

**IN THE MATTER OF SEQUOYAH FUELS
CORPORATION**

NPDES Appeal No. 91-12

ORDER DENYING REVIEW

Decided August 31, 1992

Syllabus

Petitioner, a citizens group, seeks review of the partial denial of its request for an evidentiary hearing in connection with the reissuance of an NPDES permit by U.S. EPA Region VI. Petitioner maintains the land application of certain wastewater discharged by a uranium processing facility should be regulated under either the NPDES permit or under RCRA.

Held: Petitioner has failed to preserve for review the issue of whether land application of wastewater should be regulated under the facility's NPDES permit. Even assuming the issue had been properly preserved for review, the Regional Administrator did not commit clear error by excluding such activity from the coverage of the NPDES permit. Furthermore, there is no exercise of discretion or policy which is so important under the circumstances of this case as to warrant review by the Board. Petitioner's contention that the land application should be regulated under RCRA is outside the scope of an NPDES permit proceeding. Accordingly, the petition for review is denied.

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

Opinion of the Board by Judge Firestone:

Petitioner, Native Americans for a Clean Environment (NACE), seeks review of the partial denial of its request for an evidentiary hearing in connection with the reissuance of an NPDES permit by the U.S. Environmental Protection Agency's Regional Administrator for Region VI. The Environmental Appeals Board has jurisdiction to grant or deny this petition for review under 40 CFR §§ 124.72 and 124.91; *see* 57 Fed. Reg. 5320, 5335-5336 (February 13, 1992).

I. BACKGROUND

The Sequoyah Fuels Corporation ("SFC"), the permittee, operates a uranium processing plant in Gore, Oklahoma.¹ Separate from its processing operations at the Gore facility, SFC conducts a ranching and farming operation. As part of its farming and ranching operation, SFC uses a raffinate fertilizer spray which is derived from the Gore facility's treated wastewater.

On January 16, 1988, Region VI publicly announced its intent to reissue the NPDES permit for the SFC facility. Under the terms of the draft permit, the discharges subject to NPDES permitting would include those flowing from SFC's outfalls for combined waste, treated sanitary wastewater, and stormwater surface runoff. At the public hearing on the draft permit, EPA explained that the permit would not extend to SFC's raffinate fertilizer activities, because the "spray fertilizer activities which are non-point source agricultural activities * * * are specifically excluded from NPDES permitting under 40 CFR Part 122.3(e)." (Record, p. 00299.) On May 26, 1988, Petitioner submitted written comments stating that the land application of raffinate fertilizer should be regulated under RCRA. Petitioner stated that "EPA should immediately commence the regulation of [permittee's] raffinate application program under the provisions of RCRA." (Record, p. 00259-260.) After Region VI issued the notice of the final permit decision on October 15, 1988, Petitioner, on November 15, 1988, filed objections to the final permit and a request for an evidentiary hearing that reiterated its earlier comments, including its contention that the land application of raffinate fertilizer should be regulated under RCRA. Specifically, Petitioner again stated: "NACE has requested that EPA RCRA regulate the land surface application of Barium-treated Uranium Raffinate Solvent Extract."² (Record, p. 00054.) The Regional Administrator granted Petitioner's request for an evidentiary hearing on two issues unrelated to the raffinate fertilizer program and denied the request on the remainder of the issues, including the RCRA issue. On June 17, 1991, Petitioner filed a timely notice of appeal and petition for review.

¹ Sequoyah Fuels' facility is licensed by the NRC under a source material license to possess and use natural uranium for the production of UF₆ from uranium concentrates. This license covers treatment, storage and disposal of process and contaminated waste materials.

² In its response to Petitioner's earlier comments, EPA explained in its final permit decision that "[t]his matter is under review by the RCRA program but is not an NPDES matter." (Record, p. 00155.)

II. DISCUSSION

In its petition for review, Petitioner argues that the Regional Administrator erred in failing to grant a hearing on the issue of whether the land application of raffinate should be regulated under either the NPDES permit program or RCRA. In other words, rather than restricting the focus of its objections to the Regional Administrator's refusal to regulate the raffinate spraying under RCRA, Petitioner is now adding the NPDES permit program as a potential alternative means of regulating this activity. In response to the petition, the Region argues that the Regional Administrator did not err because: (1) the land application of raffinate is excluded from the NPDES permitting requirement as a non-point source agricultural activity and (2) Petitioner failed to raise the issue of regulating the raffinate spraying under the NPDES permit in its request for an evidentiary hearing. The Region concedes that regulation may be appropriate under RCRA and/or the Atomic Energy Act of 1954, but maintains the issue of such regulation is not relevant to the issuance of an NPDES permit under the Clean Water Act. In the permittee's response to the petition, SFC similarly argues that the Regional Administrator did not err because: (1) Petitioner failed to raise the issue of regulation under the NPDES permit during the comment period or in its request for an evidentiary hearing and (2) the issue of regulation under RCRA is outside the scope of the NPDES permit decision.

Under the rules governing an NPDES permit proceeding, there is no appeal as of right from the Regional Administrator's decision. *In the Matter of Miners Advocacy Council*, NPDES Appeal No. 91-23 at 3 (May 29, 1992). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the Environmental Appeals Board.³ *Id.*; 44 Fed. Reg. 32,887 (June 7, 1979)(preamble to 40 CFR Part 124). The petitioner has the burden of demonstrating that review should be granted. *Miners Advocacy Council, supra*, at 3; see 40 CFR § 124.91(a). For the reasons stated below, Petitioner has failed to meet that burden.

³With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887. While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." 44 Fed. Reg. 32,887; see 57 Fed. Reg. 5320.

A. The NPDES issue.

Petitioner raises for the first time in its petition for review the issue of whether the land application of raffinate should be regulated under SFC's NPDES permit. In its comments and request for an evidentiary hearing, Petitioner specifically argued that the land application of raffinate is governed by RCRA. Petitioner cannot now be heard to argue that this activity should be governed under the Clean Water Act's NPDES permit program.

The rules set forth in 40 CFR Part 124 are intended to ensure that the Region has an opportunity to address any concerns raised by the permit, thereby promoting the Agency's longstanding policy that most permit issues be resolved at the Regional level. *See* 44 Fed. Reg. 32,887. All reasonably ascertainable issues and all reasonably available arguments supporting a person's position must be raised by the close of the public comment period. 40 CFR § 124.13. To preserve an issue for appeal, the petitioner must also raise that issue in its request for an evidentiary hearing. *Miners Advocacy Council, supra*, p. 8. Any person requesting an evidentiary hearing must also state the disputed legal and factual issues with specificity.⁴ *See* 40 CFR § 124.74.

By not asserting in its comments and request for an evidentiary hearing that the land application of raffinate should be regulated under SFC's NPDES permit, Petitioner has failed to preserve this issue for review by the Board.

In addition, even assuming the Petitioner had preserved the issue, the Regional Administrator's decision was not clearly erroneous and does not involve an exercise of discretion or policy that warrants our review. The land application of fertilizer as a plant nutrient or nutritional chemical is an agricultural activity which is not covered by the NPDES permit program. In 40 CFR § 122.3, the Agency excludes from the NPDES permit requirement:

- (e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, in-

⁴A request for evidentiary hearing to reconsider or contest a final NPDES decision must state each legal or factual question alleged to be at issue and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated. 40 CFR § 124.74(b)(1). Such requests shall also contain specific references to the contested permit conditions, as well as suggested revised or alternative permit conditions which would be required to implement the purposes and policies of the Clean Water Act. 40 CFR § 124.74(c)(5).

cluding storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from [certain defined] concentrated animal feeding operations[,] concentrated aquatic animal production facilities[,] aquaculture projects[, and] silvicultural point sources[.]

There is no dispute that the land application of raffinate is conducted in association with SFC's agricultural and ranching activities. As such, it qualifies as a non-point source discharge not subject to NPDES requirements. The Petitioner has given us no reason for questioning the Regional Administrator's determination. Accordingly, the Petitioner has failed to establish a basis for review of the Regional Administrator's decision to exclude the raffinate activities from the scope of SFC's NPDES permit.

B. The RCRA issue.⁵

The Petitioner maintains the Agency should regulate the land application of raffinate under RCRA. We do not reach the merits of the issue, for the Petitioner's claim may not be heard in this proceeding. The scope of an NPDES permit proceeding does not extend to issues of RCRA regulation unless the NPDES permit and RCRA permit proceedings for a facility have been consolidated. *See generally* 40 CFR Part 124; *Cf. In the Matter of U.S. Department of Energy Pinellas Plant*, RCRA Appeal No. 91-3 (July 8, 1992); *Waste-Tech Services and BP Chemicals America, Inc.*, RCRA Appeal No. 88-8 (Sept. 22, 1988). In limited circumstances, persons requesting an evidentiary hearing on an NPDES permit under 40 CFR § 124.74 may also request an evidentiary hearing on a RCRA permit. 40 CFR § 124.74(a)(2). Such a request will be granted only if processing of the RCRA permit is consolidated with processing of the NPDES permit as provided in 40 CFR § 124.4. 40 CFR § 124.74(a)(2). Consolidation of the proceeding is initiated by the preparation of both draft NPDES and RCRA permits at the same time. 40 CFR § 124.4(a)(1).

Here, no draft RCRA permit was being processed by Region VI in a consolidated proceeding. Indeed, Petitioner seeks to impose RCRA requirements upon the land application of raffinate. The issue of RCRA regulation over the land application of raffinate fertilizer has been and continues to be a matter under review by Region VI. To the extent Petitioner is not satisfied with the Agency's decision

⁵As noted above, there is no doubt that the Petitioner preserved this issue as it was raised in both its written comments and request for an evidentiary hearing.

concerning RCRA jurisdiction, it may pursue its appropriate remedies for citizen relief under RCRA.⁶

In sum, the Regional Administrator did not err in denying Petitioner's request for an evidentiary hearing and the Board finds no exercise of discretion or policy issue warranting review. Accordingly, the petition for review is denied.

So ordered.

⁶While we offer no opinion as to the merits of petitioner's RCRA argument, if the Petitioner believes that EPA has a nondiscretionary duty to regulate SFC's raffinate spraying under RCRA, it is free to pursue its remedies under Section 7002 of RCRA. 42 U.S.C. § 6972.