IN THE MATTER OF THERMALKEM, INC., ROCK HILL, SOUTH CAROLINA

RCRA Appeal No. 92–4

ORDER DISMISSING APPEAL

Decided March 10, 1993

Syllabus

ThermalKEM, Inc. seeks review of a decision by U.S. EPA Region IV denying ThermalKEM's proposed amendment to its Part A permit application. ThermalKEM operates a waste treatment and storage facility in Rock Hill, South Carolina at which it incinerates both hazardous and non-hazardous waste. The facility is currently operating under interim status. In September of 1990, the Agency's new organic toxicity characteristic (TC) rule became effective. As a result of this rule, many of the wastes incinerated at ThermalKEM's facility that were formerly considered non-hazardous were reclassified as hazardous. In order to continue burning these wastes at the same rate as before the effective date of the TC rule, ThermalKEM sought to revise its Part A permit application to, inter alia, increase the incinerator's hazardous waste mass feed rate. The Region denied the proposed amendment on the ground that ThermalKEM had failed to demonstrate that operation of the incinerator at the increased mass feed rate would adequately protect human health and the environment. ThermalKEM has filed an appeal under 40 C.F.R. § 124.19.

Held: The Region's denial of the proposed change to ThermalKEM's Part A application did not constitute a final permit decision. The Region's determination is therefore not reviewable under 40 C.F.R. § 124.19(a), which by its terms restricts the scope of review to specified actions affecting "final permit decision[s]." Accordingly, the appeal is dismissed.

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

Opinion of the Board by Judge McCallum:

By petition dated January 31, 1992, and submitted under 40 C.F.R. § 124.19, ThermalKEM, Inc. seeks review of a decision by U.S. Environmental Protection Agency Region IV (the "Region") denying ThermalKEM's proposed amendment to its Part A permit application. ThermalKEM had sought to amend its application to, *inter alia,* increase the mass feed rate for its hazardous waste incinerator in

Rock Hill, South Carolina. For the following reasons, ThermalKEM's appeal is dismissed.

I. *BACKGROUND*

ThermalKEM owns and operates a hazardous waste treatment and storage facility that is currently operating under interim status.[1] The facility incinerates both hazardous and non-hazardous wastes. Upon promulgation of the Agency's new toxicity characteristics (TC) rule,[2] many of the wastes incinerated at ThermalKem's facility that were previously classified as non-hazardous were reclassified as hazardous and thus became subject to regulation under Subtitle C of RCRA. To continue incinerating these previously non-hazardous wastes in the same quantities as before promulgation of the TC rule, ThermalKEM sought to revise its Part A permit application to show an increase in the facility's hazardous waste mass feed rate from 2.85 tons per hour to 5.35 tons per hour. The Region denied the proposed increase on the ground that ThermalKEM had failed to demonstrate that incineration of hazardous wastes at the increased mass feed rate would adequately protect human health and the environment.[3] ThermalKEM's petition for review followed.

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[1] On November 17, 1980, ThermalKEM's predecessor, Industrial Chemical Company, Inc., qualified for interim status under RCRA § 3005(e) by submitting a notification of hazardous waste management activity as required by RCRA § 3010(a) and filing a "Part A" application. *See* 40 C.F.R. §§ 270.1(b), 270.10(e). The date for submission of "Part B" of the RCRA permit application, containing the information necessary for issuance of a permit, is set for each existing facility by the Regional Administrator or in accordance with the dates specified in 40 C.F.R. § 270.73. *See* 40 C.F.R. §§ 270.1(b); 270.10(e)(4). According to ThermalKEM, the Part B permit has been issued but is currently on appeal. Petition for Review at 6, 10–11. Thus, ThermalKEM continues to operate under interim status. *See* Petition for Review at 10; 40 C.F.R. § 270.73(a) (stating that interim status terminates when "[f]inal administrative disposition of a permit application is made."). The Region does not dispute that ThermalKEM is operating under interim status.

[2] 55 Fed. Reg. 11,798 (March 29, 1990); 40 C.F.R. Part 261, Subpart C. The rule, *inter alia,* establishes a new hazardous waste characteristic based on the leachability of hazardous constituents under the toxicity characteristic leaching procedure and adds 25 new organic constituents to the list of toxic constituents regulated under RCRA. *See* 55 Fed. Reg. at 11,803; Appendix II to 40 C.F.R. Part 261.

[3] *See* Letter from James S. Kutzman, Associate Director, Office of RCRA and Federal Facilities, U.S. EPA Region IV, to William J. Ziegler, Vice President of Health, Safety, and Environmental Affairs, ThermalKEM, Inc. (Jan. 8, 1992) (Exh. A to Petition for Review). According to Mr. Kutzman, the proposed increase in the facility's mass feed rate constitutes an increase in design capacity "[a]nd until the South Carolina Department of Health and Environmental Control (DHEC) is authorized for the TC rule, EPA is responsible for any approval of a design capacity increase requested under the TC regulations." *Id* at 2.

Region IV has filed a Motion to Dismiss Appeal, dated March 18, 1992. The Region contends that, because the denial of the proposed amendment to ThermalKEM's Part A application did not constitute a final permit decision under 40 C.F.R. § 124.15, the Region's determination is not subject to appeal under Section 124.19(a). We agree.

II. *ANALYSIS*

40 C.F.R. § 124.19(a) provides, in part:

> Within 30 days after a RCRA, UIC, or PSD *final permit decision* * * * has been issued under § 124.15, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.

(Emphasis added.) Under section 124.15(a), "final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." The term "permit" is defined as:

> [A]n authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part * * *. *Permit does not include interim status (§270.70)* * * *.

40 C.F.R. § 124.2 (emphasis added). Thus, decisions affecting a facility's interim status operations are not considered permit decisions. *See In re Shell Oil Company Deer Park Manufacturing Complex,* RCRA Appeal No. 87–19, at 3–4 (Adm'r, Sept. 8, 1988) (holding that interim status is not a permit and decisions regarding interim status will not ordinarily be treated as permit decisions).[4]

In the present case, ThermalKEM is not appealing from a final permit determination within the meaning of the above-cited regulations. By its own account, ThermalKEM sought to revise its Part A permit application "to achieve *interim status* for additional hazardous waste mass feed and to remain in full compliance with the *in-*

[4]The regulations provide certain exceptions to this rule. *See, e.g.,* 40 C.F.R. § 270.10(e)(5) (procedures of Part 124 apply where interim status is terminated for failure to submit a Part B permit application in a timely manner); 40 C.F.R. § 265.147(c) (applying informal procedures of § 124.5 to variances from interim status financial responsibility requirements). Under the facts of this case, however, nothing in the regulations provides for an appeal under Part 124.

terim status standards set forth in Part 265, Subpart O." Petition for Review at 2 (emphasis added). The denial of such a request does not constitute a decision issuing, modifying, revoking and reissuing, or terminating a permit within the meaning of the above-cited regulations and therefore is not reviewable under 40 C.F.R. § 124.19(a).[5] *See Shell Oil, supra,* at 3–4. Accordingly, ThermalKEM's petition for review is hereby dismissed.

So ordered.

[5] We also reject ThermalKEM's assertion that the Region's denial amounts to a termination of interim status and should be treated as the functional equivalent of a final permit decision. *See Shell Oil, supra,* at 3 (rejecting the petitioner's argument that denial of an interim status exemption is reviewable under 40 C.F.R. § 124.19 because it is "functionally similar" to a permit decision). The Region, in rejecting the proposed modification, determined that ThermalKEM has yet to demonstrate that a higher mass feed rate will be sufficiently protective of human health and the environment. Whatever the merits of this determination (which we do not reach in today's order), it does not prevent the facility from continuing to operate under interim status. Whether ThermalKEM may have to curtail its operations to comply with the TC rule, and if so, to what extent, is not material to this determination.