IN THE MATTER OF POLLUTION CONTROL INDUSTRIES OF INDIANA, INC.

RCRA Appeal No. 92–3

ORDER DENYING REVIEW

Decided August 5, 1992

Syllabus

Petitioner Pollution Control Industries of Indiana ("PCII") appeals a condition of a hazardous waste management permit issued to it by the Environmental Protection Agency's Region V for its East Chicago, Indiana facility. The challenged condition requires the testing of certain incoming waste streams using the Toxicity Characteristic Leaching Procedure ("TCLP"). PCII asserts that TCLP testing is not required by applicable regulations, will not provide additional useful information, and is not being required of similar facilities in its area. Region V responds that the TCLP testing requirement is appropriate and permissible under applicable regulations and that PCII cannot appeal this condition because it did not raise the issue during the comment period on the draft permit.

Held: PCII's comments on the draft permit related only to two specific aspects of the TCLP testing procedure. The Region's response to those two concerns was appropriate. PCII did not make a broad-based challenge to the TCLP testing requirement, although it could have done so since the issue was reasonably ascertainable at the time. Therefore, it failed to comply with the procedural requirements for preserving this broader challenge for appeal and, accordingly, review is denied.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich. Environmental Appeals Judge Nancy B. Firestone did not participate in this Decision.

Opinion of the Board by Judge Reich:

Petitioner Pollution Control Industries of Indiana ("PCII") is appealing certain terms of a permit issued to it pursuant to the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 ("RCRA") and the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6901 *et seq.*, and regulations promulgated thereunder. This permit was issued by the U.S. Environmental Protection Agency's Region V on December 31, 1991,

to PCII for its facility in East Chicago, Indiana. PCII has appealed the permit in accordance with 40 CFR § 124.19 (1991).

PCII operates a hazardous waste fuel blending and storage facility in East Chicago, Indiana. The facility accepts hazardous waste and produces a fuel for combustion at facilities located off-site. The permit at issue here would allow PCII to continue to store hazardous waste in tanks and containers at the facility. A final hazardous waste management permit was issued jointly by Region V and the State (Indiana Department of Environmental Management) and consists of a final Federal permit and a final State permit. The Federal permit covers those provisions of HSWA for which the State has not yet been authorized.

Petitioner submitted a Petition for Review of Condition in RCRA Final Permit on January 31, 1992 ("Petition"). The Petition relates only to the Federal permit. Authority to resolve such appeals on behalf of the Agency has been delegated by the EPA Administrator to this Board in 40 CFR § 124.19, 50 Fed. Reg. 5335 (February 13, 1992).

PCII's Petition focuses on one particular aspect of the permit, relating to its obligation to test incoming waste streams. As stated in the Petition:

> Discussions with the Indiana Section of the RCRA Permitting Branch of USEPA Region 5 have confirmed that the intent of certain conditions added to the Permit by USEPA is to require that the Toxicity Characteristic Leaching Procedure ("TCLP") test be performed on each waste stream (as defined in Section C of Attachment I to the Permit (the "Waste Analysis Plan")) to be received by PCII as input to its operation. According to USEPA, such TCLP testing is to be performed irrespective of any information, certification or waste determination (pursuant to 40 CFR § 262.11) which PCII may have obtained or be able to obtain from the Generator.

Petition at 1. PCII also argues that TCLP testing is not required by applicable regulations, would provide no new information required for safe storage of the incoming wastes, and has not been required of similar facilities in the area.

The Region filed a response to the Petition[1] with the Board on April 24, 1992. The Response not only challenges the bases set forth for review in the Petition but also contends that Petitioner has failed to satisfy the procedural requirements for review, and thus the Petition should be denied on that basis.

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 CFR § 124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to the Federal Register notice in which Section 124.19 was promulgated states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." *Id.* The burden of demonstrating that review is warranted is on the Petitioner.

The procedures for the issuance of a RCRA permit are found in 40 CFR Part 124. Two important provisions of Part 124 relate to the obligation of persons to raise their objections to a permit prior to an appeal. 40 CFR § 124.13 provides in part:

> All persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10.

In addition, 40 CFR § 124.19 provides in part:

> [A]ny person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. Any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision * * *. The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment

[1] Response of the United States Environmental Protection Agency to Petitioner's Request for Review of Condition in RCRA Final Permit ("Response").

> period (including any public hearing) to the extent required by these regulations * * *.

Adherence to these requirements is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final.[2] Therefore, a threshold analysis is required to determine whether Petitioner complied with §§ 124.13 and 124.19 and thus is entitled to raise this challenge on appeal. As noted, Region V contends that it did not.

In light of the Region's contentions, it is necessary to determine whether the issue raised on appeal was previously raised during the comment period. On appeal, PCII has objected to the requirement for TCLP testing on each waste stream.[3] The Petition is somewhat confusing on the precise scope of the objection, however. The excerpt from the Petition previously quoted focuses on the obligation to test in circumstances where data are provided by a generator. This could be read as merely requesting relief from the obligation to test a waste stream if the generator has already supplied the requisite data. However, the supporting arguments in the Petition and the relief requested suggest that PCII's objection is broader than this one situation. Its arguments against the TCLP requirement relate to its overall appropriateness as applied to PCII's facility. The specific relief requested is to "[m]odify or delete such conditions so as to remove from the Permit any requirements that TCLP analytical data be obtained for acceptance of incoming waste streams." Petition at 4. Thus, we will interpret the Petition to be a broad objection to the obligation to conduct TCLP testing, which includes but is not limited to the situation where the generator provides waste analysis data.

Next, we must address what comments are in the administrative record for purposes of determining compliance with the requirements of 40 CFR § 124.13. It is uncontroverted that PCII provided written comments on the draft permit dated July 29, 1991.[4] PCII did not testify at the public hearing on the draft permit. PCII, in a Reply

[2] *See In re Shell Oil Company,* RCRA Appeal No. 88–48, at 3 (March 12, 1990) ("These rules help 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.").

[3] The Toxicity Characteristic Leaching Procedure is found at 40 CFR Part 261, Appendix II. It is designed to determine the mobility of organic and inorganic analytes in liquid, solid, and multiphasic wastes.

[4] Letter from Tita Lagrimas, Director of Regulatory Affairs, PCII, to Joseph DiMatteo, RCRA Permitting Branch, Region V, USEPA.

Memorandum to the Region's Response,[5] asserts that it raised the objections to TCLP testing which it now attempts to raise on appeal during the comment period not only through its written comments but also "in several meetings and conference calls with EPA prior to the end of the public comment period * * *." PCII Reply at 2. During those meetings and conference calls, according to PCII, "PCII expressly questioned the regulatory basis for PCII to obtain TCLP testing of its incoming waste streams (regardless of the party responsible for such testing), and the appropriateness of the TCLP testing requirement for PCII's particular operations." *Id.*

Region V has requested leave to file a document entitled "Supplemental Response of the United States Environmental Protection Agency to Petitioner's Request for Review of Condition in RCRA Final Permit" ("Supplemental Response"). Leave to file this document is hereby granted. In the Supplemental Response, the Region denies that it participated in any meetings with PCII during the comment period. It acknowledges that the permit writer spoke with PCII on at least one occasion but denies that it was in regard to the subject of PCII's Petition. Supplemental Response at 2.

There is nothing in the administrative record relating to the telephone calls or alleged meetings between PCII and Region V during the comment period. We have only PCII's unsubstantiated, and contested, allegations that the issues were the same as in the Petition. This is not sufficient. To assure an adequate administrative record on appeal, PCII should have made sure that its written comments raised all of the issues of concern. To ascertain in contested cases whether the issue raised on appeal was properly preserved for review, we will look only to the written comments which the petitioner filed on the draft permit.

It is uncontested that some of PCII's comments on the draft permit related to the TCLP testing procedure. The more difficult question is whether the particular objections to the testing requirement as raised on appeal were raised in PCII's comments. We find that they were not.

PCII's comments on the requirement for TCLP testing were focused on two particular aspects of the testing requirement. The first was that PCII not be required to conduct the TCLP testing but that TCLP testing be conducted by the generator of the waste in-

[5] Reply Memorandum of Pollution Control Industries of Indiana in Support of its Petition for Review of Condition in RCRA Final Permit ("PCII Reply").

stead.[6] The requirements for general waste analysis by the owner or operator of a treatment, storage, or disposal facility provide for the possibility of generator-supplied data.[7] The Region, in its Response to Comments, agreed to add the following clarifying language to certain requirements of the permit: "Analytical data that is not submitted by the Generator must be obtained by PCII in accordance with 329 IAC 3–41–4 and 40 CFR 264.13."[8] Thus, rather than directly shifting the testing burden to the generator as PCII would have preferred, the Region made clear that PCII as the permittee had the burden of analyzing the waste except to the extent that the generator had already adequately done so. This language accurately reflects the structure of 40 CFR § 264.13(a)(2), which allows for generator-supplied data but puts the burden for waste analysis on the facility owner or operator if generator-supplied data are not provided.[9]

The Petition for Review contains a number of arguments against TCLP testing, none of which were raised in PCII's comments on the draft permit. In fact, PCII's comments on the draft permit con-

[6] Comments numbered 6, 10, 14, 16, 19, and 20. The particular language suggested by PCII to be added as a footnote to the TCLP testing requirement reads: "Will be obtained by the Generator or by an outside laboratory retained by the Generator in accordance with 329 IAC 3–41–4, CFR 264.13, and 262.20." However, comments 6, 10, 14, and 16 refer back to comment number 2. In that comment, PCII seemed to recognize that it is ultimately responsible for providing the waste analysis data since it suggested adding to the narrative on the waste analysis plan the following language:

> In accordance with 329 IAC 3–41–4, CFR 264.13, CFR 262.20, required waste stream data which is not provided by the Generator will be obtained by PCII, by an outside laboratory retained by PCII, or by an outside laboratory retained by the Generator.

These provisions seem inconsistent on what obligation PCII would have if the generator does not provide the data but there is no explanation for this seeming inconsistency.

[7] 40 CFR § 264.13(a)(2) provides in part:

> The owner or operator of an off-site facility may arrange for the generator of the hazardous waste to supply part of the information required by paragraph (a)(1) of this section, except as othewise [sic] specified in 40 CFR 268.7 (b) and (c). If the generator does not supply the information, and the owner or operator chooses to accept a hazardous waste, the owner or operator is responsible for obtaining the information required to comply with this section.

[8] Response to Comments on the Draft Federal Permit for Pollution Control Industries of Indiana comments and responses number 1, 4, 6, 7, and 8.

[9] We recognize that PCII's Petition states that TCLP testing will be required of PCII irrespective of any testing which the generator may have done. PCII indicates that it has confirmed this interpretation of the permit with Region V. However, as we read the permit, TCLP testing would not be required of PCII if a generator provided all of the data which TCLP testing would yield.

tained no explanation of the reasons for its suggested changes or arguments supporting why the changes were appropriate. Thus, PCII failed to satisfy its obligation to provide all reasonably available arguments supporting its position during the comment period.

Since, as previously noted, it is possible to construe PCII as objecting to the requirement that PCII do TCLP testing under any circumstances, it is necessary for us to determine whether its comments concerning generator testing were intended to convey a wholesale rejection of the appropriateness of TCLP testing by PCII in all circumstances, thus preserving this issue for review. We do not read its comments in that manner. The particular language PCII suggested adding to the permit, quoted in note 6 *supra*, refers to data being obtained by the generator in accordance with § 264.13.[10] This reference can only be to the language about the owner or operator arranging for the generator to supply part of the data required since that it is the only place in that section that the generator is mentioned. The reference in the same quoted language to § 262.20 is simply to the manifesting requirement which applies to the generator when waste is being transported off-site. This relates to the transfer of information about the waste from the generator to the receiving facility. There is no reference in the comments, as there is in the Petition, to 40 CFR § 262.11, the section on hazardous waste analysis by a generator. Therefore, in context, we read PCII's comments as merely expressing a desire to shift the burden for TCLP testing under the permit to the generators rather than challenging whether TCLP testing was appropriate at all.[11]

Further support for this reading comes from the following language suggested by PCII in its comment number 20 dealing with annual waste stream evaluations:

> In order to show proper characterization of each Waste Stream, the Toxicity characteristic leaching procedure (TCLP) test will be conducted if the Generator cannot or will not certify that the Waste Profile or process generating the waste has not changed. When a Waste Stream is tested for and passes the TCLP test (is not characteristically toxic), then the EP-Toxicity test may be required.

[10] *See* note 7, *supra*.

[11] It is instructive that PCII's comments did not simply suggest deletion of the TCLP requirement, as they have in the Petition. Deletion, rather than shifting the burden, would seem more consistent with an objection to the TCLP testing as not being rationally required for PCII's facility.

This language, *suggested by PCII*, clearly contemplates that TCLP testing would be conducted absent generator certification. This is wholly inconsistent with the outright rejection of TCLP testing PCII now asserts.

The other focus of PCII's comments was that the requirement for TCLP testing be contingent on the results of the total metals analysis. If the total metals analysis indicated that the metals content of a waste stream was below certain minima, TCLP testing would not be required.[12] The Region, in its Response to Comments, indicated that the TCLP contains provisions that would obviate the need for use of TCLP if a total analysis of the wastes demonstrates that individual analytes are below appropriate regulatory levels for the particular toxicity characteristic waste being analyzed. Because the Region determined that the TCLP procedure itself contained the flexibility PCII requested, it made no change to the permit.[13]

PCII's comments on the draft permit thus contain no broad challenge to the regulatory basis or appropriateness of TCLP testing as applied to its facility. To the extent that its Petition makes a broader challenge, it contravenes the requirements of 40 CFR §§ 124.13 and 124.19 to have raised this challenge before the close of the comment period on the draft permit. These broader issues were certainly reasonably ascertainable during the comment period and did not arise from changes from the draft to the final permit. To the extent that the Petition reiterates the two specific issues raised during the comment period, we find that the change made to provide for generator-supplied data and the explanation of why no change was required to accommodate a total metals analysis were fully responsive to PCII's concerns. For all of the foregoing reasons, the Petition for Review is denied.

So ordered.

[12] Comments number 8B and 12B.

[13] Response to Comments, comments and responses number 3 and 5. *See* 40 CFR Part 261, Appendix II, Section 1.2.