

**IN RE GREAT LAKES CHEMICAL CORP.
MAIN PLANT**

RCRA Appeal Nos. 92-34, 92-36, and 92-37

ORDER DENYING REVIEW

Decided July 7, 1994

Syllabus

U.S. EPA Region VI and the State of Arkansas issued a permit under the 1976 Resource Conservation and Recovery Act (RCRA), and the 1984 Hazardous and Solid Waste Amendments (HSWA) to RCRA, 42 U.S.C. §§ 6901-6992k, to Great Lakes Chemical Corporation (Great Lakes). Most of the permit conditions were issued by the State, which received authority to administer most aspects of its RCRA and HSWA program from EPA in 1991. A few permit conditions were issued under EPA's HSWA authority. Three petitions were filed challenging the permit conditions. Great Lakes seeks to clarify one federally-imposed condition related to land disposal restrictions, and raises substantive challenges to a corrective action condition. Great Lakes also contends that only the State had authority to issue the corrective action condition. Tommy Gates, Janis Gates, and Patsy Gates raise substantive challenges to certain State-issued portions of the permit. The Arkansas Historic Preservation Program (AHPP) alleges that Region VI violated the National Historic Preservation Act in issuing the permit.

Held: The Board denies review of the petitions. The issue raised by Great Lakes concerning the land disposal restriction condition is moot, because the Region represents that it agrees with Great Lakes' interpretation and the Board construes the Region's agreement as binding. Review of the corrective action condition is denied, because both the Region and Great Lakes agree that only the State had the authority to adopt corrective action requirements, and the condition was in fact included under State, not federal, authority. Therefore, the condition is not subject to administrative appeal within EPA. Review of the Gates' petition is also denied because the issues raised relate only to the State portion of the permit. Finally, review of the petition of AHPP is denied as moot, because AHPP has now certified that no historic properties are implicated by the permit issuance.

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

Opinion of the Board by Judge Firestone:

I. BACKGROUND

We have consolidated for decision three petitions seeking review of a permit issued to Great Lakes Chemical Corporation of El Dorado,

Arkansas (Great Lakes) under the 1976 Resource Conservation and Recovery Act (RCRA) and the 1984 Hazardous and Solid Waste Amendments to RCRA, 42 U.S.C. §§ 6901-6992k. The permit was jointly issued on October 14, 1992, by U.S. EPA Region VI under the authority of HSWA, and by the Arkansas Department of Pollution Control and Ecology (ADPCE) pursuant to the Arkansas Hazardous Waste Management Act, Arkansas Act 406, as amended (1979) (AHWMA). Petitions for review were filed by Tommy Gates, Janis Gates, and Patsy Gates, private citizens who reside near the permitted facility (RCRA Appeal No. 92-34); Great Lakes, the permittee (RCRA Appeal No. 92-36); and the Arkansas Historic Preservation Program (AHPP) (RCRA Appeal No. 92-37).

The petitions for review collectively raise a number of challenges to the conditions imposed in the permit. As explained below, the Board concludes that review must be denied with respect to the issues raised by Great Lakes concerning permit condition XII(b).Q. and all of the issues raised in the Gates' petition, because those issues all relate to conditions imposed by the State of Arkansas under the State's authorized RCRA and HSWA program, and therefore the Board has no basis upon which to exercise its power of review. The remaining issue raised in Great Lakes' petition is moot by virtue of the Region's acquiescence to Great Lakes' interpretation of the challenged condition. Finally, the petition of the Arkansas Historic Preservation Program is now moot by virtue of the AHPP's post-petition review of material furnished by the State and its conclusion that the permit will not affect any historic places.

II. DISCUSSION

Under the rules governing this proceeding, a Region's permit decision will only be reviewed if 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; 45 Fed. Reg. 33,412 (May 19, 1980). 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 * * *." *Id.* The burden of demonstrating that review is warranted is on the Petitioner. *See, e.g., In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 4 (EAB, Nov. 23, 1993). Moreover, the Board is empowered to review only permit conditions stemming from a federal exercise of authority, and not the decisions of States exercising permitting authority under authorized State programs. *In re LCP Chemicals - New York*, RCRA Appeal No. 92-25 (EAB, May 5, 1993) (citing *In re Vulcan Materials Co.*, RCRA Appeal No. 87-1, at 1-2 (Adm'r,

Sept. 8, 1988) (issues relating to State-issued portion of permit are subject to State, not federal, review)).

A. *Petition of Great Lakes*

The State of Arkansas received final authorization from U.S. EPA to carry out the State's Hazardous Waste Management Program in November 1991. *Arkansas; Final Authorization of State Hazardous Waste Management Program Revisions; Review of Immediate Final Rule*, 56 Fed. Reg. 57,593 (Nov. 13, 1991). At that time, the Agency authorized the State to become the permitting authority in lieu of EPA with respect to virtually all RCRA and HSWA program requirements. *Arkansas; Final Authorization of State Hazardous Waste Management Program Revisions; Immediate Final Rule*, 56 Fed. Reg. 47,153, 47,157 (Sept. 18, 1991). The Agency retained permitting authority with respect to a few HSWA provisions including certain land disposal restrictions. *Id.*

Great Lakes challenges only two conditions of its permit: condition II.M.5.d. relating to certain land disposal restrictions; and condition XII(b).Q., a corrective action provision that imposes certain air monitoring and modeling requirements on Great Lakes. Great Lakes seeks only a clarifying interpretation of condition II.M.5.d. However, Great Lakes contends that the Region lacked authority to impose condition XII(b).Q. because corrective action authority had been delegated to Arkansas. Great Lakes also raises numerous substantive challenges to condition XII(b).Q.

First, with respect to the land disposal restrictions, condition II.M.5.d. of the permit requires Great Lakes to perform a waste analysis following process changes. Great Lakes interprets the requirement to apply only to process changes that are not otherwise covered by the Waste Analysis Plan contained in condition I.I. Petition for Review at 8. In its response, Region VI states that it agrees with Great Lakes' interpretation of the condition. The Board will construe the Region's agreement as a binding interpretation of condition II.M.5.d. *In re General Motors Corp.*, RCRA Consolidated Appeal Nos. 90-24, 90-25, at 12 (EAB, Nov. 6, 1992) (Agency representation concerning interpretation of permit condition declared binding by Board); *In re W.R. Grace & Co.*, RCRA Appeal No. 89-28, at 4 n.6 (Adm'r, Mar. 25, 1991) (same). Because there is no longer any dispute as to the meaning of the condition, the Board denies review on the grounds that the issue is moot.

Second, with respect to condition XII(b).Q. related to corrective action, the Region concedes that Arkansas received authorization in

1991 to impose corrective action conditions and exercise omnibus authority. Therefore, the condition was imposed under State law and is not part of the federal portion of Great Lakes' permit. Region's Response to Great Lakes' Petition at 10. Great Lakes apparently assumed the condition was part of the federal portion of the permit because it was marked with an asterisk indicating that it was issued under joint authority with EPA. The Region explains that the asterisk was simply an error with respect to condition XII(b).Q. *Id.* Based on the foregoing, it is undisputed by the parties, and the Board agrees, that Arkansas is the only permitting authority with the power to impose condition XII(b).Q. in Great Lakes' permit. Therefore, condition XII(b).Q. is subject only to State, not federal, review. *See Vulcan Materials Co., supra*, at 1-2 (“[M]atters relating exclusively to the state-issued portion of the permit [are] not subject to an administrative appeal within U.S. EPA.”).¹ Accordingly, the Board denies Great Lakes' petition for review of condition XII(b).Q.²

B. *Petition of Tommy Gates, Janis Gates, and Patsy Gates*

The Gates' petition challenges a number of conditions in Great Lakes' permit, including conditions related to groundwater monitoring and treatment; air monitoring; assessment of on and offsite contamination; underground injection of fluids; point source discharges; compliance with a State-issued consent order; and reporting requirements. Upon review of the petition, however, it is apparent that all of the issues raised in the Gates' petition concern permit conditions issued by the State under its RCRA and HSWA authority. Neither of the conditions that were, in fact, jointly issued by Arkansas *and* EPA (conditions II.M.5. and XII(b).P.) are implicated in the Gates' petition. Accordingly, for the same reasons explained above, the Gates' challenges are not properly before the Board, and the Board must deny review of the petition.

C. *Petition of Arkansas Historic Preservation Program*

AHPP's petition was premised on EPA's and Arkansas' alleged failure to comply with § 106 of the National Historic Preservation Act by failing to take into account the effect of the proposed permit on

¹ Because condition XII(b).Q. was issued under State authority, the Board has not considered whether the permit condition is supported on substantive grounds.

² The Region recognized that Great Lakes' challenge to condition XII(b).Q. raised a threshold issue concerning the reviewability of the petition, yet did not bring the issue to the Board's attention other than to refer to it in its response. We note for future matters that parties should raise such threshold issues by way of an expedited motion to dismiss or deny the petition early in the appeal, in order to allow for expeditious resolution where appropriate.

properties included in or eligible to be listed with the National Register of Historic Places. AHPP contends that EPA and Arkansas failed to provide it with information necessary to determine whether any historic places would be affected by the permit.

According to the Region's response to the petition, which has not been disputed, following the filing of the petition the State forwarded to AHPP all information requested concerning the facility and surrounding properties. AHPP then issued a clearance notice stamped at the bottom of the State's letter transmitting the additional information. The clearance notice certifies that the permit "will have no effect on significant cultural resources." Exhibit A to Region's Response to AHPP's Petition. It therefore appears that the concerns expressed in AHPP's petition have been rendered moot due to the State's subsequent response and AHPP's determination that no cultural resources are affected by the permit. Accordingly, AHPP's petition is denied.

III. CONCLUSION

The petition for review of Great Lakes is denied because there is no basis for review of condition XII(b).Q. and any dispute concerning the meaning of condition II.M.5.d. has been rendered moot. The petition for review of Tommy Gates, Janis Gates, and Patsy Gates is denied because there is no basis for review of the issues raised therein. The petition of AHPP is denied because the issue raised therein has been rendered moot.

So ordered.