IN THE MATTER OF CHEVRON CHEMICAL CO. (RICHMOND, CA FACILITY)

RCRA Appeal No. 90–15

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided April 27, 1992

Syllabus

This case involves a petition for review of a permit issued by the United States Environmental Protection Agency, Region IX, under the Resource Conservation and Recovery Act (RCRA). The permit authorizes Chevron Chemical Company to operate a hazardous waste incineration facility in Richmond, California. Petitioners (Chevron, the Pipe Trades Council of Northern California (PTC), and Citizens for a Better Environment) raise a total of twelve issues on appeal.

After filing its appeal, Chevron filed a motion requesting consideration of additional information. Chevron contends that this information will correct what it characterizes as erroneous factual assumptions made by the Region.

Held: The proceeding is remanded and the Region is instructed to determine whether the record should be supplemented with the new information submitted by Chevron and, if so, whether the permit should be revised. Given the nature and volume of this information, it would not be appropriate for the Board to attempt to determine its significance for the first time on appeal. On remand, the Region is also instructed to address two arguments raised by Chevron and PTC respectively. First, the Region must clarify its rationale for selecting a cancer risk level of 10^{-6} rather than the 10^{-5} level recommended by an EPA guidance document cited by Chevron and a proposed EPA regulation. Second, the Region must consider whether information submitted by Chevron that was classified as confidential business information (CBI) should nevertheless be released to the public pursuant to the "Special rules governing certain information obtained under the Solid Waste Disposal Act," 40 C.F.R. § 2.305.

All other proposed grounds for relief raised by the several petitioners have been considered and rejected for the reasons stated in the Region's response.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion by Judge McCallum:

On May 8, 1990, U.S. EPA Region IX issued a permit under the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C.A. §§6901–6992k, authorizing Chevron Chemical Company to operate a hazardous waste incineration, storage, and treatment facility located in Richmond, California.[1] Three appeals have been filed under 40 C.F.R. § 124.19 by Chevron, the Pipe Trades Council of Northern California (PTC), and Citizens for a Better Environment (CBE) in conjunction with the West County Toxics Coalition. As requested by the Agency's Judicial Officer,[2] the Region filed a response to the petitions dated November 30, 1990 (Region's Response).

The parties raise a total of twelve issues for consideration on appeal.[3] Chevron argues that the permit improperly requires it to repeat the entire trial burn procedure as part of any reapplication following expiration of the permit in 1995; that the permit's limitations on the total amount of wastes entering the incinerator are overly restrictive; and that the mass feed rates for certain metals entering the incinerator are overly restrictive and, in some cases, technically impossible to demonstrate. PTC makes the following arguments: the Region improperly withheld information from the public regarding wastes at the facility on the ground that such information is confidential; the permit's metal feed rates are higher than those measured in the trial burn; the risks to sensitive receptors in the community, such as children and the elderly, were not adequately evaluated; the permit should contain a limit on zinc emissions; trial burn measurements of the metal feed and emissions rates were inaccurate; and the Region's selection of Principle Organic Hazardous Constituents (POHCs) regulated by the permit was flawed. PTC and CBE both argue that the permit improperly allows Chevron to burn

[1] All wastes stored or treated at the facility are generated on-site by the production, formulation or packaging of pesticides or other chemical products.

[2] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

[3] In its appeal, Chevron raised several additional issues regarding various inconsistencies and errors in the final permit. Chevron and the Region have agreed to resolve these matters through a Class 1 permit modification under 40 C.F.R. §270.42. These issues have therefore been rendered moot and need not be addressed in today's order.

wastes not specified in the permit and that the permit's waste minimization provisions are inadequate. Finally, CBE argues that the Region failed to consider the cumulative risk from the facility as a whole.

On July 3, 1991, Chevron filed a motion requesting permission to supplement the record to correct what it characterizes as erroneous factual assumptions made by the Region in writing the permit and in responding to the petitions for review. This supplemental information was submitted along with the motion. Specifically, Chevron seeks to present additional information regarding the Region's decision: 1) to limit the total amount of wastes entering the incinerator to 300,000 tons for the five-year permit term and to 75,000 annually;[4] and 2) to include mass feed rates for certain metals (arsenic, beryllium, cadmium, and chromium) more restrictive than those in the draft permit.[5] Chevron contends that the Region's decision on these issues was arbitrary and lacked any technological or health-based justification.

The Region has not submitted a substantive response to the new information or otherwise expressed its views as to its significance. Although Region IX now states that the appeal should be resolved based on the existing administrative record,[6] at a June 20, 1991 meeting, the Region purportedly encouraged Chevron to file this supplemental information,[7] thereby arguably suggesting that the Region views the new material as relevant to the present proceeding.

Given the nature and volume of the information submitted by Chevron,[8] it would not be appropriate to attempt to discern its signifi-

[4] *See* Final Permit Condition I.K.4. These limits were added in response to public comments on the draft permit.

[5] Final Permit Condition IV.C.16. provides:

> The mass feed rates of toxic metals to the incinerator * * * shall not exceed:
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> | | |
> |---|---|
> | Arsenic: | .0410 (lbs./hr.) |
> | Beryllium: | .0008 (lbs./hr.) |
> | Cadmium: | .0006 (lbs./hr.) |
> | Chromium: | .0233 (lbs./hr.) |

[6] *See* Letter from Laurie Williams, Assistant Regional Counsel, to David R. Heckler, Assistant Judicial Officer (November 18, 1991).

[7] *See* Letter from Margaret Rosegay, Esq., Counsel for Chevron, to Bessie Hammiel, U.S. EPA Hearing Clerk (July 3, 1991).

[8] In its Supplemental Filing, Chevron presents information alleging that the Region—in limiting the total waste feed to the incinerator to 300,000 tons for the permit's five-year term (75,000 tons annually)—may have failed to appreciate the dynamic nature of the specialty chemical market which, according to Chevron, requires that a manufacturer be able to respond to changing market conditions within a three

cance for the first time on appeal. The permitting rules contemplate that the Region will initially consider and analyze information relevant to the final permit determination.[9] Immediate consideration of the newly submitted information on appeal would circumvent that orderly process, forcing the Board to either forego the Region's views—an obviously undesirable consequence—or to solicit them separately (along with those of other interested parties), thereby running the risk of transforming the appeal process into a full fledged public comment process—a matter best left to the Region in the first instance. Indeed, the Region itself has suggested that if the additional evidence is to be considered, the affected permit issues should be remanded to the Region for further consideration.[10]

To ensure adequate consideration of Chevron's request, this proceeding will be remanded for additional limited proceedings. The Region is directed to consider whether, under the circumstances, the record should be supplemented with the additional information supplied by Chevron. If the Region determines that this information should become part of the administrative record, it should solicit public comment thereon. The Region should then determine whether the permit's current limitation on the amount of wastes entering the incinerator and the mass feed rates for the four metals mentioned above should be revised.

On remand, the Region must also clarify its rationale for selecting a cancer risk level of $1x10^{-6}$ rather than the $1x10^{-5}$ level recommended by an EPA guidance document cited by Chevron as well as the proposed rules for owners and operators of hazardous waste incinerators. *See* Guidance on Metals and Hydrogen Chloride Controls for Hazardous Waste Incinerators, Volume IV of the Hazardous Waste Incinerator Guidance Series, at Appendix I–13 (August 1989); Standards for Owners and Operators of Hazardous Waste Incinerators (Proposed Rule), 55 Fed. Reg. 17,862, 17,874 (April 27, 1990). In its response, the Region correctly notes that there is nothing

to six-month period or lose business to competitors. Moreover, Chevron provides information to show that an increase in the volume of waste handled by the incinerator to 130,000 tons/year would not require any change to the facility, its equipment, or its personnel. Chevron asserts that the incinerator contains state-of-the-art technology, "is operated by highly trained personnel with the benefit of sophisticated computerized process controls and oversight, much of which has been added since the trial burn." Supplemental Filing at 2. Chevron also presents risk assessment data alleging that, contrary to the Region's assertion, a capacity limitation of 75,000 tons/year is not necessary to protect public health and the environment.

[9] *See generally* 40 C.F.R. Part 124, Subpart A.

[10] *See* Letter from Laurie Williams, Assistant Regional Counsel, to David R. Heckler, Assistant Judicial Officer (November 18, 1991).

that requires it to choose a risk level of 10^{-5}.[11] Nevertheless, this explanation does not provide a very satisfying basis for dispensing with the issue Chevron raises. Accordingly, the Region must provide a more reasoned justification for proposing a risk level that differs from the level specified in the EPA guidance and the proposed rules.[12]

Finally, the Region must reconsider its refusal to release certain information classified as confidential business information (CBI). *See* 40 C.F.R. § 2.208 (substantive criteria for use in confidentiality determinations). PTC contends that the Region's failure to release this information denied PTC and other interested parties any meaningful opportunity to comment on the permit. In its response, the Region contends, *inter alia,* that once the CBI determination was made, it had no discretion to release the disputed information. The Region, however, fails to consider the "Special rules governing certain information obtained under the Solid Waste Disposal Act," 40 C.F.R. § 2.305, which allow the release of CBI to the public under certain circumstances. On remand, the Region shall consider whether the special rules apply and, if so, whether the disputed information should be released to the public. The Region's determination on this issue shall constitute final Agency action. If the Region determines that the CBI was properly withheld from the public, PTC may pursue all available avenues of relief in the appropriate federal court.

All other proposed grounds for review raised by the several petitioners have been considered and rejected for the reasons contained in the Region's response. Under the rules governing this proceeding, there is no appeal as of right from the Region's permit decision. Ordinarily, a RCRA permit determination 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(a); *In re Chemical Waste Management Inc.,* RCRA Appeal No. 87–12, at 2 (May 27, 1988);

[11] The Region also notes that a risk level of 10^{-6} is "consistent * * * with the clean-up level sought at most Superfund Sites which are remediated pursuant to CERCLA, 42 U.S.C. § 9601 *et seq.* and the National Contingency Plan, 40 C.F.R. § 300.430(e)(2)(i)(A)(ii)." Region's Response at 15.

[12] The Board notes for the parties consideration that the four metals at issue here are listed as hazardous pollutants under section 112(b)(1) of the Clean Air Act, as amended, 42 U.S.C. § 7412(b)(1). Under section 112(f)(2)(A) of the Clean Air Act, 42 U.S.C. § 7412(f)(2)(A), whenever it is determined that technology-based emission standards promulgated under section 112(d) for sources of pollutants classified as known, probable, or possible carcinogens, do not reduce lifetime cancer risks to the maximum exposed individual to less than "one in one million," the Administrator is authorized to promulgate health-based standards for such sources.

In re Highway 36 Land Development Co., RCRA Appeal No. 87–5, at 2 (September 2, 1987). The preamble to the regulations 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 Petitioners. Petitioners have failed to meet this burden with respect to the other proposed grounds for review.

CONCLUSION

This proceeding is remanded and the Region is directed to reopen the permit proceedings for the limited purposes mentioned above. The Region shall give public notice of this decision under 40 C.F.R. § 124.10.

So ordered.