IN THE MATTER OF WASTE TECHNOLOGIES INDUSTRIES

RCRA Appeal Nos. 93–7 & 93–9

ORDER DENYING REVIEW FOR LACK OF JURISDICTION

Decided June 21, 1993

Syllabus

This action involves two petitions relating to the operation of the Waste Technologies Industries ("WTI") hazardous waste incinerator in East Liverpool, Ohio. Both petitions challenge actions taken by U.S. EPA Region V upon receipt of the results of a trial burn at the WTI facility. One petition, filed by Greenpeace, Inc., Teresa Swearingen, and Alonzo Spencer, seeks review of an April 6, 1993 letter from the Region to WTI approving the commencement of post-trial burn operations. The second petition, filed jointly by the City of Pittsburgh and the State of West Virginia, seeks review of an April 12, 1993 letter from the Region to WTI imposing two additional conditions for operation during the post-trial burn period.

Held: The Board lacks jurisdiction to review either of these letters and the petitions must therefore be dismissed.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

This action arises from the implementation of a Resource Conservation and Recovery Act (RCRA) permit issued to Waste Technologies Industries ("WTI") to construct a commercial hazardous waste management facility in East Liverpool, Ohio. The permit was issued by U.S. EPA Region V on June 24, 1983, and became effective on January 25, 1985. The facility is designed to incinerate inorganic wastes in a kiln and secondary combustion chamber.

Construction and operation of the WTI facility has been highly controversial. Previous appeals, involving earlier stages of the permitting process, were filed with the Agency and addressed in *In re*

Waste Technologies Industries, RCRA Appeal No. 83–5 (Adm'r, Dec. 17, 1984) and *In re Waste Technologies Industries, East Liverpool, Ohio,* Appeal Nos. 92–7 *et al.* (EAB, July 24, 1992). Neither of those two previous decisions, however, was challenged in a Federal circuit court. *See West Virginia* v. *Waste Technologies,* _____ F.2d _____, 36 ERC 1457, 1458 (4th Cir. 1993). The particular issues involved in the current appeals arise from the completion of a test burn by WTI and the actions taken by Region V in response to the test burn results.

Two petitions for review have been filed with the Board. The first was filed by Greenpeace, Inc., Teresa Swearingen and Alonzo Spencer. As discussed more fully below, they appeal the issuance of a letter by Region V on April 6, 1993, approving the beginning of the post-trial burn period of operation. The second petition was filed jointly by the City of Pittsburgh and the State of West Virginia. This petition challenges the issuance of a letter issued by Region V on April 12, 1993, imposing two additional restrictions on WTI's operation during the post-trial burn period. Both petitions were timely filed and have been consolidated for decision. For the reasons discussed below, both petitions are denied for lack of jurisdiction.

II. *DISCUSSION*

A. *Trial Burn*

The trial burn was conducted pursuant to a trial burn plan approved by Region V on January 8, 1993. The January 8 approval letter provided in part:

> Following the trial burn, WTI must submit for U.S. EPA review and approval a certification of compliance with permit emission limits for carbon monoxide (Condition C.13 of the permit) and particulate matter (Condition C.4 of the permit). Such certification must include sufficient preliminary test data to document compliance. Until the U.S. EPA approves such certification, WTI is not authorized to burn hazardous waste pursuant to Condition C.13 of the permit.

Letter from Valdus Adamkus, Regional Administrator, Region V to WTI, dated January 8, 1993, at 2.

WTI conducted the trial burn testing during the period between March 10 and March 18, 1993. On March 24, WTI submitted the

certification required by the January 8 approval letter. Region V (and Ohio EPA) requested that one of the test burns be repeated, and it was on March 30. Data from this run were submitted to Region V on April 2.

On April 6, 1993, Region V issued a letter indicating that it had reviewed the emission certifications and found them in compliance with the January 8 approval letter and applicable permit conditions. Accordingly, the letter stated that "WTI is hereby approved to begin the post-trial burn period of operation, subject to the limitations of Conditions C.4, C.13, C.15, and all other applicable conditions of the RCRA permit." As previously noted, the Greenpeace *et al.* petition for review relates to this approval.

On April 12, 1993, Region V sent another letter to WTI. As stated in that letter, the Region was unaware, at the time of its April 6 letter, of a problem concerning the destruction and removal efficiency ("DRE") of carbon tetrachloride, one of the three principal organic hazardous constituents ("POHCs"), during condition 2 of the trial burn, involving burning of aqueous waste. Data included in an April 2 letter from WTI indicated that during condition 2, the required 99.99% DRE for carbon tetrachloride was not achieved. (The DRE was achieved or surpassed for carbon tetrachloride under other trial burn conditions and for the other POHCs under all conditions.)

In light of this information, Region V determined that the following action must be taken "pursuant to Condition C.13(d) of the effective RCRA permit":

1. Since WTI has not demonstrated that it can achieve the DRE performance standard of Condition C.4 for each POHC tested in the aqueous waste, WTI shall cease feeding aqueous waste to the incinerator.

2. Since WTI has not demonstrated that it can achieve the DRE standard of Condition C.4 for each POHC tested at the maximum total feed rate of 32,708 lb/hr, WTI shall not feed the incinerator at a total rate greater than 20,375 lb/hr (*i.e.,* the total feed rate demonstrated during trial burn condition 3).

Letter from Valdus Adamkus to WTI, dated April 12, 1993, at 1–2. This letter forms the basis of the joint Pittsburgh/West Virginia petition for review.

For context, we note that the regulatory provisions governing the test burn and subsequent operation are found at 40 C.F.R. § 270.62. According to 40 C.F.R. § 270.62(b)(10), operating requirements in the final permit shall be based on the trial burn test results and established as a permit modification pursuant to § 270.42. In the interim, § 270.62(c) provides, in part:

> (c) For the purposes of allowing operation of a new hazardous waste incinerator following completion of the trial burn and prior to final modification of the permit conditions to reflect the trial burn results, the Director may establish permit conditions, *including but not limited to allowable waste feeds and operating conditions sufficient to meet the requirements of § 264.345 of this chapter,* in the permit to a new hazardous waste incinerator. These permit conditions will be effective for the minimum time required to complete sample analysis, data computation and submission of the trial burn results by the applicant, and modification of the facility permit by the Director.

(Emphasis added.)

B. *Greenpeace et al. Petition for Review*

Greenpeace, Teresa Swearingen, and Alonzo Spencer filed their petition (hereinafter referred to as the "Greenpeace Petition") on May 6, 1993. Greenpeace challenges "EPA's grant of authorization for WTI and Von Roll[1] to begin commercial operation."[2] Greenpeace Petition, at 7. The petition then identifies a number of reasons why petitioners believe that this "authorization" is arbitrary and capricious, an abuse of discretion, not in accordance with law, and not supported by substantial evidence. Greenpeace Petition, at 8–13. It seeks, among other things, "[i]mmediate suspension of all EPA authorizations permitting hazardous waste management, storage and incineration activities by

[1] Von Roll (Ohio), Inc. and Waste Technologies Incorporated are apparently both owned by Von Roll America, Inc. In the January 8, 1993 trial burn approval letter, Von Roll (Ohio), Inc. was authorized to act as managing partner of WTI, rather than as an "operator" with independent decision-making authority.

[2] While Greenpeace did not explicitly say so, we have interpreted this challenge as relating to the April 6 letter, since Greenpeace identifies this as the letter which "permitted WTI to begin commercial operation." Greenpeace Petition, at 6.

WTI and Von Roll (Ohio) at their East Liverpool, Ohio facility." Greenpeace Petition, at 14.

In its petition, Greenpeace states that "[t]he Environmental Appeals Board has jurisdiction to hear this petition pursuant to, *inter alia,* 40 C.F.R. § 124.19." Greenpeace Petition, at 1. In an order dated May 10, 1993, the Board stated that "[t]his jurisdictional statement is insufficient to determine Petitioners' legal basis for arguing that the Board has jurisdiction over this matter." The Board ordered petitioners to file a brief explaining "the precise basis" on which they were relying in asserting the Board's jurisdiction. The Region was then directed to file a response on the jurisdictional issue. Greenpeace filed a supplemental brief on May 27, 1993, and the Region its response on June 14, 1993. We now conclude that this Board has no jurisdiction to review the April 6 approval by Region V. The Greenpeace Petition is accordingly hereby denied.

Greenpeace's jurisdictional argument is succinctly stated as follows:

> The Environmental Appeals Board has jurisdiction to hear this petition pursuant to 40 C.F.R. § 124.19. The analysis supporting jurisdiction here is simple and straightforward. The decision at issue is a decision by EPA to approve what in effect is a final RCRA permit for operation of a hazardous waste incinerator for the period after trial burn and prior to EPA's ultimate decision on the permit application for long term operation. This permit while "temporary" is final for all practical purposes and Petitioners will be irreparably harmed if review is postponed until issuance of the long term permit.

Greenpeace Supplemental Brief, at 1. Greenpeace further states that it is no defense to the Board's jurisdiction that EPA did not follow the 40 C.F.R. Part 124 procedure for permit decisions. *Id.*

In its response, Region V disputes the contention that the Board has jurisdiction. It notes that, under 40 C.F.R. § 124.19(a), the Board has jurisdiction to review a "final permit decision" issued under § 124.15. Section 124.15(a) defines final permit decisions to include "a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." The Region argues that the April 6 letter is not a final permit decision as defined in § 124.15(a).

The Region notes that the permit, which became effective in 1985, contained provisions for post-trial burn operation consistent with 40 C.F.R. § 270.62(c), such as Conditions C.4, C.13 and C.15. In its January 8 approval letter, Region V added an interim condition pursuant to § 270.62(c), requiring the permittee to certify compliance with permit emission limits for carbon monoxide and particulate matter prior to proceeding to post-trial burn operation. This certification requirement was incorporated into the trial burn plan by the January 8 approval letter and the final trial burn plan incorporated into the permit.[3]

In the Region's view, the April 6 letter was not a "final permit decision" or even an "authorization" (as that term is used in defining a "permit" under 40 C.F.R. § 124.2.) It is neither the issuance of a permit, nor the denial, modification, revocation and reissuance, or termination of such. "It simply acknowledged that WTI had satisfied certain requirements for proceeding into post-trial burn operation, which is authorized by WTI's permit." Region's Response to Greenpeace Supplemental Brief, at 3. Requiring a certification of compliance was intended only as an additional "check" on the performance of the incinerator. "To treat conditions like that imposed in WTI's trial burn plan as requiring full permitting procedures would obviously impair the regional offices' discretionary authority to require checkpoints at various points in the process, or other minor steps in permit implementation that are beyond what is required in the regulations." *Id.* at 4.

We believe that the Region is correct. The permit was validly issued and became effective in 1985 (and was subsequently modified in 1992). At the time of the April 6 letter, the permit already contained the interim certification and approval requirements by virtue of the January 8, 1993 letter, which was issued pursuant to § 270.62(c).[4] WTI submitted its certification and the Region approved post-trial burn operation, in accordance with the specific requirement that the Region's approval be obtained prior to such operation.

[3] Condition C.6 requires testing in accordance with the trial burn plan. The January 8 letter approved Revision 4 of the Trial Burn Plan. It also provided that the letter, with the certification requirements, "is part of and is hereby incorporated into the approved Trial Burn Plan."

[4] Greenpeace cannot now challenge the approval mechanism itself. First, it is questionable whether establishing interim conditions pursuant to § 270.62(c) constitutes a reviewable "final permit decision" under § 124.19. Second, even if the January 8 letter were considered to be a "final permit decision," a petition for review would have to have been filed within 30 days, pursuant to 40 C.F.R. § 124.19(a). That time has long since passed.

Greenpeace now challenges the Region's approval of the post-trial burn operation.

This is clearly a decision arising from the implementation of a permit, rather than the issuance (or modification) of a permit.[5] It is a challenge to an action expressly contemplated by the permit. As the Board has previously stated:

> The purpose of this Board is to determine whether the permit was appropriately issued. The Board has no oversight responsibility for the implementation of a validly issued permit. Once we have satisfied ourselves [that a permit has been validly issued], we have no basis for retaining jurisdiction to address any implementation issues that may arise.

In re General Electric Company, RCRA Appeal No. 91–7, at 9 (EAB, Nov. 6, 1992). Since the action being complained of is one in implementation of the existing permit rather than a final permit decision under § 124.15(a) (or a modification decision under § 270.42),[6] this Board does not have jurisdiction to hear an appeal and the petition for review must be denied.

C. *Pittsburgh / West Virginia Petition for Review*

The Joint Petition for Review was filed by the City of Pittsburgh and the State of West Virginia (hereinafter referred to as the "Pittsburgh/West Virginia Petition) on May 11, 1993. As previously noted, it seeks review of the April 12 letter issued by the Region. It asserts that:

> The trial burn results received by the EPA indicated that the WTI incinerator failed to achieve the required DRE, and, accordingly, further operation is illegal except under modified permit operating conditions which have been approved in accordance with the procedures established in EPA's regulations.

Pittsburgh/West Virginia Petition, at 5. The petition further states that changes to post-trial burn conditions must be made by means of Class 2 permit modifications under 40 C.F.R. § 270.42 and thus

[5] A discussion of the applicability of permit modification requirements is included in the section on the Pittsburgh/West Virginia Petition, *supra.*

[6] *See* note 5 *supra.*

the changes were made invalidly by the April 12 letter. The petition also argues that the EPA authorization of the plant's post-trial burn operation fails to protect human health and the environment, as required by 42 U.S.C. § 6925(c)(3).[7] The petition seeks, *inter alia,* revocation of the WTI permit and an order to WTI and Von Roll requiring the immediate cessation of all activities involving hazardous waste at the East Liverpool, Ohio facility. *Id.* at 11.

As with the Greenpeace Petition, the Pittsburgh/West Virginia Petition merely recites that Board has jurisdiction "pursuant to, *inter alia,* 40 C.F.R. § 124.19." Pittsburgh/West Virginia Petition, at 1. As it did relative to the Greenpeace Petition, the Board issued an order on May 13, 1993, requiring petitioners to file a supplemental brief on the jurisdictional issue. This brief was filed on May 27 and a Region V response filed on June 14.

Pittsburgh and West Virginia assert a number of alternative bases for Board jurisdiction. First, they argue that the April 12 letter is an "authorization," and thus within the definition of a "permit" under 40 C.F.R. § 124.2.[8] Second, they note that the Board has authority under 40 C.F.R. § 124.19(b) to review a RCRA permit condition *sua sponte.* Third, they argue that the letter "modifies" the RCRA permit by changing the categories of waste to be burned and by reducing the maximum total feed rate. They assert that such modifications are appealable as final permit decisions under 40 C.F.R. §§ 124.15(a) and 124.19, and pursuant to 40 C.F.R. § 270.41 (requiring such modifications to be processed under Part 124). Fourth, they

[7] The petition also discusses changes in ownership and operation of the WTI facility subsequent to the issuance of the original permit and states that the April 12 action allows what the petition describes as the "the new WTI partnership" and Von Roll "to continue to own and operate the plant without a permit." Pittsburgh/West Virginia Petition, at 6–9.

[8] Petitioners state that the letter, by use of the term "limited commercial operation" in describing the April 6 approval, created ambiguity over what had been "authorized."

> The letter may have been intended to authorize the post-trial burn period of operations as prescribed in the permit. Alternatively, as the facts more clearly indicate, the approval may have been given to operate commercially outside the restrictions pertaining to the post-trial burn based upon the review of trial burn results. Nonetheless, in either case, the letter constitutes an authorization within the meaning of 40 C.F.R. § 124.2 and, thus, a final permit decision.

Pittsburgh/West Virginia Supplemental Brief, at 2–3. In its response, the Region indicates that the term "limited commercial operation" as used in the April 12 letter was interchangeable with the term "post-trial burn operation." Region's Response to Pittsburgh/West Virginia Supplemental Brief, at 6. As such, it covered the post-trial burn period only, as defined in 40 C.F.R. § 270.62(c). *Id.*

state that the changes are appealable as modifications under 40 C.F.R. § 270.42(f)(2), since Appendix I to that section lists changes to the "permit conditions applicable during the shakedown period . . ., the trial burn period, or the period immediately following the trial burn" as Class 2 modifications. Finally, they argue that 40 C.F.R. § 270.62(b)(10), which "provides for modifications to a RCRA permit after the review of trial burn results," requires such modifications to be made in accordance with the procedures in 40 C.F.R. § 270.42. Since the changes at issue would be Class 2 modifications under that section, they would be appealable to the Board.

The Region addresses each of these arguments in its response. First, the Region asserts that its April 12 letter was not an authorization but rather the invocation of a condition of the existing WTI permit. This provision, Condition C.13, is entitled "Incinerator Operating & Monitoring Requirements During the Post-Trial Burn Period." Condition C.13(d) provides, in part:

> If based upon the analytical results of the trial burn, the permittee determines that the incinerator failed to achieve any of the performance standards specified in Condition C.4 of this permit, the Permittee shall notify the Regional Administrator within twenty-four (24) hours. Upon the request of the Regional Administrator the Permittee shall cease feeding hazardous waste to the incinerator.

The Region interprets this provision "as authorizing the Regional Administrator to order the facility to cease feeding all hazardous waste, or a portion of the hazardous waste the facility is permitted to feed, as appropriate in response to the nature of the performance standard failure." Region's Response to Pittsburgh/West Virginia Supplemental Brief, at 2. The Region specifically invoked this provision in establishing the additional operating limitations and "[i]nvocation of a permit condition is not a final permit decision." *Id.* Rather, it goes to the implementation of the existing permit.

The Region also disputes petitioner's characterization of the additional limitations as permit modifications.

> Modifications authorize activities or impose conditions beyond the scope of the effective permit and are changes to the permit. This provision, Condition C.13(d), was in the original permit which became effective in 1985. The provision does not contemplate

> a permit modification; rather it authorizes the Regional Administrator to request that WTI cease feeding hazardous waste based on preliminary trial burn results.

Id at 3.[9]

The Region makes the following additional points:

(1) 40 C.F.R. § 270.42 does not apply because the changes were not modifications, but even if they were, this section applies only to permittee-initiated modifications and the changes here were not initiated by WTI;

(2) 40 C.F.R. § 270.62(b)(10) relates to the establishment of operating conditions in the final permit. It does not apply to interim restrictions during the post-trial burn period;

(3) The April 12 letter was not an "authorization" to conduct post-trial burn operation since such operation was already approved (by the April 6 letter) and had commenced; and

(4) The Board's *sua sponte* review jurisdiction is limited to conditions established under Part 124, and the restrictions at issue were not established under Part 124. In any event, the Board must act under this authority within 30 days of service of notice of the Regional Administrator's action.

We believe that the Region's analysis is essentially correct. None of the bases cited by petitioners support Board jurisdiction in this case.

The most significant issue raised by the Pittsburgh/West Virginia Petition is whether the changes made by the April 12 letter are "modifications" to the WTI permit. We conclude that they are not modifications. The WTI permit specifically contemplated, in Condition C.13(d), that additional restrictions on the waste feed might be im-

[9] The Region notes that if it had to go through modification procedures under 40 C.F.R. parts 270 and 124, this could allow WTI to operate without restrictions on waste feed during the pendency of the modification process since contested permit conditions are stayed pending appeal. "Paradoxically, the effect of Petitioners' argument would be to allow WTI to operate without the waste feed restrictions imposed through the April 12th letter pending completion of EAB review." Region's Response to Pittsburgh/West Virginia Supplemental Brief, at 4.

posed based on the results of the test burn. That is precisely what happened here. It is true that the April 12 letter added specificity to the permit in this respect but that does not make it a modification.

The definition of a modification was discussed at some length in a recent Board opinion, *In re General Electric Company,* RCRA Appeal No. 91–7 (EAB, Apr. 13, 1993). In that case, the issue was whether revision by the Region of an interim submission (such as a RCRA Facility Investigation plan) constituted a permit revision. In addressing this issue, the Board stated:

> When the Region revises an interim submission, it is exercising its authority under the existing permit language to ensure that the contemplated studies and investigations are adequate for selection of corrective remedies. The Region's revisions are part of a process contemplated in the original permit by which the general terms of the original permit are made more specific. Thus, when the Region makes such revisions, it is fulfilling the terms of the permit, not changing them.

In re General Electric, supra, at 11–12.

Similarly, here the Region's actions in the April 12 letter were "part of a process contemplated in the original permit by which the general terms of the original permit are made more specific." The Region's actions were taken pursuant to permit Condition C.13(d) and § 270.62(c), which address interim operating conditions following completion of the trial burn and prior to final modification of the permit to reflect trial burn results. They are not modifications. Because they are not modifications, there is no "final permit decision" under § 124.15 or Board jurisdiction under § 124.19.[10]

Since the actions being challenged are not modifications, §§ 270.41 and 270.42 are also inapplicable.[11] In addition, there is no basis for *sua sponte* review by the Board under § 124.19(b) since the April 12 letter does not impose a condition under Part 124.

[10] This is true even if the April 12 letter were considered an "authorization." The test for Board jurisdiction under § 124.19(a) is whether the action is a "final permit decision" under § 124.15(a), not whether the action meets the definition of a permit under § 124.2. This means there must be one of the actions (issuance, modification, etc.) identified in § 124.15(a).

[11] In any event, the Region is correct that § 270.42 applies only to permittee-initiated changes, and therefore is inapplicable for that reason as well.

Finally, § 270.62(b)(10) is inapplicable because, as the Region asserts, it applies only to the setting of "the operating requirements in the final permit." [12] Limits covering operation "following the completion of the trial burn and prior to final modification of the permit conditions" are established under § 270.62(c), which does not contemplate use of § 240.42 modification procedures. Thus, none of the provisions cited by petitioners provides Board jurisdiction.

III. *CONCLUSION*

The Board does not have jurisdiction to consider either the April 6 letter raised in the Greenpeace Petition or the April 12 letter covered by the Pittsburgh/West Virginia Petition. Accordingly, both petitions must be, and hereby are, dismissed for lack of jurisdiction.

So ordered.

[12] The Region has acknowledged that, consistent with § 270.62(b)(10), it must follow the procedures in § 270.42 for modifying the permit as necessary to incorporate final operating conditions. Region's Response to Pittsburgh/West Virginia Supplemental Brief, at 7. That section contemplates both public participation and the possibility of appeal for the more significant modifications. In fact, the earlier appeal in RCRA Appeal Nos. 92–7 *et al.*, in which both the City and State participated, involved modifications under § 270.42.