

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In the Matter of:)
Merck & Co., Inc.) RCRA Permit Appeal No. 99-3
Docket No. NJD001317064)
_____)

ORDER DENYING PETITION FOR REVIEW

Currently before the Environmental Appeals Board ("Board") is a Petition for Review ("Petition") filed by Ms. Barbara Sashau, to review a permit issued by the U.S. Environmental Protection Agency, Region 2 ("Region"). The Region issued the permit under the Hazardous and Solid Waste Amendments of 1984¹ ("HSWA"), to Merck and Company, Inc. ("Merck") for a facility located in Rahway, New Jersey. Since New Jersey is authorized to administer most of the RCRA program within its jurisdiction, see 64 Fed. Reg. 41,823 (August 2, 1999), the permit issued by the Region is limited

¹The Hazardous and Solid Waste Amendments ("HSWA") of 1984, are amendments to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6902. HSWA provides the U.S. Environmental Protection Agency with the authority, among other things, to require owners and operators of treatment, storage and disposal facilities to investigate and/or clean-up hazardous waste released into the environment. See 42 U.S.C. §§ 6924(u),(v) and 6928(h).

to corrective action and other regulatory requirements not within the scope of New Jersey's authorized RCRA program.

In her Petition, Ms. Sashau does not clearly define the issues she is attempting to raise, nor does she specifically reference the permit terms affected. Nonetheless, we can discern the following issues: (1) the New Jersey Department of Environmental Protection ("NJDEP") grants permit requests on a "pro forma" basis, merely rubber-stamping proposals made by companies for clean-ups; (2) no investigatory research has been done on Merck waste; (3) a schedule for monitoring the cleanup must be established in the permit and the actual monitoring must be performed by an independent lab paid through a trust fund established by Merck; (4) the State of New Jersey has severe pollution problems caused by pharmaceutical companies, which evidences that NJDEP is not monitoring strictly enough; and (5) Merck executives should be required to use "Merck cleaned-up water" on a daily basis. She concludes by asking this Board to "examine [her] original suggestions/recommendations to form the basis of this appeal."

The Region responds to the Petition by arguing that:

(1) Ms. Sashau's single-sentence reference to the totality of

the comments that she made during the public comment period does not entitle her to Board review of those comments;

(2) most of the issues raised in her Petition were not raised during the public comment period, and thus are not preserved for review; and (3) as to the issues preserved for review, Ms. Sashau fails to demonstrate either error, improper exercise of discretion, or an important policy consideration that warrants review by the Board.

DISCUSSION

A. *Background*

The underlying facts do not appear to be in dispute. On May 26, 1999, the Region published: (1) a Public Notice of Intent to Issue the Hazardous and Solid Waste Amendments Permit ("Public Notice"); (2) a Statement of Basis for Proposed Corrective Measures Under RCRA §§ 3004(u) and (v) ("Statement of Basis"), and; (3) a Draft Hazardous and Solid Waste Amendments of 1984 Permit ("Draft Permit"), for Merck's Rahway, New Jersey facility. In accordance with 40 C.F.R. § 124.10, a public comment period on Merck's Draft Permit was held from May 27, 1999, until July 12, 1999. Responsiveness Summary for the Issuance of the Hazardous and Solid Waste

Amendments of 1984 Permit ("Responsiveness Summary") at 1-2, Response of Region 2 to Permit Appeal at 2.

Ms. Sashau filed comments on June 2, 1999. Letter from Barbara Sashau, June 2, 1999. The Region responded to Ms. Sashau's (and other) comments in its Responsiveness Summary and the permit was issued on October 7, 1999. Ms. Sashau's Petition was timely filed on October 26, 1999.

B. *Standard of Review and Procedural Requirements*

Appeals of RCRA permits are governed by 40 C.F.R. § 124.19 (Appeal of RCRA, UIC, NPDES, and PSD Permits). That section sets forth the time, eligibility, and substantive requirements for a valid appeal of an Agency decision to issue a permit under RCRA.

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. 40 C.F.R. § 124.19; see, e.g., *In re Caribe General Electric Products*, RCRA Appeal No. 98-3, slip op. at 9 (EAB, Feb. 4, 2000), 8 E.A.D. ____; *In re Austin Powder Co.*, 6 E.A.D. 713, 715 (EAB 1997); *In re Johnston Atoll Chem. Agent Disposal System*, 6 E.A.D. 174, 178 (EAB 1995); *In re Allied-Signal, Inc.*, 5 E.A.D. 291, 292 (EAB 1994).

Furthermore, the preamble to section 124.19 states that "this power of review should only be 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. 40 C.F.R. § 124.19(a); *Allied-Signal*, 5 E.A.D. at 292, citing *In re Laidlaw Environmental Sciences*, 4 E.A.D. 870, 876 (EAB 1993).

When petitions for review are filed by individuals unrepresented by an attorney, such as Ms. Sashau, the Board tries to interpret those petitions in a light that is most favorable to those individuals. *In re Beckman Production Services*, 5 E.A.D. 10, 19 (EAB 1994). However, those individuals are not excused from compliance with EPA rules and regulations. See, e.g., *In re Jiffy Builders*, CAA Appeal No. 98-2, slip op. at 8 (EAB, May 25, 1999), 8 E.A.D. ____, citing *In re Rybond* 6 E.A.D. 614, 627 (EAB 1996) ("The fact the [Respondent] who is not a lawyer, chooses to represent himself * * * does not excuse Respondent from the responsibility of complying with the applicable rules of procedure")(citations omitted). Further:

While the Board does not expect or demand that such petitions will necessarily conform to exacting and

technical pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the Region erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board.

Beckman, 5 E.A.D. at 19.

One of the prerequisites to obtaining Board review is that a petitioner must "raise all reasonably ascertainable issues and submit all reasonably ascertainable arguments supporting their position by the close of the public comment period" 40 C.F.R. § 124.13; *In re RockGen Energy Center*, PSD Appeal No. 99-1, slip op. at 7 (EAB Aug. 25, 1999), 8 E.A.D. ____; *In re Jett Black, Inc.*, UIC Appeal Nos. 98-3 & 98-5, slip op. at 8 (EAB, May 27, 1999), 8 E.A.D. ____; *In re Encogen Cogeneration Facility*, PSD Appeal Nos. 98-22 through 98-24, slip op. at 8 (EAB, March 26, 1999), 8 E.A.D. ____.

"The effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *RockGen*, slip op. at 7 quoting *Encogen*, slip op. at 8. "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the

permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994) (quoting *In re Union County Resource Recovery Facility*, 3 E.A.D. 455, 456 (Adm'r 1990)).

Consequently, Ms. Sashau was required, among other things, to: (1) provide the Board with reasons supporting a review; and (2) demonstrate that issues being raised for review in the petition were raised during the public comment period. 40 C.F.R. § 124.19(a), 40 C.F.R. § 124.13.

C. *Issues Raised in the Petition*

We note initially that Ms. Sashau requested that the Board examine her original recommendations to form the basis for her appeal. Petition at 4. However, the mere reference to comments made during the public comment period is an inadequate basis for seeking review. The Board has previously stated that:

[A] petitioner may not simply reiterate its previous objections to a draft permit. Rather, a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous. *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996) (quoting *In re LCP Chem.*, 4 E.A.D. 661, 664 (EAB 1993)); see also *In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997) (rejecting review of RCRA permit on particular issue because petitioner simply reiterated previous objections to a draft permit).

Caribe General Electric Products, slip op. at 22 (EAB, Feb. 4, 2000), 8 E.A.D. _____. Ms. Sashau does not even attempt to show that the Region's response to the comments she incorporated by reference were "clearly erroneous." Consequently, we will only consider those issues that were specifically raised in her Petition.

In this instance, only two of the issues that Ms. Sashau raised in the Petition satisfy the requirement articulated in 40 C.F.R. § 124.13 of being raised during the public comment period.² Those two issues address monitoring requirements and the use of "Merck-cleaned" water by Merck executives.

With regard to these issues, Ms. Sashau must still show that these issues are either: (1) based on findings of fact or conclusions of law that are clearly erroneous as required by 40 C.F.R. § 124.19(a)(1); or (2) reflect exercises of discretion or important policy considerations that should be reviewed by the Board as required by 40 C.F.R. § 124.19(a)(2). As stated above, Ms. Sashau bears the burden of demonstrating that review of these issues is warranted. 40 C.F.R.

²We are denying review of the following issues for failure to comply with 40 C.F.R. § 124.13: (1) NJDEP's granting of permits on a "pro-forma" basis; (2) alleged lack of investigatory research performed on Merck waste; and (3) pollution problems caused in New Jersey by pharmaceutical companies.

§ 124.19(a); *Allied-Signal*, 5 E.A.D. at 292 (EAB 1994). We find that she has not met this burden.

With regard to the monitoring and independent lab issue, the Petition does not address the explanation set forth by the Region in the Responsiveness Summary. The Region explained that any results offered by Merck would be subject to the review and approval of the Region and the NJDEP.

Responsiveness Summary at 4, see also Response of Region 2 to Permit Appeal at 9. In the absence of information addressing why the Region's explanation reflects either error and/or an important policy consideration warranting Board review, Ms. Sashau fails to meet her burden. See *Caribe General Electric*, slip op. at 9 (EAB, Feb. 4, 2000), 8 E.A.D. ____.

Consequently, the Board will not review this issue.

With regard to the suggested requirement that Merck executives be required to use "Merck-cleaned water" in their homes, the Region explained that the proposed corrective measures were more protective of human health and the environment than Ms. Sashau's proposal. Responsiveness Summary at 4, see also Response of Region 2 to Permit Appeal at 9. Here again, inasmuch as the Petition does not address that explanation, Ms. Sashau fails to meet her burden.

CONCLUSION

In light of the Petitioner's failure to meet threshold procedural requirements and failure to meet the burden of demonstrating that review is warranted, the Board finds inadequate basis for review of the permit and the Petition for Review is denied.

So ordered.

Dated: 7/6/00

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Edward E. Reich
Environmental Appeals Judge

Certificate of Service

I hereby certify that copies of the foregoing *Order Dismissing Petition for Review* in the matter of Merck & Co., Inc., RCRA Permit Appeal No. 99-3, were sent to the following persons in the manner indicated:

First Class Mail

Ms. Barbara Sashau
15 Elm Street
Florham Park, New Jersey 07932

Inter-Office Mail

Stuart N. Keith, Esq.
U.S. Environmental Protection
Agency, Region III
Office of Regional Counsel
290 Broadway
New York, New York 10007-1866

Dated: 07/06/00

_____/s/
Annette Duncan
Secretary