IN THE MATTER OF LCP CHEMICALS—NEW YORK

RCRA Appeal No. 92–25

ORDER DENYING REVIEW

Decided May 5, 1993

Syllabus

LCP Chemicals—New York, a division of the Hanlin Group, Inc. ("LCP") petitions for review of a permit issued by Region II pursuant to the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA") for LCP's facility in Onondaga County, New York. The entire RCRA permit for LCP consists of the HSWA permit and the RCRA permit issued by New York, which also contains corrective action requirements. LCP's petition for review raises four general categories of issues: (1) LCP incorporates by reference all issues raised in its request under New York law for an adjudicatory hearing on the New York-issued portion of the permit, and requests review of those conditions in the HSWA permit that replicate conditions in the New York-issued permit; (2) LCP contends that the Region violated 40 C.F.R. § 124.17 by failing to respond to all comments made during the public comment period and adding a new condition to the final permit without explanation in the response to comments, (3) LCP contends that the Region is without authority to impose certain permit conditions, and (4) LCP contends that the HSWA permit contains deadlines inconsistent with deadlines in the New York-issued permit.

Held: Section 124.19 requires a petitioner to provide in its petition for review an identification of the permit condition in question and a statement as to why the condition requires review under the standard set forth in § 124.19. LCP failed to satisfy these procedural requirements with respect to issue categories 1, 2 and 4 above, and review of those issues is therefore denied.

With respect to the issues identified in category 3, LCP's petition must also fail. Under § 124.19, a permit ordinarily will not be reviewed unless the petitioner demonstrates that the permit condition in question is based upon a clear error of law or fact, or involves an important matter of policy or exercise of discretion warranting review. To the extent LCP identifies specific permit conditions at issue, LCP fails to meet this substantive standard. LCP contends that the permit improperly requires New York's approval prior to the closure of sewers and structures. Review of this issue is denied because there is no such statement in the permit, only in the RCRA Facility Assessment, which is not a permit condition subject to review. LCP contends that the permit impermissibly allows the Region to impose additional obligations on the permittee after permit issuance. Because the Region is authorized to implement corrective action in a phased process, review of this issue is denied. Finally, LCP contends that the permit impermissibly provides that compliance with

the permit does not constitute a defense to actions brought under RCRA § 7003, the Comprehensive Environmental Response, Compensation and Liability Act, or any other law governing protection of human health and the environment. Because this permit condition is an accurate statement of the law, review is denied.

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

Opinion of the Board by Judge Firestone:

I. *BACKGROUND*

LCP Chemicals—New York, a division of the Hanlin Group, Inc. ("LCP"), has petitioned for review of a permit issued by U.S. EPA Region II pursuant to the 1984 Hazardous and Solid Waste Amendments ("HSWA") to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*, for LCP's facility in Onondaga County, New York.[1] The entire RCRA permit issued to LCP for this facility consists of two parts: a permit for the post-closure care of two surface impoundments issued by the State of New York, which is authorized to administer its hazardous waste program in lieu of the federal program under RCRA § 3006(b),[2] and the HSWA portion of the permit issued by Region II, which establishes corrective action requirements for the facility. Although New York was not authorized to administer HSWA at the time it issued the permit,[3] the State-issued portion of this permit also includes corrective action requirements pursuant to State law.[4]

The Board received LCP's timely petition for review on July 13, 1992. In brief, LCP's petition raises four general categories of issues: (1) LCP incorporates by reference all issues raised in its request under New York law for an adjudicatory hearing on the

[1] The facility currently stores and distributes hydrochloric acid and caustic soda. Until production activities stopped in 1988, the facility manufactured liquid chlorine, caustic soda, hydrochloric acid, and sodium hypochlorite bleach. *See* RCRA Facility Assessment Report ("RFA") at 3–4 (Response to Petition, Exhibit 5).

[2] New York approved LCP's closure plan for the two surface impoundments at this facility in 1988 and approved LCP's closure certification in August 1991. *See* RFA, at 4.

[3] New York received final authorization to administer HSWA on May 22, 1992. *See* 57 Fed. Reg. 9978 (Mar. 23, 1992). In accordance with a Memorandum of Agreement ("MOA") between the State of New York and Region II, U.S. EPA retains jurisdiction of this final permit, which was signed before the May 22, 1992, effective date of New York's authorization. *See* Order (Jan. 29, 1993) (Region II showed cause for not dismissing LCP's petition pursuant to the MOA).

[4] This duplication is permissible under RCRA. *See In re Ciba-Geigy Corp. and Hercules, Inc.*, RCRA Appeal No. 91–28 (Apr. 7, 1992).

State-issued portion of the permit, and requests review by this Board of "those conditions of the HSWA permit which replicate conditions of the [New York-issued] Permit that LCP has challenged," Petition for Review, at 2; (2) LCP alleges that Region II, in violation of 40 C.F.R. § 124.17, failed to respond to all comments made during the public comment period on the draft permit, and impermissibly added a new condition to the final permit without explanation in the response to comments; (3) LCP maintains that Region II is without statutory or regulatory authority to impose certain permit conditions, including a provision which allows the Region to review submissions and require additional studies and investigations; and (4) LCP contends that the federally-issued HSWA permit contains deadlines which must be changed because they are inconsistent with those in the State-issued RCRA permit.[5]

Upon request of this Board, Region II responded to the petition for review on September 25, 1992. Region II contends that review should be denied because LCP's petition fails to satisfy the procedural pleading requirements of 40 C.F.R. § 124.19. In addition, the Region argues that to the extent the petition arguably satisfies those requirements, that is, states objections to particular permit conditions with some specificity, LCP has not met the substantive requirements of § 124.19 by demonstrating that those conditions are based upon clear error or an exercise of discretion or policy warranting review. For the reasons set forth below, we agree with the Region and deny review on all issues.

II. *DISCUSSION*

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19. The preamble to § 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner. *See In re Beazer East, Inc. and Koppers Industries, Inc.*, RCRA Appeal No. 91–25 at 3 (Mar. 18, 1993) (and cases cited therein).

[5] In addition, LCP's petition for review states that the "examples [of permit conditions] given for each category above are provided for purposes of illustration only and do not constitute a complete list of each issue to be raised on appeal. LCP reserves its rights to supplement this request as appropriate." Petition for Review at 4. (*See* note 9, *infra*.)

To meet this burden, § 124.19 requires a petitioner to include in its petition for review "a statement of the reasons supporting review, including * * * a showing that *the condition in question* is based on" either a clearly erroneous finding of fact or conclusion of law or on a policy or exercise of discretion warranting review. 40 C.F.R. § 124.19(a) (emphasis added). We have interpreted this provision as requiring two things in a petition for review: a clear identification of the conditions in the permit at issue,[6] and an argument that the condition warrants review.[7] In fulfilling this latter requirement, it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review.[8] Tested by these standards, LCP's petition for review must be denied.

A. *LCP's Failure To Identify Specific Permit Conditions*

First, LCP seeks review of "those conditions of the HSWA permit which replicate conditions of the [State-issued] Permit that LCP has challenged," and incorporates by reference its written request for a State adjudicatory hearing. Petition for Review at 2. LCP has not, however, identified any conditions in the HSWA permit that replicate conditions in the State-issued permit to which it objects. Moreover, LCP's reference to its request for a State adjudicatory hearing wholly fails to explain why the Region's decision to impose the conditions at issue is clearly erroneous or otherwise warrants review. LCP states that the purpose of its appeal of these allegedly duplicative provisions is "to allow LCP to seek an amendment of those conditions set forth in the HSWA permit which correspond to conditions set forth in the [State-issued permit] that may be amended as a result of LCP's adjudicatory hearing." Petition for Review at 2. We agree with Region II that "[t]o the extent that the issue intended to be raised by LCP here is consistency between the two permits, it is not yet ripe. If and when changes are made

[6] *See In re BFGoodrich Co.,* RCRA Appeal No. 89–29 at 4 (Dec. 19, 1990) (review not available for issue that did "not directly call into question the propriety of any specific permit term").

[7] *See In re Waste Technologies Industries,* RCRA Appeal Nos. 92–7 *et al.* at 23 (July 24, 1992) (review denied where petitioner did not identify "any discrete finding of fact or conclusion of law made by the Region which they contend was clearly erroneous or otherwise warrants review").

[8] *See In re Adcom Wire,* RCRA Appeal No. 92–2, at 10 (Sept. 3, 1992) (§ 124.19 not satisfied by mere reference to comments made during public comment period on draft permit).

to the New York Post-Closure Permit, LCP may seek conforming modifications to the HSWA permit." Response to Petition at n.1. In these circumstances we deny review of the issues raised in category 1 of the petition for review. *See In re Hytek Finishes Co.*, RCRA Appeal No. 88–45 (Jan. 13, 1989) (agency administrative appeal procedures should not be used to pursue speculative concerns); *In re Amoco Oil Co.*, RCRA Appeal No. 84–5 (May 17, 1985) (propriety of inspection pursuant to permit not ripe when no inspection has been alleged).

Second, LCP contends that the Region violated 40 C.F.R. § 124.17 by failing to respond to all of the comments on the draft permit. Nonetheless, LCP has not identified which comment(s) the Region supposedly failed to address. Similarly, LCP contends that the HSWA permit contains deadlines inconsistent with those in the State-issued permit, but LCP has failed to identify any condition in the final HSWA permit imposing such a deadline.

It is not this Board's obligation to search through the permit for the specific permit conditions that fall into LCP's general categories of objections. Section 124.19 places the burden of identifying the questionable permit conditions squarely upon the petitioner. Absent any references to the specific permit conditions at issue, and a discussion as to why the Region's decision to impose those conditions warrants review, this Board has no basis for granting review. Accordingly, LCP's request for review on the issues raised in categories 2 and 4 of the petition for review are denied.

B. *The Permit Conditions Identified by LCP*

LCP has failed to satisfy the substantive requirements of § 124.19 with respect to the permit conditions that were identified in category 3 of the petition for review.[9]

[9] As discussed above, LCP does identify a few permit conditions in its petition for review, but argues that these are "for purposes of illustration only, and do not constitute a complete list of each issue to be raised on appeal." *See* note 5, *supra*. LCP's tactic of providing only examples of permit conditions at issue flatly contravenes the requirement of § 124.19 that a petition for review must identify the specific permit conditions at issue. A petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although briefing may occur *after* review has been granted, the discretion to grant review is to be sparingly exercised, and therefore, under the rules applicable to these proceedings, a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted. *See In re General Electric Co.*, RCRA Appeal No. 91–7, at 23 (Nov. 6, 1992).

First, LCP contends that the Region improperly included in the final permit a condition requiring approval from the State of New York "prior to the closure of sewers and structures," on the ground that "[t]his condition was not included in the draft permit and [Region II] has failed to provide a basis for its inclusion in the final permit" as required by 40 C.F.R. § 124.17.[10] Petition for Review, at 3. The Region responds that there is no condition in the permit requiring LCP to seek approval of the State prior to closure of sewers and structures. Nor does LCP identify such a permit condition. Instead, LCP cites the RCRA Facility Assessment ("RFA") Report, which provides that "[t]he facility should submit a decommissioning plan to the [State] for its review and approval before closing any abandoned tanks, pipelines, sewers, or structures." RFA Report, at 5. The RFA Report, which is a part of the corrective action process completed prior to permit issuance, provides the basis for the permit but is not a condition of the permit, and is not subject to review in these proceedings. Moreover, to the extent that LCP disagrees with the exercise of the State's authority, its concerns should be presented to the State. *See, e.g., Vulcan Materials Company,* RCRA Appeal No. 87–1, at 1–2 (Sept. 8, 1988) (issues relating to state-issued portion of permit are subject to state, not federal, review). In these circumstances we deny review of this issue.

Second, LCP argues that Permit Module III, condition B.8.(c) of the permit is unlawful. This permit condition provides:

> The Regional Administrator may require the Permittee to conduct new or more extensive assessments, investigations, or studies, based upon the information provided in the progress reports referred to in Condition B.8(a) of this Module above, or upon other supporting information.

This provision is located in a portion of the permit detailing LCP's obligation to submit progress reports of all activities conducted pursuant to the provisions of the permit.[11] LCP contends that the provision

[10] Section 124.17, in part, provides that the Region's response to the comments on the draft permit shall "[s]pecify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change."

[11] As noted in the quoted permit condition at issue, this progress report requirement is contained in Condition B.8(a) of the permit, which provides in part that "[t]he Permittee shall submit, to the Regional Administrator, signed progress reports, as specified in approved work plans pursuant to this Permit, of all activities (i.e., SWMU Assessment, Interim Measures, RCRA Facility Investigation, Corrective Meas-

is improper because Region II is "without authority to reserve the right to impose additional permit conditions [such as assessments, investigations and studies] after issuance of the permit." Petition for Review, at 3.

Region II responds that this permit condition is required to allow a phased approach to corrective action. The Region explains that corrective action permits contemplate that additional information will be required before all releases at a facility have been fully identified and characterized. Response to Petition, at 17–20. This condition allows the Region to ensure that the assessments, investigations and studies undertaken by the permittee will provide that the pollution is adequately identified and addressed. And, as the Region notes in its response, the Administrator in *In re Hoechst Celanese Corp.*, RCRA Appeal No. 87–13 (Feb. 28, 1989), specifically upheld this procedure:

> By necessity, corrective action is often a phased process because, at the time of permit issuance, there might not be sufficient information to identify the particular corrective action measures needed. *See* 50 Fed. Reg. 28,714 (July 15, 1985). If this is the case, the permit should establish a time frame under which the needed information will be obtained. *Id.* As the process advances—from RFA to RFI plan to RFI report to a final decision on the specific corrective action measures required—newly acquired data is used to refine each subsequent phase. Once all necessary information is acquired and appropriate corrective action identified, the permit is modified accordingly. *Id.*

In re Hoechst Celanese, at 6–7. The Region concludes that LCP's concerns are similar to the ones rejected in *In re W.R. Grace & Co.,* RCRA Appeal No. 89–28 (Mar. 25, 1991), where it was held that revisions to interim submissions, such as RFI workplans or reports, are not permit modifications subject to procedures detailed in the regulations for modifying permits.

LCP contends that the Region "is without authority to reserve the right to impose additional permit conditions after issuance of the permit." Petition for Review, at 3. LCP apparently believes that

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ures Study) conducted pursuant to the provisions of the Corrective Action Schedule of Compliance * * *."

the Region must include all obligations in the original permit. LCP apparently does not question the Agency's authority to impose additional conditions through permit modifications. Rather, LCP apparently questions the Region's express "reservation" of rights in the permit. As explained in *In re Hoechst Celanese,* it is well-settled that corrective action is typically a phased process because rarely at permit issuance is all necessary information available. Therefore, the typical RCRA permit will contain a schedule of compliance dictating the steps to be taken to obtain this information. Consequently, it is not uncommon for "obligations in the schedule of compliance [to be] written in general terms, with the permit providing that the details of those obligations will be filled in later as more information about the site becomes available." *In re General Electric Co.,* RCRA Appeal No. 91–7, at 3 (Apr. 13, 1993). LCP's permit comports with these principles, and thus there is no merit to LCP's argument. Review of this provision is denied.[12]

Finally, LCP argues that Section A of Permit Module I is not lawful. This section of the permit provides that:

> Compliance with the terms of this permit does not constitute a defense to any action brought under Section 7003 of RCRA, * * * Sections 106(a), 104, 107 and/or 122 of the Comprehensive Environmental Response, Compensation and Liability Act [CERCLA], * * * or any other law and corresponding regulations governing protection of public health and the environment.

[12] As previously noted, the Region cited *In re W.R. Grace & Co.* in support of its position. That case, and our recent decision in *In re General Electric Co.,* RCRA Appeal No. 91–7 (Apr. 13, 1993), pertained to the procedures applicable to the exercise of the Region's authority to impose additional obligations after permit issuance. Those decisions recognize that the Region has two sources of authority to impose additional obligations upon the permittee after permit issuance: modification of the permit under 40 C.F.R. §270.41, or incorporation of interim submissions, such as an RFI workplan, into the permit in accordance with due process requirements set forth in *In re General Electric Co.* The procedures for imposing additional obligations through incorporation of interim submissions required by the permit are detailed elsewhere in the permit, and LCP has not challenged those provisions. We note, moreover, consistent with our decision in *In re General Electric Co.,* at n.24, LCP will be entitled to the procedures specified in that opinion in the event the Region seeks to exercise its authority to impose additional obligations upon LCP through the incorporation of interim submissions into the permit.

Again, without explanation, LCP contends that "the [Region] is without legal authority to so limit the permittee's rights." Petition for Review, at 3.

LCP's conclusive contention, without more, does not meet its burden of demonstrating review is warranted under § 124.19. *See In re Hadson Power 14—Buena Vista,* PSD Appeal Nos. 92–3, 92–4 and 92–5, at n.54 (Oct. 5, 1992). Nonetheless, because the permit condition is an accurate description of applicable law, we conclude on the merits that it is not based on clear error nor does it provide any other basis for review. As noted by Region II in its response to the petition, under the applicable regulation, 40 C.F.R. § 270.4(a), compliance with a HSWA permit constitutes compliance with RCRA Subtitle C; the regulation does not, however, provide that compliance with the permit is compliance with any other provision of RCRA or any other law protecting human health and the environment. For example, RCRA § 7003, which is not a part of Subtitle C, provides that it may be applied "notwithstanding any other provision of this chapter." 42 U.S.C. § 6973(a). In addition, liability under CERCLA is defined by CERCLA § 107(a), 42 U.S.C. 9607(a), which also states, in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—[T]he following persons are liable * * *.[13]

In view of the clear language in RCRA § 7003 and CERCLA § 107, the permit correctly puts LCP on notice that compliance with a RCRA Subtitle C permit does not bar EPA from taking lawful actions when necessary to protect human health and the environment.[14]

III. *CONCLUSION*

For the reasons set forth above, LCP has failed to demonstrate that review of this permit is warranted under 40 C.F.R. § 124.19. Accordingly, review is denied.

So ordered.

[13] While CERCLA liability does not extend to federally permitted releases under CERCLA § 107(j), this exemption applies only to the extent the HSWA permit authorizes any such releases. 42 U.S.C. § 9607(j).

[14] For example, compliance with this permit certainly would not satisfy compliance with the Clean Air Act or Clean Water Act should LCP need permits under those Acts.