

IN THE MATTER OF CARGILL, INC.

RCRA Appeal No. 92-14

ORDER DENYING REVIEW

Decided May 18, 1992

Syllabus

A citizen has filed a petition for review challenging the decision of U.S. EPA Region IX to issue a permit under Section 3005 of the Resource Conservation and Recovery Act to Cargill, Inc. for its hazardous waste incinerator in Lynwood, California. Petitioner argues that the Region did not comply with certain procedures of California law and thus failed to give the citizens of Lynwood an adequate opportunity to participate in the decision-making process that led to the issuance of the final permit.

Held: Review is denied because the issue was not raised during the public comment period or at the public hearing, even though it was reasonably ascertainable at that time.

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

Per Curiam:

Before us is a petition for review filed by the Reverend Charles Lenard Floyd challenging the decision of U.S. EPA Region IX to issue a permit under Section 3005 of the Resource Conservation and Recovery Act of 1976 (RCRA), as amended, 42 U.S.C. § 6925, to Cargill, Inc. for its hazardous waste incinerator in Lynwood, California. The incinerator is used to destroy liquid and gaseous wastes from Cargill's synthetic resin manufacturing plant. The facility has been operating under interim status. As requested by the Environmental Appeals Board, Region IX has filed a response to the petition for review.

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. 33412 (May 19, 1980). The preamble to the Federal Register notice in which Section 124.19 was promul-

gated 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 petitioner in this case has not carried that burden.

The gist of the petition is that Region IX did not give the citizens of Lynwood an adequate opportunity to participate in the decision-making process that led to the issuance of the final permit. Petitioner charges that the Region's alleged failure to provide such an opportunity violated California Government Code § 54950, which requires meetings of "the legislative body of a local agency" to be "open and public."

The Region responds that this issue has not been preserved for review, because petitioner failed to raise it during the public comment period or at the public hearing, even though it was reasonably ascertainable at that time. *See* 40 CFR §§ 124.13 and 124.19(a). The Region also notes that California Government Code § 54958 does not apply to meetings conducted by the Region, and petitioner has not cited any Federal permitting procedures that were violated by the Region. Finally, the Region's response details the extensive notice procedures carried out by the Region.

We conclude that the Region afforded the public every opportunity to participate provided for under Federal permitting procedures. We agree with the Region that this issue has not been preserved for review, since any alleged defect in the public hearing procedures was reasonably ascertainable at the time of the public comment period. Accordingly, since this issue has not been preserved for review, review is hereby denied.

So ordered.