BEFORE THE REGIONAL ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
REGION 4

In the Matter of:	)	
LWD, INC., CALVERT CITY KENTUCKY	)	
	)	REVIEW OF DETERMINATION
	)	

FINAL DECISION ON REVIEW

This action is before me upon request for review by LWD, Inc., (hereinafter "LWD") of a determination by the Environmental Protection Agency ("EPA") under its "Off-site Policy" that its facility in Calvert City, Kentucky, is no longer acceptable for receipt of hazardous wastes from Superfund sites.

BACKGROUND

LWD owns and operates a commercial hazardous waste storage and treatment facility in Calvert City, Kentucky. Since 1980, LWD has operated the Facility under an "Interim Status" designation by EPA (and the Commonwealth of Kentucky) pursuant to the Resource Conservation and Recovery Act ("RCRA"), Section 3005(e), 42 U.S.C. 6925(e).[1]

On February 16, 1999, an initial notice of unacceptability was sent to LWD, in which LWD was notified that EPA determined that conditions exist at LWD which "render it unacceptable for the receipt of off-site waste generated as a result of removal and remedial activities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The

[1]Due to the fact that EPA could not issue permits to all treatment, storage and disposal facilities before the requirement to have a RCRA permit became effective, certain facilities were treated as if they had been issued a permit on a temporary basis known as "interim status".

determination was made because of what EPA considered to be a relevant violation and relevant releases as those terms are described in the Off-site Rule. Specifically, EPA notified LWD that the relevant violation was LWD's failure to comply with a RCRA Section 3013 Order issued on February 7, 1997, and the relevant releases were the releases of dioxins from the LWD's incineration units that receive hazardous wastes and hazardous substances.

Pursuant to LWD's request made in response to the initial notice, and in accordance with the Off-site Rule, an informal conference was held on March 29, 1999. In attendance were representatives of LWD, EPA, the U.S. Department of Justice, and the Commonwealth of Kentucky. Thereafter, by letter dated April 8, 1999, EPA notified LWD of its determination that the information provided at the meeting was insufficient to support a determination of acceptability, and LWD would become unacceptable on April 19, 1999. That letter also outlined the procedures for seeking reconsideration of that determination. On April 15, 1999, EPA received LWD's request for reconsideration. By letter dated April 16, 1999, pursuant to the Off-site Rule, the determination of unacceptability was extended pending this decision.

Pursuant to the Off-site Rule, an Agency Neutral was designated to review the supplemented record, and the arguments submitted, and prepare a recommendation to the Regional Administrator. After reviewing the supplemented Administrative Record, the submissions of EPA and LWD, and conducting an informal meeting on August 10, 1999, with representatives of both parties a recommendation was made. This decision accepts that recommendation.

THE OFF-SITE POLICY

Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), provides that in the case of any CERCLA response action involving the off-site transfer of any hazardous substance, pollutant, or contaminant (CERCLA waste), that CERCLA waste may only be placed in a facility that is in compliance with RCRA (or other applicable Federal law) and applicable State requirements. EPA issued its Revised Procedures for Planning and Implementing Off-Site Response Actions on November 13, 1987.[2] Effective October 22, 1993, that Policy was superseded by the Off-site Rule at 40 C.F.R. §300.440. (58 Fed. Reg. 49201 (1993)). The purpose of the policy is to ensure that wastes from Superfund sites that must be taken off-site for final disposal do not contribute to present or future environmental problems, by directing those wastes to facilities determined to be "environmentally sound". In The Matter of Laidlaw Environmental Services (Recovery), Inc.," RCRA LADO79464095. The EPA considers the off-site determination to be its "business decision as to where CERCLA wastes under the Agency's control should be sent." 58 Fed. Reg. 49200, 49206, (1993).

[2]The initial guidance, entitled "Guidance on Requirements for Selecting an Off-site Option in a Superfund Response Action," was issued in January 1983. In May 1985, U.S. EPA issued "Procedures for Implementing Off-Site Response Action" (50 FR 45933). The 1986 Superfund Amendments and Reauthorization Act (SARA) reaffirmed the rationale embodied in CERCLA section 104(c)(3) and stated the off-site requirements at CERCLA section 121(d)(3). The off-site policy was updated and revised to implement SARA by the OSWER Directive No. 9834.11 on November 13, 1987. *See* In the Matter of Ross Incineration Services, Inc., 1992 EPA RJO Lexis 19, April 6, 1992, citing 53 FR 48218 (1988).

A facility is acceptable to receive off-site CERCLA waste if there are no relevant violations at the unit receiving the CERCLA waste or relevant releases from the receiving unit. 40 C.F.R. §§300.440(a)(4); (b)(1) and (2).

40 C.F.R. §300.440(b)(1)(ii) defines "relevant violations" to:

> include significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities; prevent releases of hazardous waste, hazardous constituents, or hazardous substances to the environment; ensure early detection of such releases; or compel corrective action for releases.

40 C.F. R. § 300.440(b)(2)(ii)(A), clarifies relevant releases in providing that a receiving unit at facilities such as LWD's incinerators may receive off-site CERCLA waste

> "...only if that unit is not releasing any hazardous waste, hazardous constituent, or hazardous substance in the ground water, surface water, soil or air."

DISCUSSION

EPA's position, as set forth in its Response to LWD's Submittal in Support of Request for Reconsideration, is that according to LWD's own data, there were detectable levels of dioxin emissions from its incinerator stacks. Based upon these findings, EPA had a Sensitivity Analysis performed. EPA then did a screening risk assessment which showed dioxin emissions above health based levels in three of six tests performed. These findings form the basis of EPA's determination that there is a "relevant release". This was also the basis upon which EPA determined that the release of dioxins from LWD may present a substantial hazard to human health or the environment requiring further analysis. Therefore, on February 7, 1997, EPA issued an order to LWD pursuant to Section 3013 of RCRA,

42 U.S.C. § 6934 ("Section 3013 Order") requiring LWD to submit a Trial Burn Plan, and to implement it once approved. Ultimately, EPA approved a Trial Burn Plan with certain modifications. However, LWD failed to implement the Plan. The "relevant violation" is LWD's violation of the Section 3013 Order.

LWD has raised a number of arguments contesting both the data and conclusions reached by EPA. Many of these contentions are set forth in pleadings submitted in two cases filed in the United States District Court for the Western District of Kentucky.[3] In essence LWD argues that while it has shown "measured levels of dioxin" such release has not been found to "pose a threat to human health or the environment". (*See* letter from J. Anthony Goebel to Richard D. Green, April 15, 1999, page 3) It relies upon the expert opinion of Dr. John Whysner, a dioxin expert and risk assessor, who identified what he considered flaws with the Sensitivity Analysis and conclusions based thereon. In addition, LWD contends that the Order was improperly issued, in part because it requires modifications to the

[3]On June 24, 1998, LWD filed the first lawsuit, ("LWD # 1) Civil Action No. 5:98CV-171-J, seeking declaratory and injunctive relief based upon EPA's issuance of a draft Part B permit which LWD claimed imposed emission standards on it even though EPA had not properly promulgated regulations pertaining to those standards. The second lawsuit ("LWD # 2) Civil Action No. 5:99 CV-42-R, was filed by LWD on February 2, 1999 challenging EPA's issuance of the Section 3013 Order and seeking an injunction staying its effective date and accrual of any civil penalties thereon. On February 12, 1999, the Court granted EPA's Motion to Dismiss that action due to the lack of subject matter jurisdiction because there was no final agency action. There is a Motion for reconsideration pending in that action. In LWD #2 EPA filed a Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and a Memorandum For Preliminary Injunction and In Support of a Cross-Motion to Dismiss, which are pending. LWD sought on February 4, 1999, to consolidate those two actions. On May 20, 1999, EPA filed an enforcement action against LWD for its failure to comply with the Section 3013 Order. On June 29, 1999, the District Court dismissed LWD #2.

LWD facility which are unauthorized, and therefore cannot form the basis of a finding of a relevant violation for the purpose of the Off-site Rule.

While the Administrator has taken a position on these issues in pleadings submitted in the aforementioned federal cases, these issues are now before me and are being revisited in this proceeding. The outcome on these issues could indeed be different from the positions taken in the federal cases. LWD, has asked that in the alternative to finding in its favor on these matters, that this decision be stayed pending the outcome of the federal court cases. However, I find that approach would impede my authority and responsibility to make off-site determinations. The regulators themselves, in drafting these rules appear to have contemplated that there may be proceedings running in tandem. The rules, at 40 C.F.R. § 300.440(f)(1) provide that "A facility found to be unacceptable to receive CERCLA wastes based on relevant violations or releases may regain acceptability if ...the facility has prevailed on the merits in an administrative *or judicial* challenge to the finding of noncompliance or uncontrolled releases upon which the unacceptability determination was based". (emphasis added) In the best interests of justice and to preserve the integrity of this process, a determination as to LWD's acceptability to receive off-site waste is appropriate at this time.

LWD's VIOLATION OF THE RCRA SECTION 3013 ORDER IS A "RELEVANT VIOLATION" FOR PURPOSE OF THE OFF-SITE RULE

Section 3013(a) of RCRA, 42 U.S.C. § 6934(a), provides in pertinent part as follows:

"If the [EPA] determines, upon receipt of any information, that

> (1) the presence of any hazardous waste at a facility or site at which hazardous waste is, or has been, stored, treated, or disposed of, or
>
> (2) the release of any such waste from such facility or site **may present a substantial hazard to human health or the environment**, he may issue an order requiring the owner or

> operator of such facility or site to conduct such monitoring, testing, analysis, and reporting with respect to such facility or site as he [EPA] deems reasonable to ascertain the nature and extent of such hazard.
>
> (emphasis added).

I am persuaded that the standard to be met in determining whether there is a substantial hazard, is the "minimum threshold" referred to in the case relied upon by EPA, United States v. Seafab Metal Corp., 28 ERC (BNA) 1231, 18 ELR 21024 (W.D. Wash. 1988). The rationale, as further evidenced in the Congressional Record siting Senator Gore, (Cong. Rec. 3357, February 21, 1980), is that the remedies required are relatively modest, not necessitating that an actual hazard exist.

What constitutes a showing that there "may be a substantial hazard" is vehemently contested by LWD. While LWD does not refute the dangers of the carcinogenic effect of dioxin in the environment, nor the data it submitted on May 26, 1994, in response to a Section 3007 RCRA Information Request, it does dispute the methodology used in the Sensitivity Analysis and Risk Assessments. Therefore, LWD contends, since the results are not reliable, the conclusion reached of the substantial nature of the hazard is unreliable as well.

LWD also raises a number of other objections to the validity of the 3013 Order. One of these objections is that the Order requires LWD to make modifications to its facility. However, what LWD does not address is that it was LWD who made the initial suggestion regarding modifications, the EPA has clearly notified LWD that it is free to conduct the trial burns without modifications to the units, and that EPA will amend the current plan to eliminate an or all of LWD's proposed modifications. *(See* EPA's Memorandum in Support of Opposition to Motion to Stay, page 23, filed in Civil Action No. 5:99CV-42 R and January 11, 1999 letter from Richard Green to Mr. Bill O'Brien, attached to EPA's

Response to LWD, Inc.'s Submittal in support of Request for Reconsideration, as Exhibits 1 and 11 respectively). Therefore, I find LWD's objections on this basis unconvincing.

LWD has also objected to the Order based upon the 90 day time period provided to conduct the trial burn. LWD had the opportunity to object to this when EPA counter proposed this period in reaction to LWD's objections to the initial 45 days provided. LWD had ample opportunity to seek a longer period prior to reaching this stage of proceedings.

It is LWD's contention that the Sensitivity Analysis is flawed that merits closer scrutiny here.

I have thoroughly reviewed the submissions, with special emphasis on the arguments raised by Dr. Whysner regarding the Sensitivity Analysis and what he has claimed lacks scientific validity. Dr. Whysner's position is best set out in his supplemental affidavit as follows:

"In conclusion, the assumptions used in the EPA's Sensitivity Analysis are not plausible and do not represent a "conservative worse cases scenario". Furthermore it was appropriate in my previous affidavit to raise concerns regarding the inconsistencies between the Sensitivity Analysis and the document that the Sensitivity Analysis refers the reader to for more information (the February, 1996 Draft Plan). Finally , the information regarding the assumptions and the actual calculations used to determine bioaccumulation are not properly addressed in the Sensitivity Analysis".

In summary, he most strongly argues in this as well as his other affidavits that 1) only long-term, rather than worst case short term conditions, monitoring results could be used for comparison to the identified potential health risks; 2) the draft risk guidance violates the premise of carcinogenic risk assessment, which is based upon incremental cancer risk from a given source; and 3) there is insufficient information for a risk assessor to evaluate how bioaccumulation is considered in the Sensitivity Analysis.

Similarly, I have carefully reviewed the EPA position and arguments refuting Dr. Whysner's claims. While recognizing that expert opinions may vary somewhat in what is scientifically preferable,

the underlying basis of the Order must be shown to be scientifically valid when held up to close scrutiny. However, embracing the longstanding principle that "an agency's decision is entitled to special deference when highly technical or scientific issues are involved, Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 36 (D.C. Cir.) (Embanc), cert. denied, 426 U.S. 941 (1976), I find that the EPA Sensitivity Analysis withstands the objections of LWD for the following reasons:

1. The Sensitivity Analysis appropriately followed EPA guidance titled "Guidance for Performing Screening Level Risk Analysis at combustion Facilities Burning Hazardous Wasted " April 15, 1994).

2. While the Sensitivity Analysis Report, out of context, excludes certain information needed to verify some results, the additional documentation has been provided to LWD, which taken along with the Report, provides all information needed.

3. While the designation of biotransfer factors was indicated in lieu of bioconcentration factors which were actually used, thus leading to confusion for purposes of verifying the data, it did not serve to invalidate the Sensitivity Analysis Report upon which the 3013 Order was based.

I am, therefore, satisfied that the failure to conduct the trial burn is a violation of a valid order. However, the narrower single issue now before me is whether the violation of what has been determined to be a valid RCRA 3013 Order is a "relevant violation" under the Off-site Rule. Additional clarification of whether or not LWD's violation of the Order constitutes a "relevant" violation for purpose of the Off-site Rule is found in the preamble, setting forth that such violations will generally be Class I violations by high priority violators (HPVs), 58 FR 49208. HPVs are further discussed in the

December 21, 1987, RCRA Enforcement Policy (Attached as Exhibit 6 to EPA's Response to LWD's Submittal).

Under the section entitled "Violator Definitions and Enforcement Responses", a "High Priority Violator" is defined as a handler who:

Has caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constituents; or
Is a chronic or recalcitrant violator...; or
Deviates from terms of permit, order...by not meeting requirements in a timely manner and/or by failing to perform work as required by terms of ...orders...; or
Substantially deviates from RCRA statutory or regulatory requirements.

Under the previous section defining violations, Class I violations include deviations from orders which could result in a failure to:

"...b) Prevent releases of hazardous waste or constituents,
both during the active and any applicable post-closure periods of
the facility operation where appropriate; or
c) Assure early detection of such releases;..."

I find that LWD's violation falls into the categories of both Class I violations as well as HPVs, and therefore constitutes a "relevant violation" for purposes of the Off-Site Policy.

LWD IS UNACCEPTABLE TO RECEIVE OFF-SITE CERCLA WASTE BECAUSE ITS RECEIVING UNIT HAS HAD A RELEVANT RELEASE

LWD does not dispute that it reported a release, but attempts to establish that the release was exempt under the off-site rule as either a "De minimis release, or one that does not pose a threat to human health or the environment. 40 C.F.R. § 300.440(b)(2)(i)(A) and (C)

LWD argues that the measured levels of dioxin emissions at the Facility are controlled by an "enforceable agreement with the Commonwealth of Kentucky, by controlling the inlet temperature of

exit gases to the bag house." *See* LWD's Submittal in Support of Request for Reconsideration of U.S. EPA Off-Site rule Unacceptability Determination, page 16, and the March 14, 1994, letter from Caroline P. Haight to Mr. Gary Metcalf, attached as Exhibit 14 thereto. However, I am persuaded by EPA's arguments on both these points, that a) the letter referred to is incorrectly characterized as enforceable by EPA and b) LWD's dioxin release does not fall into the de minimis category as that is referred to in these regulations. LWD contends that without promulgated dioxin standards LWD's measurable dioxin emissions fall within the de minimis release exemption unless EPA proves such emissions present a threat to human health or the environment, and again relies upon Dr. Whysner's affidavits to show that such threat has not been established. However, reference is made to the discussion above regarding Dr. Whysner's affidavits and to the same conclusion reached. Therefore, I find that LWD has had a relevant release under the off-site rule.

ADDITIONAL ARGUMENTS

Citing Chemical Waste Management, Inc. v. EPA, 56 F. 3d 1434 (D.C. Cir. 1995), LWD contends a lack of due process in the off-site policy itself as well as the application of that policy in this instance. However, a review of the Administrative Record shows that there were adequate grounds for the action, and LWD had been given notice and opportunity to present its position. The Agency's action has not been arbitrary and capricious or a denial of due process. Furthermore, LWD has not shown that EPA discriminated against its facility. *See* In the Matter of Ross Incineration Services, Inc., 1992 EPA RJO LEXIS 19, 1992.

LWD has also raised additional arguments addressing EPA's misuse or abuse of its omnibus authority, in addition to its failure to issue a permit. However, I find that these arguments confuse the

issues at hand and do not have direct bearing on the validity of the unacceptability determination. The findings of relevant violation and relevant release are made independent of the permit process and do not reflect a misuse of omnibus authority.

CONCLUSION

Based upon the above, I affirm the Region's determination of February 16, 1999, and hold that pursuant to the EPA Off-site Rule, 40 C.F.R. §300.440, the LWD Calvert City, Kentucky facility is unacceptable for receipt of off-site CERCLA waste.

Date: December 16, 1999

/S/
JOHN H. HANKINSON, JR.
Regional Administrator