IN RE AUSTIN POWDER COMPANY

RCRA Appeal No. 95-9

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided January 6, 1997

Syllabus

Austin Powder Company ("Austin") has filed a petition seeking review of the federal portion of a permit issued by U.S. EPA Region V, under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§ 6901-6992k. Austin raises the following three issues which are addressed in this decision: 1) whether the permit provides sufficient flexibility to allow Austin to take site-specific considerations into account in preparing the RCRA Facility Investigation Workplan or the Corrective Measure Study Workplan; 2) whether the Region erred in failing to include "action levels" in the permit that can be used to determine, without the necessity of obtaining a permit modification, that no further corrective action is required with respect to a particular solid waste management unit ("SWMU"); and 3) whether the Region erred in requiring further investigation at four of the SWMUs listed in the permit (SWMUs 9-12).

Held: On the issue of whether the permit provides the permittee with sufficient flexibility, the Region has interpreted the permit as allowing the permittee the opportunity to demonstrate the need for omissions or deviations from the Scope of Work included as Attachment I to the permit in light of site-specific circumstances. The Board adopts this interpretation as an authoritative reading of the permit that is binding on the Agency. Austin's objections in this regard are therefore moot. On the issue of whether the permit should contain action levels to determine whether further corrective action is required without the need for a permit modification, the permit is remanded and the Region is ordered to either clarify its basis for not including action levels or revise the permit to include appropriate action levels. Finally, review is denied on the issue of whether the Region erroneously listed SWMUs 9-12 as requiring further investigation because Austin's petition fails to state why the Region's response to a virtually identical comment on this issue was clearly erroneous or otherwise warrants review.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Austin Powder Company ("Austin") has filed a Petition for Review of Permit ("Petition"), dated October 31, 1995, seeking review of the

federal portion of a permit issued by U.S. EPA Region V, under the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§ 6901-6992k.[1] As requested by the Environmental Appeals Board, the Region filed a response dated December 14, 1995, to Austin's petition for review ("Region's Response").

Austin operates an explosive manufacturing facility near McArthur, Ohio. The permit authorizes certain hazardous waste management activities and requires corrective action at certain solid waste management units ("SWMUs") identified at the facility.[2] The Region issued a draft permit on January 24, 1995, and Austin submitted written comments on March 21, 1995. Comments of Austin Powder Company on Draft RCRA Permit ("Comments") (Exh. B to Petition). No other party commented on the draft permit. The Region issued the final permit along with a response to Austin's comments on September 29, 1995.

In its petition for review, Austin raises the following three issues which we address in this decision: 1) the permit does not provide sufficient flexibility to allow Austin to take site-specific considerations into account in preparing the RCRA Facility Investigation ("RFI") Workplan or the Corrective Measure Study ("CMS") Workplan.[3]

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[1] The non-HSWA portion of the permit was issued by the State of Ohio, an authorized State under RCRA § 3006(b), 42 U.S.C. § 6926(b).

[2] Under RCRA § 3004(u), 42 U.S.C. § 6924(u), permits issued after November 8, 1984, shall require:

> [C]orrective 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 * * *.

Although neither the statute nor the regulations define a SWMU, the Board has upheld the following definition:

> [A]ny discernable 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 waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

In re General Motors Corp., Delco Moraine Division, 4 E.A.D. 334, 336 (EAB 1992). *See also id.* at 337 n.5 (stating that the above definition is consistent with the Agency's proposed Subpart S rules governing corrective action for SWMUs (55 Fed. Reg. 30,808 (July 27, 1990)) and with the RCRA Facility Assessment Guidance, OSWER Dir. 9502.00-5 at 1-3 (Oct. 9, 1986)). The permit in the present case identifies 25 SWMUs at the facility and lists 6 as requiring further investigation.

[3] Generally, corrective action requirements consist of several steps. The first step is usually the RCRA Facility Assessment ("RFA"), during which the Agency attempts to identify actual and potential releases of hazardous waste or hazardous constituents. If the RFA indicates that

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Petition at 3-4; 2) the Region erred in failing to include action levels "which can be applied to determine, without the necessity of obtaining a permit modification, that no further action is required with respect to a particular SWMU." *Id.* at 4; and 3) the Region erred in requiring corrective action at four of the SWMUs listed in the permit because there is no evidence that any hazardous wastes or hazardous constituents were released from these SWMUs. *Id.* at 6-7.[4]

II. *DISCUSSION*

A. *Standard of Review*

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. 40 C.F.R. § 124.19; *see, e.g., In re Johnston Atoll Chemical Agent Disposal System*, 6 E.A.D. 174, 178 (EAB 1995); *In re Allied- Signal, Inc.*, 5 E.A.D. 291, 292 (EAB 1994). 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 * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. 40 C.F.R. § 124.19(a); *see also Johnston Atoll,* 6 E.A.D. at 5; *Allied Signal,* 5 E.A.D. at 292.

B. *Petitioner's Claims*

1. *Flexibility*

Austin argues that permit conditions III.F.1. (requirements for conducting the RFI)[5] and III.F.3. (requirements for conducting the

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further investigation is required, the next step is the RFI, during which the permittee assesses the identified releases by characterizing their nature, extent, and rate of migration. The goal of the RFI is to provide sufficient data to determine if remedial action is required. Next, if necessary, the permittee conducts a CMS, during which appropriate remedial measures are identified. The Region then selects the appropriate remedial measures which the permittee must implement. *See In re Amoco Oil Company*, 4 E.A.D. 954, 962 n.10 (EAB 1993).

[4] The petition has raised four additional concerns pertaining to Permit Conditions I.D.5. (Duty to Mitigate), I.D.7. (Duty to Provide Information), III.G.2. and III.G.3. (Dispute Resolution), and V (Schedule of Compliance). In its response to the petition for review, however, the Region has agreed to modify the disputed permit conditions in the manner sought by Austin. These conditions are therefore remanded for incorporation of the language proposed by Region V. Thus, Austin's request for review with regard to these provisions is denied as moot.

[5] Permit condition III.F.1. states, in part:

> The Permittee shall conduct an RFI to evaluate thoroughly the nature and extent of the release of hazardous waste(s)
> Continued

CMS)[6] are not sufficiently flexible in that they require the permittee to comply with all elements in the permit's scope of work ("SOW") (*see* Attachment I to Final permit) even if site-specific factors would justify omissions or deviations from the SOW. Specifically, Austin states that the permit:

> [D]oes not explicitly recognize the flexibility needed in developing a RCRA Facility Investigation Workplan and a Corrective Measures Study Workplan. These permit conditions imply that the workplan submissions must contain all of the elements and information described in the [SOW] attached to the permit as Attachment I. However, this position is inconsistent with the Agency's position in other instances where it allows a permittee to demonstrate that omissions or deviations from the SOW may be appropriate in the Agency's judgment in light of site-specific circumstances.

Petition at 3-4.

In response, the Region contends that the disputed permit provisions provide sufficient flexibility to allow for deviations or omissions from the SOW in appropriate circumstances. In particular, in its

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> and hazardous constituent(s) from all applicable SWMUs as identified from the results of the approved RFI Release Assessment. The major tasks and required submittal dates are shown below. Additional tasks and associated submittal dates may also be specified in the Schedule of Compliance (Permit Condition VI.). The scope of work for each of the tasks is found in Attachment I (Corrective Action Scope of Work).

[6] Permit condition III.F.3. states, in part:

> If the Regional Administrator determines, based on the results of the RFI and other relevant information, that corrective measures are necessary, the Regional Administrator will notify the Permittee in writing that the Permittee shall conduct a CMS. The purpose of the CMS will be to develop and evaluate the corrective action alternative(s) and to outline one or more alternative corrective measure(s) which will satisfy the performance objectives specified by the Regional Administrator. The major tasks and required submittal dates are shown below. Additional tasks and associated submittal dates may also be specified in the Schedule of Compliance (Permit Condition V.). The Scope of Work for each of the tasks is found in Attachment I.

response to the petition for review, the Region states that upon submission of the RFI and CMS workplans, the Region will consider any requests from the permittee for omissions or deviations from the SOW. Region's Response at 7-8. Similarly, in its response to comments on this issue the Region stated:

> U.S. EPA understands that omissions or deviations from the "Corrective Action Scope of Work" are inevitable because the Corrective Action Scope of Work is intended to apply to all facilities. All portions may not apply to all facilities. The Permittee may communicate omissions or deviations which it deems pertinent to the corrective action activities in writing to the U.S. EPA project manager.

Response to Comments at 12; *see also id.* at 8. Thus, the Region interprets the disputed provisions as allowing the permittee the opportunity to demonstrate to the Region the need for omissions or deviations from the SOW in light of site-specific circumstances, and we adopt this interpretation as an authoritative reading of the permit that is binding on the Agency. *See In re Amoco Oil Company*, 4 E.A.D. 954, 981 (EAB 1993). Austin's objections in this regard are therefore moot.

2. *Action Levels*

Under permit condition III.F.2.a. (Determination of No Further Action — Permit Modification), the permittee may request a Class 3 permit modification pursuant to 40 C.F.R. § 270.42 to terminate further corrective action requirements under the permit where the results of the RFI and other relevant information "conclusively demonstrate that there are no releases of hazardous waste(s), including hazardous constituents, from SWMUs at the facility that pose a threat to human health and the environment." In its petition for review, Austin argues that the Region erred in failing to include any "action levels" in this permit provision (as well as in condition I.A.7. of the SOW) (Determination of Further Investigation) that can be used to determine, without the need for a permit modification, that no further corrective action is required with respect to a particular SWMU. Petition at 4.

According to Austin, the permit, as currently drafted, is inconsistent with the Board's holding in *In re Environmental Waste Control, Inc.*, 5 E.A.D. 264 (EAB 1994). In that case, the Board, relying on the Agency's proposed Subpart S rules governing corrective action for

SWMUs,[7] held that, absent site-specific reasons, permits must include action levels to determine the need for further corrective action. *Environmental Waste Control,* 5 E.A.D. at 286-287 (*citing In re Sandoz Pharmaceuticals Corp.*, 4 E.A.D. 75, 81-83 (EAB 1992)). The Board stated that if the Region includes specific action levels in the permit, "then the Region's evaluation of the RFI and determination of whether the action levels have been exceeded for particular media" will determine whether corrective action will be required with respect to the particular SWMU involved. *Environmental Waste Control,* 5 E.A.D. at 287-88. If action levels have not been exceeded, no further corrective action would be required under the permit, thereby eliminating the need for the permittee to request a permit modification to delete the requirements for further action. *Id.* at 288.

In response to the petition for review, the Region states that there are site-specific reasons for not including action levels in Austin's permit. In particular, the Region states:

> [Austin] has proposed that an action level be set for each constituent of concern. If the constituent of concern does not exceed its action level for any SWMU, then it is no longer of concern. The difficulty of this approach is that the additive or cumulative effect caused by the presence of multiple constituents of concern would not be considered. Because [Austin] has multiple SWMUs with potentially multiple constituents of concern, it is possible that all constituents of concern could be below any action level, there[by] releasing the unit from further corrective action, when the combination of all of the constituents of concern would exceed acceptable risk levels.

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[7] *See* 55 Fed. Reg. 30,798 (July 27, 1990). The preamble to the Subpart S proposal states that action levels should be specified in the permit when first issued. In particular, the preamble states, in part:

> Action levels will, whenever possible, be incorporated in the permit. The Agency believes it is advantageous to identify action levels in the permit so that the public and the permittee will know in advance what levels will trigger the requirement to conduct a CMS. This approach also minimizes the need for permit modifications later in the process, which could delay ultimate cleanup.

55 Fed. Reg. at 30,814. As of this date the Subpart S proposal has not been promulgated in final form.

> It is because of this site-specific concern that the inclusion of action levels is not appropriate in this permit.

Region's Response at 6-7. In its response to comments on this issue, however, the Region did not mention the possible cumulative effects of multiple constituents as a reason for not including action levels. This concern was raised for the first time on appeal. The only site-specific reason for excluding action levels cited in its response to comments was as follows:

> Austin Powder has performed analysis on data gathered at certain SWMUs which have been included in its RFI, but necessary information regarding the precise location of samples and sampling methodology, laboratory quality assurance, etc., are unavailable to Region 5 thus preventing Region 5 from determining the appropriate action levels if that information is to be considered.

Response to Comments at 11. Thus, because the Region has given two different reasons for refusing to include action levels in the permit without explaining how these reasons are related (if at all), we can not determine with sufficient certainty the actual basis for the Region's determination.

Moreover, even assuming that the basis for the Region's refusal to include action levels was concern for the potential risks associated with multiple contaminants, it is not immediately obvious to us why the Region could not include a permit term requiring further corrective action in the event this concern were to materialize. That is, the permit could be written so as not to excuse Austin from the obligation of preparing a CMS or taking other appropriate action if the Region determines that the risks associated with the presence of multiple contaminants at the levels detected could present a risk to human health or the environment even if the action levels for individual constituents had not been not exceeded. *See* RCRA § 3005(c)(3) (permits "shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."). In this regard, we note that the preamble to the Agency's proposed Subpart S rules states, in part:

> The Agency believes it is important to provide the Regional Administrator authority to require a CMS * * * even when no constituents exceed action levels. For example, * * * a CMS could be required in situations

> where the risks posed by the presence of multiple contaminants may be high enough to warrant a Corrective Measure Study even if no single constituent exceeds the individual action level for the constituent.

55 Fed. Reg. at 30,820.

In any case, because the Region's two differing explanations make its rationale for its permit determination on this issue unclear, the permit is remanded and the Region is ordered to either clarify its basis for not including action levels in Austin's permit (and allow Austin to submit comments on this explanation) or to revise the permit to include appropriate action levels. *See In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (administrative record must reflect the "considered judgment" necessary to support the Region's permit determination).

3. *SWMUs 9-12*

Austin objects to the inclusion of SWMUs 9-12 on the permit's list of SWMUs requiring further investigation.[8] *See* Attachment III to permit (List of SWMUs Requiring Further Investigation). According to Austin, the Region has no authority under RCRA § 3004(u) to require corrective action at these SWMUs because the releases from these SWMUs did not contain hazardous waste or hazardous constituents. Petition at 6. Specifically, Austin states:

> [T]he wastewaters managed at these four SWMUs solely consisted of water, minute concentrations of PETN, and formerly ethanol. There was insufficient PETN present to make the wastewater a reactive hazardous waste. Based on sample analyses and generator knowledge, the wastewater did not fail any of the other hazardous waste characteristics nor is it a listed hazardous waste. Therefore, there were no releases of hazardous waste from these SWMUs.

Id. at 6-7.

In response to a virtually identical comment raised during the comment period, the Region stated:

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[8] These are: PETN Dryer House No. 1 — SWMU No. 9, PETN Dryer House No. 2 — SWMU No. 10, PETN Dryer House No. 3 — SWMU No. 11, and S-5 PETN Storage — SWMU No. 12.

> U.S. EPA agrees with the commentor that the wastewaters are not considered hazardous. However, the wastewaters managed by these units have been identified as K044 wastes. This listing does not pertain so much to the wastewater as it does to the sludges from these wastewaters.
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> It should also be made clear that the U.S. EPA is mainly concerned with the natural drainageway associated with these units to which effluent was discharged prior to the installation of the PVC piping for each of these units.

Response to Comments at 20. Nothing in Austin's petition indicates why the Region's response to comments on this issue was erroneous.

As the Board has previously stated, a petitioner may not simply reiterate its previous objections to the draft permit. Rather, "a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review." *In re Envotech, L.P. — Milan, Michigan*, 6 E.A.D. 260, 268 (EAB 1996) (*quoting In re LCP Chemicals — New York*, 4 E.A.D. 661, 664 (EAB 1993)). Because Austin provides no discussion whatsoever as to why the Region's response to Austin's comments on this issue is erroneous or otherwise warrants review, the petition for review is denied as to this issue.

III. *CONCLUSION*

The permit is remanded and the Region is directed to reopen the permit proceedings for the purpose of clarifying its basis for not including action levels or, alternatively, adding such levels to the permit (which may include conditions addressing the potential synergistic affects of multiple contaminants).[9] An appeal of the remand decision will not be necessary to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1)(iii). On the other issues raised by Austin, review is denied for the reasons set forth above.

So ordered.

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[9] Although 40 C.F.R. § 124.19 contemplates that additional briefing typically will be submitted upon a grant of review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. *See In re Delco Electronics Corp.*, 5 E.A.D. 475, 489 n.15 (EAB 1994). On remand, the Region must also modify the permit in the manner agreed to in the Region's response to the petition for review. *See supra* note 4.