorized to issue permits for corrective action under HSWA. The corrective action portions of Cavenham's post-closure care permit were therefore issued by Region VI. Louisiana recently became authorized to administer certain HSWA corrective action requirements under its own hazardous waste regulatory program in lieu of EPA, *see* 60 Fed. Reg. 4380 (Jan. 23, 1995), but neither party contends that the January 1995 authorization affects Cavenham's appeal.

(including brine and crude oil sludges)." Petition for Review at 2.[8] Each of those five units is located outside of the slurry wall. *Id.* Exhibit A.

With respect to the two drainage ditches and the five oil pits, Cavenham concluded its petition for review with the following request for relief:

> CFI requests the EAB to remand the HSWA Permit with the following instructions:
>
> (a) to delete the oil pits (SWMUs 7-11) from the list of SWMUs in Section VII, Table 2; [and]
>
> * * * * * * *
>
> (d) to delete the eastern and western drainage ditches (SWMUs 21 and 22) from the list of SWMUs in Section VII, Table 2.

Petition for Review at 29-30.

On October 1, 1993, the parties jointly requested the Board to remand the permit to Region VI for deletion of the oil pits and the drainage ditches from the list of SWMUs in Section VII, Table 2. The parties reported that during the pendency of the appeal, Region VI had evaluated the results of sampling procedures conducted in the areas in question and had agreed, based on those results, to delete from Table 2 all of the SWMUs challenged by Cavenham in its petition for review. Specifically, the parties jointly stated:

> a. During the week of September 1, 1993, EPA conducted a sampling event at the facility which resulted in new information being provided EPA regarding the five oil pits and drainage ditches designated in the Permit as SWMUs, and which are the subject of this appeal:

---

[8] Cavenham's description matches that in the RCRA Facility Assessment report prepared for EPA in 1987 with respect to this site. The RFA report describes "five impoundment[s] of unknown depth from an oil field operation [that are] filled with a dark black oily substance." RFA Report at p. 65 (quoted in Petition for Review at 7 n.7). The report states that "[t]he precise waste contained in these impoundments is unknown, however they probably contain drilling fluids, brine, workover fluids and oily sludges." *Id.*

> b. As a result of the above-referenced information, the parties have agreed that EPA will remove the five oil pits (SWMUs numbered 07-11 in the Permit and which are also identified as SWMU number 29 in the RCRA Facility Assessment) and the east and west drainage ditches (SWMUs numbered 21 and 22 in the Permit) from the list of SWMUs requiring RCRA Facility Investigation (Permit Section VII, Table 2)[.]

Joint Motion to Remand at 1-2. The parties also reported that they had agreed to discuss further, "on their own and outside the parameter of this appeal," a "process" for addressing any "environmental conditions" that might later be discovered on the portion of Cavenham's property outside the slurry wall. Joint Motion to Remand at 2.

Subsequently, Cavenham became dissatisfied with the course of the discussions with Region VI regarding conditions beyond the slurry wall. Therefore, on December 28, 1994, Cavenham requested that we reinstate its appeal for the purpose of addressing the question of Cavenham's potential responsibility under HSWA for corrective action outside of the slurry wall.[9] In its motion for reinstatement of the appeal, Cavenham asks for the following relief with respect to the areas outside the slurry wall:

> CFI prays that EAB remands the Final Permit with the following instructions:
>
> * * * * * * *
>
> (2) Delete the oil pits (SWMUs 7-11) from the list of SWMUs in Section VII, Table 2; and
>
> (3) Provide clarifying comments to the Final Permit stating that the oil pits (SWMUs 7-11) are no longer considered SWMUs and that any newly created or

[9] Cavenham indicated that it did not obtain the "complete relief" it seeks because the Region continues to classify the oil pits as SWMUs, albeit not ones presently requiring an RFI, and because the Region does not concede that newly discovered problems relating solely to oil field activity cannot be classified as SWMUs.

> newly discovered conditions at the Parcel relating solely to oil field activity are not subject to SWMU designation under the Final Permit.

Petitioner's Motion to Reinstate the Appeal at 24-25. The question we now confront is whether Cavenham's appeal is mooted by the deletion of the oil pits from Section VII, Table 2, as Region VI contends, or whether the appeal is properly before us for consideration of the "clarifying comments" now requested by Cavenham.

II. *DISCUSSION*

The regulation governing RCRA permit appeals, 40 C.F.R. § 124.19, provides for review of a "condition of [a final] permit decision," based on a petitioner's showing that "the condition in question" is clearly erroneous or otherwise worthy of review. Consistent with that regulatory language, and as a matter of practical necessity, this Board has made clear that it is the petitioner's obligation to identify the specific permit conditions that it seeks to challenge in a proceeding under section 124.19. *See, e.g., LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 4 (EAB, May 5, 1993) (petition for review under section 124.19 must include "a clear identification of the conditions of the permit [that are] at issue"). Neither the Regional Office nor the Environmental Appeals Board will "search through the permit for the specific permit conditions" that, although not identified by the petitioner as contested, might nonetheless be affected by the arguments or objections in a petition for review. *Id.* at 5; *see also In re Broward County, Florida*, NPDES Appeal No. 92-11, at 18 & n.28 (EAB, June 7, 1993).

It follows that, in addressing a claim of mootness, the Board looks to whether there remain any contested permit conditions—that is, conditions identified as objectionable in the petition for review—that the Regional Office has not undertaken to revise in the manner requested by the petitioner. If no such challenged conditions remain, a petition under section 124.19 must be dismissed as moot, even if the parties continue to disagree over the meaning of the applicable legal principles.[10] The Board's role under section 124.19 is to examine, generally

[10] *Cf. In re City of Port St. Joe, Florida*, NPDES Appeal No. 93-9 (EAB, Jan. 11, 1994) (appeal mooted by EPA's withdrawal of a Clean Water Act NPDES permit under 40 C.F.R. § 124.60(b), despite petitioner's objection to the new draft permit proposed to replace it); *In re Bay County Waste Treatment Facility*, NPDES Appeal No. 92-16 (EAB, Oct. 3, 1994) (permittee's appeal mooted by withdrawal and proposed revision of challenged conditions under § 124.60(b), despite permittee's objection to withdrawal and proposed revision of other conditions challenged by a third party); *In re Simpson Paper Company*, NPDES Appeal No. 92-26 (EAB, Aug. 6, 1993) (third party's appeal mooted by permittee's voluntary relinquishment of the challenged permit).

for clear error, specific permit conditions that are challenged in a timely manner[11] by a petitioner eligible to pursue such a challenge. The Board will not normally examine uncontested conditions of a permit simply to ensure their consistency with the Board's understanding of applicable law.

Turning to Cavenham's December 28, 1994 Motion to Reinstate the Appeal, we find that Cavenham, in that motion, requests "clarification" with respect to two issues: (1) whether the five oil pits discussed in its petition for review are SWMUs, such that Cavenham, although not required to address them at this time, might in the future have to report and address "newly created" or "newly discovered" releases from them; and (2) whether oil-related environmental conditions on Cavenham's property *other than* SWMUs 7 through 11 could, if created or discovered at some future time, permissibly be classified at that time as SWMUs for which Cavenham is responsible. Neither issue was timely raised in the petition for review and therefore neither issue is properly before us,[12] even though Cavenham would now have us expand the scope of its appeal in order to address them.[13]

As to the five existing oil-related units, SWMUs 7 through 11, the permit contains three significant conditions. Section VII, Table 2 iden-

---

[11] Section 124.19 requires a petitioner to seek Environmental Appeals Board review within 30 days after the issuance of the final permit decision containing the conditions for which review is sought.

[12] As noted in the preceding footnote, for an appeal to be timely it must be brought within 30 days after issuance of the final permit decision. Any attempt to raise new issues at this stage of the proceeding amounts to nothing more than an untimely attempt to appeal a permit condition long after the 30-day period has elapsed.

[13] Referring both to the SWMU designation of SWMUs 7 through 11 and to the potential future SWMU designation of other, similar units, Cavenham insists that "[t]here is no basis for the EAB to find that the oil field issue has been fully resolved." Petitioner's Reply Memorandum in Support of Petition for Review, at 2 (Feb. 23, 1995). We agree that Cavenham's broadly conceived "oil field issue", *i.e.*, its general argument alleging a lack of corrective action responsibility for oil field wastes or units on its property, remains unresolved. The point, however, is that the scope of Cavenham's appeal is properly defined by the specific permit conditions challenged in its petition for review, and not by the general arguments or issues on which those challenges are based. Both components of the unresolved "oil field issue" are beyond the scope of Cavenham's appeal as so defined.

Cavenham also argues that the Region's suggestion of mootness would have us disregard a "reviewable" question concerning the extent of Cavenham's corrective action responsibilities under RCRA § 3004(u). Petitioner's Reply Memorandum at 3 (citing *In re Northside Sanitary Landfill, Inc.*, RCRA Appeal No. 84-4 (Adm'r, Nov. 27, 1985)). However, Cavenham misses the point. We are not concerned with the potential "reviewability" of the issues as they are now framed by Cavenham, but with the question whether Cavenham did or did not challenge, in its petition for review, the permit conditions giving rise to the corrective action responsibilities that it now calls in question.

tifies these units as SWMUs for which an RFI is currently required. Section VII.J ("Interim Measures") allows the Region to order interim measures for any release or potential release "from a SWMU" to abate a perceived threat to human health and the environment. Finally, Section VII.I ("Notification Requirements for Newly-Discovered Releases at SWMU(s)") allows the Region to require corrective action, including "further investigation and/or interim measures," to address newly discovered or newly created releases from known SWMUs—including SWMUs not originally subject to an RFI requirement.

Of the three permit provisions that impose (or that authorize the Region to impose) corrective action obligations with respect to SWMUs 7 through 11, only one—the Table designating them as "SWMUs Requiring an RFI"—is identified in the petition for review as a condition being challenged. The petition for review does not seek relief from, nor does it include any reference to, the provisions of Section VII.I (to which Cavenham now objects) or Section VII.J. It is true that, by deleting the oil pit SWMUs from Table 2 without expressly declaring them not to be SWMUs, the Region leaves the oil pits potentially subject to the requirements associated with permit Sections VII.I and VII.J. But it is not true that the Region's unwillingness to declare those requirements inapplicable to the oil pit SWMUs effectively denies Cavenham "the complete relief requested in its Petition." Motion to Reinstate the Appeal at 19. As the Region correctly notes (*see* Response to Petition for Review at 2), Cavenham's petition asked only for an instruction "to delete the oil pits (SWMUs 7-11) from the list of SWMUs in Section VII, Table 2." Petition for Review at 30. The other permit provisions affecting Cavenham's potential responsibility for SWMUs 7 through 11 were simply not discussed. Cavenham, therefore, can no longer challenge the propriety of regarding these five particular oil pits as solid waste management units under RCRA § 3004(u). By the terms of the permit, Cavenham can, however, still challenge on other grounds any future determination by Region VI to require corrective action for newly created or newly discovered releases from SWMUs 7 through 11.[14]

For reasons similar to those already discussed, Cavenham's disclaimer of responsibility for any oil field SWMUs other than SWMUs 7 through 11 is also beyond the scope of the present appeal. In connection with that issue, the most significant condition of the HSWA permit is Section VII.H ("Notification Requirements for and Assessment of

[14] According to Section VII.I of the HSWA permit, the Region will commence a permit modification proceeding in the event that it decides, based on information concerning newly discovered releases, to require investigation at a SWMU for which no such investigation was initially deemed necessary.

Newly-Identified SWMUs"), which requires Cavenham to notify the Region of any newly created or newly discovered SWMUs on the Urania property. Section VII.H, however, is nowhere mentioned in the petition for review, and therefore it, like the conditions governing future releases from existing SWMUs, is not properly before the Board as part of Cavenham's reinstated appeal.

Although Cavenham's objections concerning future SWMU designations cannot be addressed in the present proceeding, the terms of the permit allow Cavenham to raise those arguments (including arguments based on Cavenham's alleged inability to "control" the oil field activity on its property) if and when the Region actually seeks to require corrective action for any oil field unit other than SWMUs 7 through 11.[15] In that event, Section VII.H.2 of the permit would apparently allow Cavenham to object, in the context of a permit modification proceeding, to any "investigation requirement" that the Region seeks to impose with respect to any "newly identified SWMU." Implicit in this is the ability to challenge the SWMU designation itself.

III. *CONCLUSION*

The clarifying comments requested in Cavenham's Motion to Reinstate the Appeal affect the applicability of several permit conditions that Cavenham did not challenge in its original petition for review. The Regional Office has undertaken to address each of the conditions that were challenged in the petition, and Cavenham cannot now expand its appeal to include other conditions as to which similar challenges could have been, but were not, timely raised at the outset. Accordingly, RCRA Appeal No. 93-2 is dismissed as moot.[16]

So ordered.

---

[15] Even if a challenge to Section VII.H had appeared in the petition, it is unlikely that Cavenham's objection, which concerns the possibility of future SWMU designations under that provision, would have warranted review. There may never be any oil field conditions subject to designation as SWMUs under Section VII.H, and Cavenham's effort to preempt such designations now raises concerns that are speculative at best. *See In re Waste Technologies Industries*, RCRA Appeal No. 93-16, at 7 (EAB, Jan. 27, 1995) (declining to address purely speculative concerns raised in a permit appeal); *In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 8 (EAB, Nov. 23, 1993) (same). Indeed, by seeking "clarifying comments" about the regulatory status of units that may never come into existence, Cavenham is essentially requesting an advisory opinion, which we would decline to provide even if the request were properly before us. If, in the future, an actual dispute should arise under Section VII.H, the permit contains adequate mechanisms for addressing that dispute at the appropriate time. *See* Permit § VII.F.4 ("Dispute Resolution"); § VII.H.2 (referring to the commencement of a permit modification procedure if investigative work is determined to be required at a newly identified SWMU).

[16] Since we are dismissing the appeal as moot, we obviously express no opinion on the substance of Cavenham's arguments relative to the designation of "oil pits" as SWMUs.