IN RE METALWORKING LUBRICANTS COMPANY

RCRA Appeal No. 93-4

ORDER DENYING REVIEW

Decided March 21, 1994

Syllabus

Metalworking Lubricants Company seeks review of the Federal portion of a permit issued to it by U.S. EPA Region V under the Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* The challenged permit terms require the company to conduct corrective action at its Indianapolis, Indiana, facility and to remedy any off-site contamination arising from migration from a release on the facility site. In its petition for review, the company objects to these obligations on the grounds that any contamination at or migrating from the site was the responsibility of a previous owner. The company argues that the Region should allow corrective action to proceed initially under a State enforcement action, to which the previous owner can be made a party, rather than under the permit. This would avoid potentially duplicative or inconsistent requirements and allow for shifting the burden of remediation to the prior owner.

Held: Metalworking Lubricants, as the current owner and operator, is legally responsible for corrective action both on the site and for releases migrating from the site, irrespective of when the contamination occurred. Concerns about potentially duplicative or inconsistent requirements will be addressed through the Region's willingness to accept data generated for the State towards satisfaction of the permit's data requirements. Therefore, review of the challenged permit terms is denied.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Metalworking Lubricants Company, the petitioner in this action, has sought review of provisions of a permit issued to it by U.S. EPA Region V under the Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.* The federal portion of the permit covers require-

ments of HSWA, most particularly for corrective action, for which the State of Indiana has not yet received authorization. The State portion of the permit covers the non-HSWA requirements of RCRA for which the State has been authorized under RCRA § 3006(b), 42 U.S.C. § 6926(b).

The permit covers Metalworking Lubricants Company's oil recycling facility at 1509 South Senate Avenue in Indianapolis, Indiana. The final permit decision was issued by the Region on December 30, 1992, and Metalworking Lubricants filed a petition for review on February 3, 1993.[1] At the request of the Board, the Region filed a response to the petition on March 19, 1993.

In its petition, Metalworking Lubricants raises two objections to the Federal portion of the permit.[2] These objections are:

(1) The corrective action requirements of the permit should be conducted in coordination with a pending enforcement action brought by the Indiana Department of Environmental Management ("IDEM"); and

(2) Metalworking Lubricants should not be responsible for corrective action on property which it does not own.

Common to its position on both of these issues is the company's belief that it has done nothing to cause or contribute to the contamination and thus should not be required to conduct the remediation. As the company describes the situation:

> Metalworking Lubricants Company purchased the site in 1977 from D.A. Stuart Oil Company. At the time of the transaction, Stuart Oil Company had covered the site with soil and fill materials to hide the true nature and the extent of the contamination at the site. Since its purchase of the site, Metalworking Lubricants Company has not contributed in any way to further contamina-

[1] A petition for review must be filed with the Environmental Appeals Board within 30 days after service of notice of the final permit decision. 40 C.F.R. § 124.19(a). Metalworking Lubricants asserts that it received the final permit decision on January 4, 1993, and thus that the petition is timely filed. Petition for Review at 2. The Region does not contest this assertion.

[2] Both of these objections were raised in Metalworking Lubricants' comments on the draft permit and thus were properly preserved for review under §§ 124.13 and 124.19(a).

> tion and, in fact, at substantial expense has begun remediation activities. It is the D.A. Stuart Oil Company which is, in fairness, responsible for the contamination and should be held responsible for the cost of the clean-up. The Department of Environmental Management enforcement action provides an avenue to accomplish this; corrective action activities under RCRA do not.

Petition for Review at 3.

For the reasons discussed below, Metalworking Lubricants' petition for review is denied.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit 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 C.F.R. § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to section 124.19 states that "this power of review should only be 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 In re Amoco Oil Company, Mandan, North Dakota Refinery*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993); *In re Laidlaw Environmental Services, Thermal Oxidation Corp.*, RCRA Appeal No. 92-20, at 8 (EAB, Oct. 26, 1993).

A. *Coordination With IDEM Enforcement Action*

In its comments on the draft permit, Metalworking Lubricants stated that "[t]he corrective action activities outlined in Section III of the draft permit should be conducted in coordination with the pending enforcement action" before the IDEM. Comments at 1. It elaborated on this concern as follows:

> In conjunction with the enforcement action, Metalworking Lubricants Company has taken extensive steps to investigate and has begun remedial investigation regarding the major sources of contamination at the site. This has included, among other things, the placement of monitoring wells, exploratory soil borings, laboratory analysis and a bio-remediation bench study. Metalworking anticipates that the enforcement action will continue and that the Indiana Department of Environ-

> mental Management will make additional requests for further investigation and remediation work at the site.
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> Thus, there is a danger of inconsistency between the IDEM enforcement action and EPA's corrective action activities. Moreover, much of the work which has been done to date could be rendered useless if EPA's requirements are different from those of IDEM. This would obviously result in additional and unnecessary expense to Metalworking Lubricants Company.

Id. The company suggested that remediation proceed under the IDEM enforcement action, with EPA being kept informed and providing oversight. Metalworking Lubricants further stated that it anticipated that the IDEM enforcement action would be extended to the D.A. Stuart Oil Company, and thus would provide a vehicle to force that company to become accountable for the clean-up. *Id.* "Any remediation of SWMU's at the site not addressed in the IDEM enforcement action would be remediated by Metalworking in conjunction with EPA Region V." *Id.* at 1-2.

In its Response to Comments, the Region cited its authority to require corrective action, 40 C.F.R. § 264.101, [3] which implements Section 3004(u) of RCRA, 42 U.S.C. § 6924(u). The Region stated that this provision allows the Agency to impose corrective action requirements regardless of any pending State enforcement action.[4]

There was no change to the permit based on Metalworking Lubricants' comments in this regard. On appeal, the parties essentially reaffirm their previous positions. The Region does add, however, that:

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[3] 40 C.F.R. § 264.101 provides in part:

> (a) The owner or operator of a facility seeking a permit for the treatment, storage or disposal of hazardous waste must institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit.
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> (b) Corrective action will be specified in the permit. The permit will contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

[4] The Region did note that it had been in contact with IDEM regarding the enforcement action. The agencies agreed that "the permit's corrective action requirements provide a mechanism to fulfill the goals of the IDEM enforcement action." Consequently, IDEM indicated that it would consider withdrawing its enforcement action once the permit's corrective action conditions became effective. Response to Comments at 4.

> U.S. EPA has no intent to require MLC to perform work which duplicates work properly done under the state enforcement action. It is incumbent upon MLC to submit the results of any work it has done to U.S. EPA as part of the RCRA Facility Investigation ("RFI") portion of the corrective action required by the permit. Of course, if the work completed does not satisfy the RFI requirements of permit and its attached RCRA Corrective Action Plan, additional work will be necessary.

Response to Petition for Review at 3-4.

Initially, in considering this appeal, we note that Section 3004(u) of RCRA was added by HSWA, and requires the owner or operator of a facility seeking a permit to institute corrective action as necessary to protect human health and the environment. Since this obligation falls on the person(s) seeking the permit, it necessarily applies to the *current* owner or operator. *See* 40 C.F.R. § 270.10(b). Where, as here, the State has not received authorization to implement HSWA, it is EPA's obligation to issue this portion of the permit. *See* 40 C.F.R. § 271.134(f); *In re Adcom Wire Company*, RCRA Appeal No. 92-2, at 8. (EAB, Sept. 3, 1992).

We find no legally-supportable basis for Metalworking Lubricants' objection to the EPA permit provision. Its objection is essentially that the permit's corrective action requirements could improperly duplicate, or be inconsistent with, activities it is undertaking in response to IDEM's enforcement action. A substantially identical issue was addressed by the Board in *In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91-25 (EAB, March 18, 1993). In that case, the permittee objected to corrective action requirements as being duplicative of a State enforcement order and argued that the Region had failed to coordinate the permit's corrective action requirements "with efforts already undertaken in cooperation with the State." *Id.* at 9. The Region stated, as part of its response, that the permittee may, as appropriate, rely upon work done for the State to satisfy, at least in part, its permit obligations. *Id.* at 9-10. Because of the Region's willingness to take advantage of permittee's efforts under the State permit, we denied review.[5] The Region in this case has similarly indicated that Met-

[5] The Board cited *In re General Motors Corporation*, RCRA Consolidated Appeal Nos. 90-24, 90-25, at 9 (EAB, Nov. 6, 1992), where review was similarly denied because the Region had agreed to consider all data generated by the permittee through ongoing remediation efforts it was conducting with the approval of State and local officials. *See also In re General Electric Company*, RCRA Appeal No. 91-7, at 4-9 (EAB, Nov. 6, 1992) (EPA obligated to impose HSWA corrective action requirements notwithstanding allegedly potentially conflicting and duplicative requirements of State consent orders).

alworking Lubricants can submit work done for the State as a means of at least partially satisfying its permit requirements.

Finally, Metalworking Lubricants' contention that the Region should defer to the IDEM enforcement action, because that action can be used as a vehicle to shift the burden of remediation to the D.A. Stuart Oil Company as the prior owner, also presents no basis for review.[6] As noted above, the current owner or operator of a permitted facility is required to undertake appropriate corrective action "regardless of the time at which waste was placed in such [solid waste management] unit." 40 C.F.R. § 264.101(a); RCRA Section 3004(u), 42 U.S.C. § 6924(u). In the preamble to the RCRA implementing regulation, 40 C.F.R. Part 264, the Agency explained that the clean-up obligation extends to current owners and operators regardless of whether the waste was placed on the site during a period of prior ownership:

> Section 3004(u) requires corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a facility seeking a RCRA Permit *regardless of the time at which such waste was placed in such unit.* This clear statutory directive precludes a reading of the statute which would limit an owner's or operator's responsibilities to waste placed in units during his or her tenure. *Accordingly, the owner or operator of a solid waste management unit containing only waste placed there by a previous owner would be fully responsible for corrective action for any release from such unit.* This interpretation would not, of course, preclude such owner or operator from bringing any action otherwise allowed by law against the previous owner seeking remuneration for the costs of corrective action.

50 Fed. Reg. 28,714 (1985) (emphasis added). The Region clearly has committed no legal error or abuse of discretion in imposing corrective action requirements on the company, even if the facts are as alleged.

For the reasons stated above, review of the permit decision on these grounds is denied.

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[6] The precise nature of this enforcement action is not described in the petition for review or the underlying administrative record.

B. *Off-Site Contamination*

Metalworking Lubricants also objects to the requirement in the permit obligating it to perform corrective action on property it does not own. The company's objection is apparently to Section III.B. of the permit, which provides:

> In accordance with Section 3004(v) of RCRA and the regulations promulgated pursuant thereto, the Permittee must implement Corrective Action(s) beyond the facility property boundary, where necessary to protect human health and the environment, unless the Permittee demonstrates to the satisfaction of the Regional Administrator that, despite the Permittee's best efforts, the Permittee was unable to obtain the necessary permission to undertake such actions. The Permittee is not relieved of all responsibility to clean up a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such releases will be addressed under the RCRA Facility Investigation, Corrective Measures Study, and Corrective Measures Implementation phases, as determined to be necessary on a case-by-case basis.

Metalworking Lubricants objects to this provision because it asserts that it has not caused any off-site migration since it purchased the property. Any off-site contamination, to the extent that it may exist, was caused by materials released by prior owners or operators. The company further states in its petition that "[a]lthough Metalworking Lubricants Company recognizes its position as an owner/operator, the off-site migration should properly be the responsibility of prior owners/operators." Petition for Review at 4.

In response, the Region asserts that the permit term is fully supported by 40 C.F.R. § 264.101(c), which implements § 3004(v) of RCRA, 42 U.S.C. § 6924(v).

Again, the Region is correct. The permit term is in all material respects virtually identical to § 264.101(c), which states:

> The owner or operator must implement corrective actions beyond the facility property boundary, where necessary to protect human health and the environment, unless the owner or operator demonstrates to the satisfaction of the Regional Administrator that, despite

> the owner's or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such actions. The owner/operator is not relieved of all responsibility to clean up a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such releases will be determined on a case-by-case basis. Assurances of financial responsibility for such corrective action must be provided.

This obligation clearly applies to the "owner or operator" of the permitted facility, and there is no dispute that Metalworking Lubricants is now the owner and operator. It applies whenever a release has migrated beyond the facility boundary as necessary to protect human health and the environment, irrespective of when the release occurred. Therefore, regardless of whether the contamination was caused by the prior owner, Metalworking Lubricants as the current owner and operator is the one who must obtain a permit and perform any corrective action required under § 264.101(c). Review of Section III.B. of the permit must therefore be denied.

III. *CONCLUSION*

For all the reasons discussed above, review of the challenged permit terms is denied.

So ordered.