IN RE CHEMICAL WASTE MANAGEMENT OF INDIANA, INC.

RCRA Appeal Nos. 95-2 & 95-3

ORDER DENYING REVIEW

Decided June 29, 1995

Syllabus

U.S. EPA Region V issued the federal portion of a permit to Chemical Waste Management of Indiana, Inc. ("CWMII") for its Adams Center Landfill Facility in Fort Wayne, Indiana. This permit was issued pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* The Environmental Appeals Board has received three petitions for review of the Region's permit decision, two of which (one filed by the City of New Haven, Indiana, and the other filed jointly by Cheryl Hitzemann and Deanna Wilkirson) are consolidated for purposes of this opinion. During the comment period on the draft permit, these and other commenters raised "environmental justice" concerns, more specifically, concerns as to whether the operation of CWMII's facility will have a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the area surrounding the facility. In an effort to address such concerns, the Region held an informal meeting, subsequent to the public hearing and the close of the comment period, to promote an exchange of information and opinions on the issue among persons who had expressed concerns about the issue during the comment period and other interested parties. The Region also performed a demographic analysis of the surrounding populations to determine whether the facility would create a disproportionate risk to human health and the environment for minority and low-income populations.

Petitioners' challenge to the Region's permit decision raises a number of points, all of which may be consolidated into the following three arguments: (1) The Agency has failed to promulgate a national environmental justice strategy, as it is required to do under an Executive Order dealing with environmental justice, and the Region's efforts to implement the Executive Order in the absence of such a strategy or other national guidance and criteria was clearly erroneous and an abuse of discretion; (2) The Region's demographic study, the scope of which was restricted to a one-mile radius around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socio-economic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; (3) The Region based its decision on information obtained at the August 11 meeting, but the information was not part of the administrative record and the meeting did not conform to the rules in 40 C.F.R. part 124 governing public hearings.

Held: (1) While the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for reviewing a permit under RCRA and its implementing regulations, the RCRA permitting process nevertheless offers certain opportunities for the Region to exercise discretion, within the constraints of that process, to implement the Executive Order, and as a matter of policy, the Region should exercise those opportunities to the greatest extent practicable; (2) The Board will review the Region's efforts to implement the Executive

Order insofar as those efforts have an effect on the permit decision; (3) Petitioners have not demonstrated, as they were required to do, how the absence of a national environmental justice strategy or the absence of some other kind of nation-wide criteria and guidance has led to an erroneous permit decision; (4) Petitioners have not demonstrated that the Region clearly erred in restricting the scope of its demographic study to a one-mile radius or in concluding that there would be no disproportionate adverse impact on low-income or minority populations within a one-mile radius; and (5) The August 11 meeting was not a public hearing and thus was not subject to requirements of part 124 governing such hearings; comments made at the August 11 meeting were properly incorporated into the administrative record; and in any event, Petitioners have given the Board no reason to conclude that the Region based its decision on information obtained during the meeting. Review of the petitions is therefore denied.

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

Opinion of the Board by Judge Reich:

On March 1, 1995, U.S. EPA Region V issued a final permit decision approving the application of Chemical Waste Management of Indiana, Inc. ("CWMII") for the renewal of the federal portion[1] of a Resource Conservation and Recovery Act ("RCRA") permit and a Class 3 modification of the same permit for its Adams Center Landfill Facility in Fort Wayne, Indiana.[2] The Environmental Appeals Board has received three petitions challenging the Region's permit decision, one filed by the City of New Haven, one filed jointly by Cheryl Hitzemann and Deanna Wilkirson, and one filed by CWMII.[3] The first two petitions were filed by the same law firm and raise identical issues, and have been consolidated for purposes of this opinion. (The City of New Haven, Cheryl Hitzemann and Deanna Wilkirson will hereafter be collectively referred to as "Petitioners.") The CWMII peti-

[1] The State of Indiana has received authorization to administer its own RCRA program, pursuant to section 3006 of RCRA, 42 U.S.C. § 6926. Indiana has not, however, received authorization to administer the requirements contained in the Hazardous and Solid Waste Amendments to RCRA ("HSWA"). Consequently, when a RCRA permit is issued in Indiana, the State issues the part of the permit relating to the non-HSWA requirements and EPA issues the part of the permit relating to the HSWA requirements.

[2] On October 5, 1989, CWMII applied to EPA and Indiana for a Class 3 modification to its permit, authorizing it to expand its landfill capacity ("the Phase IV expansion"). In June of 1992, the State issued the non-HSWA portion of the modification, but the permit expired on October 30, 1993, before the Agency had acted on the federal HSWA portion of the modification. Consequently, in these proceedings, CWMII seeks both a Class 3 modification and a renewal of the HSWA portion of the permit. *See* 40 C.F.R. § 270.42(c) (regulations governing Class 3 modifications).

[3] The Board has also received amicus briefs filed by the following persons: Mark Souder, U.S. Congressman, 4th District, Fort Wayne, Indiana; Archie Lunsey, Councilman, First District, Fort Wayne, Indiana; Dennis Andrew Gordon, Allen County Zoning Administrator; Elizabeth Dobynes, President, Fort Wayne Indiana Branch, NAACP; and Charles Redd, Chairman, Political Action Committee, NAACP. Also, CWMII filed a brief in opposition to the Petitions.

tion will be addressed in a separate opinion. On May 8, 1995, at the request of the Board, the Region filed a brief (joined by EPA's Office of the General Counsel as "of counsel") responding to the two petitions addressed in this opinion. Region's Response to Petition for Review.[4]

During the comment period on the draft permit and draft modification (collectively the "draft modified permit"), Petitioners and other commenters raised what the parties refer to as "environmental justice" concerns.[5] More specifically, issues were raised as to whether the operation of CWMII's facility will have a disproportionately adverse impact on the health, environment, or economic well-being of minority or low-income populations in the area surrounding the facility.[6] The gist of Petitioners' challenge is that the measures taken by the Region to address the environmental justice concerns failed to conform to the rules governing the permitting process, violated an Executive Order relating to environmental justice, resulted in factual and legal errors and an abuse of discretion, and raised an important policy issue warranting review. For the reasons set forth in this opinion, we conclude that Petitioners have failed to demonstrate that either the Region's permit decision or the procedures it used to reach that decision involved factual or legal errors, exercises of discretion, or policy issues that warrant review. Accordingly, we are denying review of the petitions.

I. *BACKGROUND*

The Region issued the HSWA portion of the draft modified permit on May 23, 1994. The public comment period began on that date and extended through July 13, 1994. On June 29, 1994, the Region held a public hearing in accordance with the procedures set out in 40 C.F.R.

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[4] On May 22, 1995, the Region filed a separate brief addressing the petition filed by CWMII. On May 4, 1995, CWMII also filed a response to the two petitions addressed in this opinion. CWMII's brief also asked for expedited consideration of the two petitions. On May 9, 1995, the Board denied CWMII's request for expedited consideration. On May 23, Petitioners filed a reply to the Region's May 8 response brief and to CWMII's May 4 response brief. On May 26, 1995, CWMII filed a reply to Petitioners' May 23 brief.

[5] It has been asserted that Petitioners do not in fact represent minority or low-income interests that would be affected by environmental justice concerns. *See, e.g.*, the amicus brief filed by Councilman Archie Lunsey. We express no opinion on this point and these contentions play no role in our decision.

[6] Petitioners do not allege any "discriminatory or other invidious animus" and they state, therefore, that their appeals do not involve "environmental racism" claims based on such animus. Response of Petitioners to Submission by U.S. EPA Region V at 4-5.

§ 124.12.[7] On March 1, 1995, the Region issued a response to comments and its final permit decision, including the requested Class 3 modification allowing CWMII to increase the capacity of its landfill ("the Phase IV Expansion").

During the pendency of CWMII's permit application, Executive Order 12898, relating to environmental justice, was issued. The Order mandates that:

> To the greatest extent practicable and permitted by law, * * * each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, or activities on minority populations and low-income populations in the United States * * *.

Section 1-101. 59 Fed. Reg. 7629 (Feb. 16, 1994). The Order also requires that:

> Each Federal agency shall conduct its programs, policies, and activities that substantially affect human health and the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of * * * subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.

Section 2.2. *Id.* at 7630-31.

In response to the environmental justice concerns raised during the comment period on the draft modified permit, the Region held what was billed as an "informational" meeting in Fort Wayne, Indiana, on August 11, 1994. The meeting was attended by concerned citizens, and representatives of CWMII, the Indiana Department of Environmental Management, and the Region. The purpose of the meeting was to "allow representatives of all parties involved to freely discuss Environmental Justice and other key issues, answer questions and gain understanding of each party's concerns." Exhibit

[7] Petitioners have not disputed that this hearing fully conformed to the requirements of 40 C.F.R. § 124.12.

I, Region's Response to Petitions (letter from Region inviting a citizen to attend the meeting). The Region also performed a demographic analysis of census data on populations within a one-mile radius of the facility. The Region ultimately concluded that the operation of the facility would not have a disproportionately adverse health or environmental impact on minority or low-income populations living near the facility.

It is the Region's efforts to address the environmental justice concerns raised during the comment period that Petitioners challenge on appeal. As more fully set forth below, Petitioners argue that: (1) The Region clearly erred in attempting to implement the Executive Order without national guidance or criteria; (2) The Region's demographic study, the scope of which was restricted to a one-mile radius around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socio-economic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; and (3) The Region based its permit decision on information obtained at the August 11 meeting, but such information was not a part of the administrative record and the Region did not follow the procedures governing public hearings.

II. *DISCUSSION*

Under the rules governing this proceeding, the Regional Administrator's permit decision 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 Ross Incineration Services, Inc.*, 5 E.A.D. 813, 816 (EAB 1995); *In re Metalworking Lubricants Company*, 5 E.A.D. 181, 183 (EAB 1994). For the reasons set forth below, we conclude that Petitioners have not carried their burden in this case.

We believe it is useful to begin by considering the precise nature of Petitioners' environmental justice claim in the context of this RCRA proceeding and the effect, if any, the issuance of Executive Order 12898 should have on the way in which the Agency addresses such a claim.

"Environmental justice," at least as that term is used in the Executive Order, involves "identifying and addressing, as appropriate,

disproportionately high and adverse human health or environmental effects of [Agency] programs, policies, and activities on minority populations and low-income populations * * *." 59 Fed. Reg. at 7629. Some of the commenters also believe that environmental justice is concerned with adverse effects on the *economic* well- being of such populations. Thus, when Petitioners couch their arguments in terms of environmental justice, they assert that the issuance of the permit and the concomitant operation of the facility will have a disproportionately adverse impact not only on the health and environment of minority or low-income people living near the facility but also on economic growth and property values.[8] The main support in the record for this assertion is an environmental impacts study submitted by the City of New Haven. *See* Stephanie Simstad and Dr. Diane Henshel, "Exposure Pathway Analysis and Toxicity Reviews for Selected Chemicals Present at the Adams Center Treatment, Storage, and Disposal Facility," at 8 (June 24, 1994), Exhibit E, CWMII's Response to Petition. That study purports to "evaluate the potential for human exposure to toxic chemicals derived from the treatment and disposal of chemicals at the Adams Center." *Id.* at 1. It identifies "exposure pathways" by which citizens living near the facility may be exposed to pollutants from the facility, but its central conclusion is that more risk assessment needs to be done before the extent and probability of such exposure can be determined accurately.[9]

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[8] *See, e.g.*, paragraph 5.J. of the Hitzemann/Wilkirson Petition.

[9] Some of the conclusions reached in the study are as follows: (1) The chemicals disposed at the facility can be extremely hazardous to human health when not properly contained within the landfill; (2) There is reason to believe that these chemicals are not being contained within the site itself; (3) The most obvious evidence of exposure of adjacent areas to waste materials from the site are the visible dust clouds that form during stabilization of incoming wastes; (4) Since the facility began handling hazardous waste in 1985, numerous problems in landfill management of groundwater and leachate have occurred; (5) The individuals most likely to be affected by emissions from this site live in the low income residential areas near the landfill; (6) The sediments in a nearby river watershed are moderately to heavily polluted and the fish in the river have pollutant elevations above expected background levels; and (7) Before a decision can be made as to whether a human health risk exists to the neighboring population from operation of the Adams Center Facility, additional contaminant monitoring information must be obtained. Study at 36-38. An unpaginated abstract appearing at the beginning of the study concludes that:

> Due to the fact that many of the nearby residents are low income and/or minority, they are likely to have significantly higher exposures than that of the general population. In order to adequately protect this subpopulation, special consideration in the risk assessment process must occur to determine if a threat to human health exists. More extensive monitoring should be pursued to determine ambient air concentrations of metals and other particulate matter as well as volatile organic

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Although it is not made explicit in the petitions, it is nevertheless clear that Petitioners do not believe that the threats posed by the facility can be addressed through revision of the permit. Rather, it is apparent that Petitioners believe that their concerns can be addressed only by permanently halting operation of the facility at its present location or, at a minimum, preventing the Phase IV Expansion of the facility. Thus, Petitioners challenge the permit decision, including the modification, in its entirety, rather than any specific permit conditions.

At the outset, it is important to determine how (if at all) the Executive Order changes the way a Region processes a permit application under RCRA. For the reasons set forth below, we conclude that the Executive Order does not purport to, and does not have the effect of, changing the substantive requirements for issuance of a permit under RCRA and its implementing regulations. We conclude, nevertheless, that there are areas where the Region has discretion to act within the constraints of the RCRA regulations and, in such areas, as a matter of policy, the Region should exercise that discretion to implement the Executive Order to the greatest extent practicable.

Permit Issuance Under RCRA: While, as is discussed later, there are some important opportunities to implement the Executive Order in the RCRA permitting context, there are substantial limitations as well. As the Region notes in its brief, the Executive Order by its express terms is to be implemented in a manner that is consistent with existing law. Section 6-608. 59 Fed. Reg. at 7632 ("Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.") (*cited in* Region's Response to Petition at 12). The Region correctly points out that under the existing RCRA scheme, the Agency is *required* to issue a permit to any applicant who meets all the requirements of RCRA and its implementing regulations. Region's Response to Petition at 12. The statute expressly provides that:

> Upon a determination by the Administrator (or a State, if applicable), of compliance by a facility for which a permit is applied for under this section with the require-

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compounds at these residential areas. Soil samplings should also be undertaken to determine the cumulative past exposure to these contaminants. An accurate risk assessment needs to be performed that recognizes the unique exposure pathways of these individuals as there is not enough monitoring data to determine their actual exposure levels. Currently, it is known that there are releases from the site and there are potential pathways that are completed to human receptors.

> ments of this section and section 3004, the Administrator (or the State) *shall issue* a permit for such facilities.

RCRA § 3005(c)(1), 42 U.S.C. § 6925 (emphasis added). Thus, as the Region observes:

> Under federal law, public support or opposition to the permitting of a facility can affect a permitting decision if such support or opposition is based on issues relating to compliance with the requirements of RCRA or RCRA regulations or such support or opposition otherwise relate to protection of human health or the environment. RCRA does not authorize permitting decisions to be based on public comment that is unrelated to RCRA's statutory or regulatory requirements or the protection of human health or the environment.

Region's Response to Petition at 12. The Region correctly observes that under RCRA and its implementing regulations, "there is no legal basis for rejecting a RCRA permit application based solely upon alleged social or economic impacts upon the community." Region's Response to Petition at 11. Accordingly, if a permit applicant meets the requirements of RCRA and its implementing regulations, the Agency *must* issue the permit, regardless of the racial or socio-economic composition of the surrounding community and regardless of the economic effect of the facility on the surrounding community.

Implementing the Executive Order: Nevertheless, there are two areas in the RCRA permitting scheme in which the Region has significant discretion, within the constraints of RCRA, to implement the mandates of the Executive Order. The first of these areas is public participation. *See* "Environmental Justice Strategy: Executive Order 12898," EPA/200-R-95-002, at 8 (April 1995)(calling for "early and ongoing public participation in permitting and siting decisions."). Part 124 already provides procedures for ensuring that the public is afforded an opportunity to participate in the processing of a permit application. The procedures required under part 124, however, do not preclude a Region from providing other opportunities for public involvement beyond those required under part 124. *See In re Waste Technologies Industries*, 5 E.A.D. 646, 653 n.10 (EAB 1995) ("[A] Regional office can always offer more procedural safeguards than it is legally obligated to provide."). We hold, therefore, that when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy,

exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.

A second area in which the Region has discretion to implement the Executive Order within the constraints of RCRA relates to the omnibus clause under section 3005(c)(3) of RCRA. The omnibus clause provides that:

> Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.

42 U.S.C. § 6925(c)(3). Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 796 n.64 (EAB 1995) ("[T]he Agency has traditionally read [section 3005(c)(3)] as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment."). In that event, the facility would have to shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.

There is nothing in section 3005(c)(3) to prevent the Region from taking a more refined look at its health and environmental impacts assessment, in light of allegations that operation of the facility would have a disproportionately adverse effect on the health or environment of low-income or minority populations. Even under the omnibus clause some judgment is required as to what constitutes a threat to human health and the environment. It is certainly conceivable that, although analysis of a broad cross-section of the community may not suggest a threat to human health and the environment from the operation of a facility, such a broad analysis might mask the effects of the facility on a disparately affected minority or low-income segment of the community. (Moreover, such an analysis might have

been based on assumptions that, though true for a broad cross-section of the community, are not true for the smaller minority or low-income segment of the community.) A Region should take this under consideration in defining the scope of its analysis for compliance with § 3005(c)(3).

Of course, an exercise of discretion under section 3005(c)(3) would be limited by the constraints that are inherent in the language of the omnibus clause. In other words, in response to an environmental justice claim, the Region would be limited to ensuring the protection of the health or environment of the minority or low-income populations.[10] The Region would not have discretion to redress impacts that are unrelated or only tenuously related to human health and the environment, such as disproportionate impacts on the economic well-being of a minority or low-income community. With that qualification in mind, we hold that when a commenter submits at least a superficially plausible claim that operation of the facility will have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion under section 3005(c)(3) to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low-income community whose health or environment is alleged to be threatened by the facility. In this fashion, the Region may implement the Executive Order within the constraints of RCRA and its implementing regulations.

Petitioners' Challenge to the Region's Efforts to Implement the Executive Order. It is the Region's efforts to implement the Executive Order, described above, that are the basis of the Petitioners' challenges. Petitioners raise a number of points, all of which may be consolidated into the following three arguments: (1) The Agency has failed to promulgate a national environmental justice strategy, as it is required to do under the Executive Order, and the Region's effort to implement the Order in the absence of such a strategy or other national guidance and criteria was erroneous;[11] (2) The Region's demographic study, the scope of which was restricted to a one-mile radius

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[10] *See In re Sandoz Pharmaceuticals Corporation*, 4 E.A.D. 75, 80 (EAB 1992) ("[B]y its own terms, § 3005(c)(3) authorizes only those permit conditions necessary to protect human health or the environment. Accordingly, the Region may not invoke its omnibus authority unless the record contains a properly supported finding that an exercise of that authority is necessary to protect human health or the environment.")

[11] *See infra* n.12.

around the facility, was clearly erroneous and ignored evidence presented during the comment period concerning the racial and socioeconomic composition of, and the facility's impact on, the community living both within and outside of the one-mile radius; (3) The Region based its decision on information obtained at the August 11 meeting, but the information was not part of the administrative record and the meeting did not conform to the rules in 40 C.F.R. part 124 governing public hearings.

Reviewing Challenges Based on the Executive Order: As a threshold matter, the Region suggests that claims relating to the implementation of the Executive Order are not subject to review. In support of this argument, the Region points out that the Executive Order itself expressly provides that it does not create any substantive or procedural rights that could be enforced through litigation. More specifically, the Order states in § 6-609 that:

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

59 Fed. Reg. at 7629. However, while the Region is correct that section 6-609 precludes *judicial* review of the Agency's efforts to comply with the Executive Order, it does not affect implementation of the Order *within* an agency. More specifically, it does not preclude the *Board*, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under section 124.19(a). Section 124.19(a) authorizes the Board to review any condition of a permit decision (or as here, the permit decision in its entirety). Accordingly, the Board can review the Region's efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue. With that in mind, we turn to the specific challenges raised by Petitioners in this case.

The Absence of National Guidance and Criteria: Petitioners first argue that the Agency has failed to promulgate a national environmental justice strategy, as it is required to do under the Executive

Order.[12] Petitioners contend that in the absence of a national strategy or other national guidance and criteria for implementing the Order, it was erroneous for the Region to attempt to implement it.[13] For the following reasons, however, we reject this argument.

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[12] Section 1-103 of the Executive Order provides as follows:

> *Development of Agency Strategies.* (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning, and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations.

59 Fed. Reg. at 7629.

[13] Petitioners make the following specific arguments concerning the absence of national guidance, criteria, or strategy for implementing the Executive Order:

> In reaching its final decision, Region 5 admits that its decision as to environmental justice ("EJ") concerns was made in the absence of any "national guidance or criteria" available to evaluate such concerns, contrary to the requirements of Executive Order 12898 signed February 11, 1994.

Petition at 3.

> Contrary to section 1-103 of Executive Order 12898, U.S. EPA has failed to finalize an environmental justice strategy. In reaching its final decision prior to finalization of such strategy, Region 5 has purported to resolve EJ concerns without any standards for its decision making.

Id.

> In addition, even if these proceedings and the findings and conclusions of Region 5 were not clearly erroneous, the purported "implementation" of Executive Order 12898 by Region 5, in the absence of any criteria whatsoever, and through proceedings and procedures which are not authorized by regulation, represents a clear abuse of agency discretion. Moreover, whether or not to countenance the enforcement of Executive Order 12898, in the absence of any criteria and

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Petitioners have not demonstrated how the absence of a national environmental justice strategy or the absence of some other kind of nation-wide criteria and guidance has led to an erroneous permit decision. Absent such a demonstration, we have no basis for reviewing Petitioners' claims.

Even assuming Petitioners could raise such a challenge, we would reject it. There is nothing in the Executive Order to suggest that the Region should have refrained from issuing RCRA permits until the Agency issued its environmental justice strategy or other national guidance or criteria. The absence of such guidance in no way prevents the Agency from addressing environmental justice issues in the meantime on a case-by-case basis, as occurred here. In any event, during the pendency of this case, the Agency issued "Environmental Justice Strategy: Executive Order 12898" EPA/200-R-95-002 (April 1995), and it is clear that it does not provide detailed guidance and criteria to the Regions in the RCRA permitting context. Rather, it underscores the importance of early and ongoing public participation in those cases where environmental justice is an issue. There is clearly no inconsistency between the strategy and the Region's permit decision that warrants review.

The Region's Demographic Study: Petitioners also question the Region's efforts to determine whether operation of the facility will have a disproportionate impact on a minority or low-income community. To assess whether there would indeed be a disproportionate impact on low-income or minority populations, the Region performed a demographic study, based on census figures, of the racial and socio-economic composition of the community surrounding the facility. The Region concluded that no minority or low-income communities will face a disproportionate impact from the facility. Petitioners argue that, in arriving at this conclusion, the Region erred by ignoring available census and other information submitted during the comment period that allegedly demonstrate a disproportionate impact of the facility on minority or low-income populations, particularly those at distances greater than one mile.[14]

> through such unauthorized procedures represents an important policy consideration which the Environmental Appeals Board should review.

Id.

[14] Petitioners specifically argue that:

> (1) The Region ignored written comments submitted by New Haven and others, including a scientific study describing the
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> Continued

Petitioners particularly criticize the Region's decision to restrict the focus of its study to the community living within a one-mile radius of the facility. Petitioners contend that the facility adversely affects citizens who live further than one mile away from the facility. In its response to the petitions, the Region defends its decision to focus on a one-mile radius for its demographic study, as follows:

> [T]he Region 5 office of RCRA has chosen a one-mile radius for demographic evaluation of disproportionately high and adverse human health or environmental impacts of RCRA facilities upon minority populations and low-income populations, based upon a Comprehensive Environmental Response, Compensation and Liability Act, * * * guidance (Hazard Ranking System Guidance Manual, November 1992, EPA 9345.1-07) developed for CERCLA sites without groundwater contamination; however, the demographic evaluation did not exclude the population located outside of the one-mile radius.

Response to Petition at 16.[15]

> potential disproportionate impact of the facility in question on low-income and minority populations, submitted by New Haven on July 13, 1994; (2) The Region chose to look only at data relating to low-income and minority populations within a one-mile radius of the facility, despite the fact that there is no evidence to support this criteria and despite the fact that an African American Fort Wayne City Councilman testified on the public record that some 13,500 of his African American constituents were adversely affected, beyond the one-mile radius because of the facility's negative impact on economic growth and housing; (3) The Region ignored its own census data which demonstrates that within two miles of the facility there are areas of the community that are 40-80% minority and that within three miles of the facility there are areas of the community that are 80-100% minority; (4) The Region ignored its own census data demonstrating that the vast majority of the minority population lives in areas within five miles of the facility; (5) The Region ignored census data demonstrating that even within a one-mile radius of the facility, 40-60% of the population is at a low income level.

Petition at 3-4.

[15] The Region's demographic analysis was in addition to the ambient air impact analysis that the Region had already performed in 1990. *See* Response to Comments at 45, Exhibit J, Region's Response to Petition.

As explained above, the Region can and should consider a claim of disproportionate impact in the context of its health and environmental impacts assessment under the omnibus clause at section 3005(c)(3) of RCRA. The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide. *See In re General Electric Company*, 4 E.A.D. 358, 375 (EAB 1992) ("The Region's selection of a method is the kind of technical decision that is best decided on the Regional level, and absent some compelling circumstance, we are inclined to defer to it."). In recognition of this reality, the procedural rules governing appeals of permitting decisions place a heavy burden on petitioners who seek Board review of such technical decisions. To carry that burden in this case, Petitioners would need to show either that the Region erred in concluding that the permit would be protective of populations within one mile of the facility, or that, even if it were protective of such close-in populations, it for some reason would not protect the health or environment of citizens who live at a greater distance from the facility. We believe that Petitioners have failed to demonstrate that the Region erred in either of these respects.

The petition mentions two parts of the administrative record in support of its claim. First, it refers to the comments of Fort Wayne City Councilman Cletus Edmonds, who contends that the facility will adversely affect the economic growth and housing of some 13,500 of his African-American constituents. Petition at 4. As noted above, however, neither RCRA nor its implementing regulations requires the Agency to consider the economic effects of a facility.[16]

Second, the petition mentions an environmental impact study submitted by the City of New Haven (described above in the introductory section of this discussion). That study indicates that particu-

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[16] Petitioner's comments suggest that the community surrounding the facility unanimously opposed continued operation of the facility. In fact, community opposition to the facility is by no means unanimous. Many in the minority community support continued operation of the facility. *See* Amicus Brief filed by Archie Lunsey, Councilman, First District, Fort Wayne, Indiana, at 2 ("Environmental Justice is a serious problem — but it is not a problem connected with Chemical Waste Management of Indiana."); Amicus Brief filed by Elizabeth Dobynes, President, Fort Wayne Indiana Branch, NAACP, at 2 ("In summary, I believe that CWMI should be required to follow the regulations of the Environmental Protection Agency and so long as they do so, I believe the facility on Adams Center Road should be allowed to continue to manage waste coming from business and industry in Indiana and neighboring states.").

lates from the facility "could" affect an African-American community living as far as two miles away from the facility:

> Since the predominant direction of the wind is westerly, residential areas may be exposed to high levels of particulates from the site. There is currently an Afro-American community approximately 2 miles west of the landfill site and they could be exposed to higher levels of particulates.

Stephanie Simstad and Dr. Diane Henshel, "Exposure Pathway Analysis and Toxicity Reviews for Selected Chemicals Present at the Adams Center Treatment, Storage, and Disposal Facility," at 8 (June 24, 1994). This conclusion, however, is stated in a very tentative fashion and provides no indication of the probabilities involved or the adverse effects, if any, increased exposure might cause. It does not show why the Region's conclusions as to the protectiveness of the permit were erroneous or why, if the population within one mile of the facility is protected (as the Region concludes), there would nonetheless be impacts beyond one mile cognizable under section 3005(c)(3). We conclude, therefore, that Petitioners have failed to carry their burden of demonstrating that the Region's technical judgment in this case does not deserve the same deference that the Board normally accords to such judgments. Review of this issue is therefore denied.

The August 11 Meeting: Petitioners' third argument is that the Region based its permit decision on information obtained during the August 11 meeting. Petitioners argue that this resulted in an erroneous decision because the information was never incorporated into the administrative record, as required under part 124, and because the meeting was a public hearing under part 124, but did not conform to the part 124 rules governing public hearings. Because the Region's permit decision failed to comply with part 124, Petitioners contend that the permitting process must be conducted over again from the beginning. The Region, however, rejects Petitioners' argument, contending that: (1) The meeting was not a public hearing under part 124 and was therefore not subject to the part 124 procedures governing public hearings; (2) The information obtained at the August 11 meeting was made part of the administrative record; and (3) In any event the Region did not base its decision on the information that was provided at the meeting. Region's Response to Petition at 9. For the reasons set forth below, we agree with the Region.

As the Region correctly points out, by the time of the August 11 meeting, the Region had already satisfied the public participation

requirements of part 124 by opening a comment period and by holding a public hearing on June 29, 1994, which fully comported with part 124. Region's Response to Petition at 9. The Region's purpose in holding the August 11 meeting was not to take more evidence for its permitting decision. Region's Response to Petition at 14 ("[I]t has never been EPA's position that the purpose of the August 11 meeting was to take evidence."). Rather, the purpose was to:

> [H]ear from some of the stakeholders in the community about their concerns regarding environmental justice, and provide an informal forum to respond to questions that had been raised by the citizens about the federal RCRA permitting process.

Region's Response to Petition at 10. These conclusions are confirmed by the letters of invitation that the Region sent out to announce the meeting. In those letters, the meeting is billed as a less formal "informational meeting." Region's Response to Petitions, Exhibit I (copy of letter from the Region inviting a citizen to the meeting).[17] The letters explain that the purpose of the meeting is to:

> [A]llow representatives of all parties involved to freely discuss Environmental Justice and other key issues, answer questions and gain understanding of each party's concerns.

Id. We conclude, therefore, that the Region accurately characterizes its activities when it states that: "U.S. EPA satisfied the statutory and regulatory requirements, and then went a step further by providing an additional opportunity to hear concerns raised by the community." Region's Response to Petition at 12.

Petitioners suggest that there is no provision in RCRA or the regulations authorizing the Region's "step further." As noted earlier, however: "[A] Regional office can always offer more procedural safeguards than it is legally obligated to provide." *See In re Waste Technologies Industries*, 5 E.A.D. 646, 653 n.10 (EAB 1995) (*quoted in* Region's Response to Petition at 11).

The Region also asserts (Response to Comments at 42), and Petitioners have not disputed, that the Region kept notes of the comments made at the August 11 meeting and that such information was incor-

[17] We note that this exhibit includes invitation letters to both Cheryl Hitzemann and Deanna Wilkirson.

porated into the administrative record. *See In re Masonite Corporation*, 5 E.A.D. 551, 560 n.10 (EAB 1994) (comments made at informal meeting between Region and citizens group were part of the administrative record because a Regional employee recorded the comments in a memorandum and submitted the memorandum to the administrative record). We accept the Region's undisputed assertion and conclude that whatever information the Region obtained at the August 11 meeting was incorporated into the administrative record.

The Region also argues that, in any event, it did not base its decision on any comments made during the August 11 meeting. We also accept this assertion, for Petitioners have offered us no reason to believe that the Region did base its permit decision on information gathered at the August 11 meeting. In support of their position, Petitioners point to the Region's description of the meeting in the Region's response to comments, as follows:

> The consensus of the minority stakeholders attending the meeting ranged from neutrality on the issue to the opinion that issuing the Phase IV permit would place no environmental injustice. Most of the minority stakeholders supported the permitting of the CWMI facility.

Response to Comments at 42. Based on the quoted statement, Petitioners charge that:

> Region 5 purports to base the decision upon a consensus of speakers at the informal meeting, while ignoring statements made by public officials and others at the publicly noticed and recorded hearing held on June 29, 1994, pursuant to section 124.12.

Petition at 2-3. The Region's statement quoted above, however, provides scant support for Petitioners' argument. The Region's statement does nothing more than report on the Region's impressions of the August 11 meeting. There is nothing in the Region's report to indicate that the Region based its permit decision on what it heard at the meeting.

Moreover, the comments made at the August 11 meeting would be relevant only to the extent they bear on the facility's impact on human health and the environment, but the Region argues, and Petitioners have not given us any reason to doubt, that:

> The substance of the environmental justice issues discussed during the August 11, 1994 meeting had previ-

> ously been raised during the public comment period, at the June 29, 1994 public hearing, and through written comments received during the public comment period.

Region's Response to Petition at 10. Thus, to the extent that the Region obtained any relevant information at the August 11 meeting, it was information that has already been received at the public hearing or through written comments. In light of these considerations, we are not convinced that the Region based its permit decision on the August 11 meeting.

III. *CONCLUSION*

For all the foregoing reasons, we conclude that Petitioners have failed to carry their burden of demonstrating that either the Region's decision or the procedures it followed to reach that decision, involved a clear error, or an exercise of discretion or important policy consideration warranting review. Review of the petitions is therefore denied.

So ordered.