IN RE WASTE TECHNOLOGIES INDUSTRIES

RCRA Appeal No. 93-16

ORDER DENYING REVIEW

Decided January 27, 1995

Syllabus

Petitioner Waste Technologies Industries ("WTI") challenges several provisions of an October 28, 1993 permit modification decision by U.S. EPA Region V. The Region's decision approved the addition of an Enhanced Carbon Injection System ("ECIS") to WTI's hazardous waste incinerator in East Liverpool, Ohio, for the purpose of reducing the facility's stack emissions of polychlorinated dibenzodioxins and polychlorinated dibenzofurans. WTI objects to limitations included in the Region's permit decision that: (1) require quarterly testing of the ECIS during the first year in which the modification is effective; (2) prohibit WTI from employing non-routine incinerator operations during ECIS testing periods; (3) require advance notice to the Region of scheduled ECIS testing, and restrict such testing to ordinary business hours to the extent possible; (4) prohibit incineration of hazardous waste at any time that the ECIS is not functioning; (5) make reference to WTI's obligation to comply with the post-trial burn permit conditions governing its incinerator operations; (6) make reference to WTI's obligation to comply with certain additional restrictions imposed by the Region in a letter dated April 12, 1993, reflecting the results of the facility's March 1993 trial burn; (7) require WTI to seek EPA approval before performing any ECIS test procedures other than those described in WTI's modification request and authorized in the Region's decision granting that request; and (8) declare that the Region is not precluded, by its approval of the ECIS installation, from requiring additional or different pollution control measures if the results of future sampling demonstrate noncompliance with any applicable State or federal environmental standards.

Held: WTI has failed to demonstrate that any of the challenged conditions reflects a clear error of fact or law or is otherwise worthy of review. WTI's amended petition for review is therefore denied.

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

Opinion of the Board by Judge Firestone:

I. *BACKGROUND*

In this appeal, Waste Technologies Industries ("WTI"), the owner and operator of a hazardous waste incinerator located in East Liverpool, Ohio, appeals from an October 28, 1993 permit modification decision

by U.S. EPA Region V. WTI requested, and the Region approved, a permit modification authorizing the addition of certain pollution control equipment known as an Enhanced Carbon Injection System ("ECIS") to the East Liverpool facility. The proposed ECIS installation was intended to reduce the facility's stack emissions of polychlorinated dibenzodioxins and polychlorinated dibenzofurans (hereinafter collectively "dioxins") after unexpectedly high levels of those pollutants were detected during the facility's March 1993 trial burn. The Region concluded, and WTI agrees, that "operation of the incinerator with the ECIS will be more protective of human health and the environment than operation of the incinerator without the ECIS." WTI objects, however, to various operational limitations and testing requirements imposed by Region V when it approved the addition of the ECIS. The challenged provisions of the modification decision are incorporated in an addendum to the WTI facility's RCRA permit, titled "Attachment XII: Permit Conditions Specific to the Enhanced Carbon Injection System (ECIS)."

Attachment XII contains two sets of conditions, the first pertaining to ECIS testing and the second to ECIS operation. In its Amended Petition for Review dated December 9, 1993, WTI raises objections concerning three of the Attachment's five testing conditions and five of its eight operating conditions. The language of the challenged conditions, and the nature of WTI's objection to each condition, are discussed below. We have jurisdiction under 40 C.F.R. §§ 270.42(f)(2) and 124.19.

II. *DISCUSSION*

Under the rules governing this proceeding, a RCRA permit decision 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 C.F.R. § 124.19; 45 Fed. Reg. 33, 412 (May 19, 1980). The preamble to section 124.19 states that the Board's power of review should be exercised "sparingly," and that "most permit conditions should be finally determined at the Regional level." *Id.* The petitioner bears the burden of demonstrating that review is warranted. *See, e.g., In re Laidlaw Environmental Services*, RCRA Appeal No. 92-20, at 8 (EAB, Oct. 26, 1993). For the reasons that follow, we conclude that WTI has failed to sustain its burden with respect to any of the challenged conditions of the October 28, 1993 permit modification.

A. *Testing Conditions*

1. *Quarterly Testing*

WTI objects to the requirement that it perform four tests of the ECIS, instead of one (as contemplated in WTI's modification request), during the first year of the system's operation.[1] According to WTI, "U.S. EPA has provided no rationale for its unilateral inclusion of quarterly testing for the first year." Amended Petition for Review, at 8. WTI is simply mistaken.

Region V's insistence on additional testing is directly responsive to two concerns expressed by commenters regarding the use of a carbon injection system at the WTI facility. One such comment suggested that pollutants captured by carbon particles could revolatilize at high temperatures and/or that the carbon particles could simply become "saturated" with captured pollutants; a second comment suggested that the introduction of carbon particles could reduce the particulate removal efficiency of the incinerator's electrostatic precipitator. The Region indicated that those were valid concerns, but that it was unclear to what extent, if at all, the potential problems associated with the carbon injection system would actually materialize. The Region therefore concluded that stack emissions should be sampled quarterly during the first year of ECIS operation, in order to detect and quantify any emissions increases attributable to the factors cited by these commenters.[2]

Thus, WTI's assertion that there is "no rationale" for additional ECIS testing is flatly wrong. The environmental concerns cited in support of extra testing may or may not be substantiated by the test results, but WTI offers no reason to disregard those concerns before the testing occurs. We conclude, therefore, that the Region's decision to require additional testing is fully consistent with 40 C.F.R. § 270.42(b)(7)(iii), which authorizes the Regional Administrator to "deny or change the terms of a Class 2 permit modification request" if the

---

[1] Condition A.2 of Attachment XII states: "The Permittee shall test the incineration system according to the performance test plan included with its June 25, 1993, Class 2 permit modification request, as modified by [the Permittee's] July 7, 1993, letter. * * * * Testing shall be conducted quarterly for the first year of effectiveness of this permit modification and annually thereafter."

[2] *See* Petition for Review, Exh. A (Region V Response to Comments), at 9 ("The U.S. EPA has decided to increase the frequency of required dioxin/furan and particulate testing during the first year from annually to quarterly. If a steady [emission] 'buildup' is observed, the U.S. EPA is reserving the right to require WTI to take additional measures, such as the addition of equipment to mechanically remove a portion of the collected carbon from the scrubber blowdown stream prior to its introduction into the spray dryer."); *id.* at 10 ("Rather than hypothesizing about what could potentially happen, the U.S. EPA is electing to closely monitor the actual results of routine particulate and dioxin/furan stack emission testing. If increasing emissions are evident, subsequent action will be taken * * *.")

conditions of the modification, as requested, "fail to protect human health and the environment." *See In re GSX Services of South Carolina, Inc.*, RCRA Appeal No. 89-22, at 11-13 (EAB, Dec. 29, 1992) (upholding permit provision requiring landfill operator to "test every batch of treated waste prior to landfill disposal" to ensure compliance with RCRA treatment standards). Review of this change is denied.[3]

2. *"Modified" Facility Operations During ECIS Testing*

Condition A.3.b prohibits WTI from employing any abnormal or atypical operating procedures for the purpose of artificially reducing stack emissions during ECIS performance tests.[4] The goal is to ensure that emissions during the tests are "representative of normal emissions,"[5] and WTI accepts that limitation as a general matter.[6] According to WTI, however, the condition as drafted implicitly includes a specific prohibition that is inconsistent with the condition's overall objective, and that might actually require WTI to deviate from normal operating procedures.

Specifically, the text of condition A.3.b states that the overall prohibition against "modifying" the WTI facility's operations for the purpose of artificially reducing emissions during tests:

> [I]ncludes a prohibition on increased makeup flow to any element of the scrubber system or increased dilution of scrubber water or spray dryer feed.

---

[3] In its amended petition for review, WTI also objects to a portion of condition A.2 stating that "[i]f modifications to the performance test plan are deemed appropriate and are approved by the Regional Administrator, the Permittee shall test the incineration system according to such modified performance test plan." Region V has agreed to delete this language because, as written, it would arguably imply a claim of authority by the Region to modify the existing performance test plan in the future without having to comply with EPA regulations governing permit modifications. *See* Region V Response to Petition for Review, at 7. Based on the Region's agreement to delete the quoted language, WTI's request for review of this portion of condition A.2 is denied as moot.

[4] The condition states: "The permittee shall not flush scrubber water out of the scrubber system prior to the test, or modify facility operations in any way that may result in a reduction in the emissions of [dioxins] or particulates during the performance test, or otherwise cause the test not to be representative of normal emissions. This includes a prohibition on increased makeup flow to any element of the scrubber system or increased dilution of scrubber water or spray dryer feed. Combustion gas temperature at the inlet to the electrostatic precipitator shall not be significantly reduced from normal during any performance test."

[5] Response to Petition for Review, at 8.

[6] Indeed, the limitation is embodied in a regulation applicable to all RCRA permits, 40 C.F.R. § 270.30(j)(1), which states that "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." *See also id.* § 270.31(b) ("All permits shall specify * * * [r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity * * * .").

WTI claims that the quoted sentence effectively prohibits the "routine flushing of atomizers which is typical of normal operations." Amended Petition for Review, at 9. Such a prohibition, WTI further claims, has no rational basis and is clearly erroneous. WTI therefore urges that the condition be rewritten so as to state explicitly that the "routine flushing of atomizers" is not prohibited.

In response, Region V argues that if a particular procedure is in fact "routine" and "typical of normal operations," then condition A.3.b by its terms would not prohibit that procedure. The Region is unwilling, however, to write an explicit exemption into condition A.3.b for the "flushing of atomizers," because WTI has not affirmatively demonstrated that that procedure is in fact a routine aspect of facility operations.

We agree that the factual record is insufficient to justify a specific exemption for the "flushing of atomizers." WTI's petition for review does not even explain the flushing procedure, nor does it specify whether the permit language affecting the procedure is that which prohibits "increased makeup flow," that which prohibits "increased dilution of scrubber water," or that which prohibits "increased dilution of * * * spray dryer feed." But the proposed exemption is, in any event, unnecessary. The Region has stated that condition A.3.b will not prohibit operating procedures that are demonstrably "routine," and we consider the Region bound by that interpretation. *See In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 27 (EAB, Nov. 23, 1993); *In re Allied-Signal, Inc.*, RCRA Appeal No. 90-27, at 18 (EAB, July 29, 1993). Thus, it would appear that if WTI can affirmatively demonstrate that the "flushing of atomizers" is a routine procedure, the performance of that procedure in its usual and routine form would not violate condition A.3.b. Accordingly, we deny WTI's amended petition for review insofar as it seeks the inclusion of permit language specifically authorizing the "flushing of atomizers" during periods of ECIS performance testing.

3. *Notice And Scheduling*

Condition A.4 directs WTI to notify the Region at least one month before conducting an ECIS performance test, and states that "[t]o the extent possible, stack sampling must be completed within normal working hours."[7] The purpose of both requirements, according to Region V, is to ensure "that Agency personnel [can] be present to observe the tests." Response to Petition for Review, at 9. Here, too, WTI accepts

[7] The condition states: "The permittee shall notify the United States Environmental Protection Agency (U.S. EPA) at least one month in advance of any dates scheduled for the ECIS performance test. To the extent possible, stack testing must be completed within normal working hours."

the goal of the challenged provisions,[8] but contends that the provisions as written are unreasonably restrictive.

Thus, WTI acknowledges the obvious need to provide some type of advance notice if EPA personnel are to observe the ECIS tests,[9] but claims that the particular notice requirement drafted by the Region is too "stringent." Amended Petition for Review, at 10. WTI's supporting argument, in full, is that it "needs to have some flexibility in scheduling the tests so as to accommodate its business needs and interests." *Id.* That argument provides no basis for concluding that the advance notice requirement is clearly erroneous. In the first place, it is not clear how or why the requirement to provide advance notice of a test would adversely affect WTI's ability to schedule the test according to its business needs and interests. But even if such an effect is assumed, we see no basis for granting review: WTI is in the business of operating a hazardous waste incinerator, and the principal "needs and interests" associated with that business include ensuring the effectiveness of necessary pollution control equipment and cooperating with the appropriate regulatory authorities toward that end. We are confident, moreover, that Region V will administer this permit reasonably,[10] and will respond appropriately in the event that the advance notice requirement produces some actual and specific hardship in application. As of now, however, WTI's concerns in regard to the notice requirement are purely speculative and insubstantial, and review of the requirement is therefore denied. *See In re Amoco Oil Company*, RCRA Appeal No. 92-21, at 8 (EAB, Nov. 23, 1993) (declining to review purely speculative concerns raised in a permit appeal); *In re Beazer East, Inc.*, RCRA Appeal No. 91-25, at 8 (EAB, March 18, 1993) (same).

The proposed restriction of testing to "normal working hours" is also readily justifiable as a means to ensure that Regional personnel

[8] Amended Petition for Review, at 10 ("If U.S. EPA wishes to observe the tests, WTI has no objection.").

[9] WTI argues that "[t]here is no regulation, standard, or even rationale requiring WTI to give U.S. EPA at least one-month advance notice in advance of the ECIS performance tests." Amended Petition for Review, at 9. We construe the argument to mean that EPA is asking for notice too far in advance, not to suggest that advance notice of any kind is *per se* objectionable. EPA is indisputably entitled to observe the tests, *see* 40 C.F.R. § 270.30(i) (authorizing Regional personnel to "observe at reasonable times any * * * practices, or operations regulated or required" under a RCRA permit), and the authority to observe the tests clearly implies the authority to require some type of advance notice as to when they will occur.

[10] As the Board has observed in previous cases, "the Regions are subject to a general requirement to 'act reasonably in implementing all permit conditions.'" *In re General Motors Corp.*, RCRA Appeal No. 93-5, at 18 (EAB, July 11, 1994) (quoting *In re Allied-Signal, Inc.*, RCRA Appeal No. 90-27, at 18 (EAB, July 29, 1993)).

can be present to observe the tests.[11] It is entirely reasonable, in our view, to insist that to the extent possible, performance tests not be scheduled in such a manner as to minimize the opportunity for regulatory oversight. The proposed limitation provides that assurance and also, by its own terms, tolerates exceptional scheduling arrangements if they should prove to be necessary. Review of the condition is, accordingly, denied.

B. *Operating Conditions*

1. *No Facility Operation Without ECIS*

Condition B.1 of Attachment XII provides that "[t]he ECIS shall be operated at all times whenever hazardous waste is being burned in the Permittee's incinerator." During the public comment period applicable to its modification request, WTI submitted a letter requesting that the modified permit allow ECIS shutdowns, for purposes of maintenance and repair, up to ten times each year for periods of up to twenty-four hours at a time. *See* Amended Petition for Review, Exh. A (Response to Comments), at 11. The Region denied that request because no provision for ECIS "down time" had been included in the proposed modification issued for public comment. The Region further stated that the amount of "down time" proposed in WTI's letter might be too great, "especially in light of the dramatically higher dioxin/furan emissions that would be expected while burning waste without the ECIS operating." *Id.* "In order to properly allow for public review and comment," Region V concluded, "the Permittee should pursue a separate Class 2 permit modification request (pursuant to item L.5.c of Appendix 1 to 40 C.F.R. 270.42) regarding this issue." *Id.*[12] WTI now renews its request on appeal.

The request must be summarily denied. WTI offers no argument whatsoever in response to the Region's explanation, in its Response to Comments, that the issue of allowing substantial ECIS "down time" must be considered in a separate modification proceeding with ad-

---

[11] We reject WTI's suggestion that the phrase "normal working hours" is vague and ambiguous in the context of this permit because the WTI facility "operates 24 hours a day, 7 days a week." Amended Petition for Review, at 10. It is clear from WTI's own arguments, and the Region's response to those arguments, that both parties understand the phrase to refer to the "working hours" of the Agency inspectors who will be called upon to observe the ECIS performance tests.

[12] Appendix I to 40 C.F.R. § 270.42 contains a nonexclusive list of different types of RCRA permit modifications, and classifies each according to the procedures that must be followed if that particular type of modification is requested by a RCRA permittee. Item L.5.c of the Appendix provides for the use of Class 2 procedures for any modification, in the context of a permit for an incinerator, of an operating condition other than those conditions specifically enumerated in items L.5.a and L.5.b (both of which are governed by more extensive Class 3 procedures).

equate opportunity for public comment. WTI has therefore completely failed to satisfy its burden of explaining how the Region's response to its request constitutes "clear error."[13]

Moreover, we can imagine no reason to disagree with the Region's conclusion regarding the need for public comment on this proposal. Although the parties address the merits of the proposal only in a cursory fashion, their briefs demonstrate that there may well be grounds for disagreement over the safety of ECIS shutdowns lasting twenty-four hours: Whereas WTI asserts that ECIS operation is desirable but "not necessary for the facility to meet any * * * emission limits" (Amended Petition for Review, at 11), the Region's response implies that during ECIS shutdown periods the incinerator's ability to comply with dioxin emissions limitations is "not assured" (Response to Petition for Review, at 11). The dispute is surely not trivial, and interested members of the public should therefore receive notice and an opportunity for comment in accordance with EPA permit modification procedures. *See* 40 C.F.R. § 270.42(b)(5) ("The public shall be provided 60 days to comment on [a Class 2] modification request.").[14]

The same is true of WTI's contention that condition B.1 should be revised to allow for a "controlled shutdown of WTI's incinerator in the event of a failure of the ECIS." Amended Petition for Review, at 10.[15] There is no explanatory material (*e.g.*, comment and response documents) in the record before us describing, with specificity and with factual support, any of the considerations for and against allowing controlled shutdowns. WTI tells us only that it would prefer to implement a controlled shutdown procedure instead of an immediate shutdown in the event of ECIS failure, for unspecified reasons of "sound engineering judgment." Region V, similarly, tells us only that in its own view, ECIS failure creates an immediate and unacceptable risk of "excessive" dioxin emissions, from which it follows that "[t]he facility

[13] *See In re Environmental Waste Control, Inc.*, RCRA Appeal No. 92-39, at 6 (EAB, May 13, 1994) (petitioner bears the burden of demonstrating why the Region's response to an objection is clearly erroneous or otherwise worthy of review); *In re LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 4 (EAB, May 5, 1993) (same).

[14] The question whether WTI's proposal would represent a "Class 2" modification, according to the classification scheme in 40 C.F.R. § 270.42, is not before us. We have cited the Class 2 procedures in the text simply because that is the classification suggested by the Region in its Response to Comments, and because WTI has not intimated that any other classification would be more appropriate.

[15] In this connection, WTI does not explain what is meant by a "controlled shutdown," except to describe it as a procedure dictated by "sound engineering judgment." Amended Petition for Review, at 10. According to Region V, WTI's desire for permit language authorizing a controlled shutdown reflects a concern that "in the event of an ECIS breakdown, * * * waste which is being incinerated must be allowed to finish burning before the system can be shut down." Response to Petition, at 10.

should not burn wastes if [the ECIS] is not operational." There apparently exists a significant disagreement between WTI and the Region implicating what are clearly legitimate health and safety concerns, but it is impossible to evaluate the merits of the dispute on the basis of the existing record. We therefore agree with Region V that the "controlled shutdown" proposal, on which WTI's original modification request was evidently silent, would most appropriately be addressed in the context of a separate permit modification proceeding with further notice to the public and an opportunity for public comment. *See* 40 C.F.R. § 270.42(b)(5). WTI's request for review of condition B.1 is, accordingly, denied.

2. *Compliance With Permit Conditions*

Condition B.2 of Attachment XII provides:

> The permittee shall operate the incineration system in compliance with the post trial burn conditions or other appropriate conditions (e.g., if the Regional Administrator approves final operating conditions for this permit) of the RCRA permit.

WTI argues that this condition is "redundant and meaningless" because compliance with the conditions of the RCRA permit "is already required under law." Amended Petition for Review, at 11. To the extent, however, that the condition merely restates obligations imposed upon WTI by other sources of law, there is no error and thus no basis for granting review. *See In re LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 9 (EAB, May 5, 1993) (permit condition reciting "an accurate description of applicable law" is not clearly erroneous or otherwise subject to review).

WTI also objects that "the clause 'if the Regional Administrator approves final operating conditions for this permit'" is misleading, because "the Regional Administrator has already approved final operating conditions for this permit." Amended Petition for Review, at 11. The Region responds that final operating conditions have not, in fact, been approved. Specifically, the Region explains:

> EPA has approved conditions for "limited commercial operation" but a final review of data from the trial burn and from a pending Phase II risk assessment has not yet been completed. After completing its review of that information, EPA will, as necessary, begin the process of modifying the permit to include "final" operating conditions (or the Agency may consider other available actions under 40 CFR §§ 270.41-43).

Response to Petition for Review, at 12. No facts or documents are cited by WTI to suggest that the Region misunderstands (or has mischaracterized) the types of operating conditions that it has and has not approved for this facility. There is therefore no basis for concluding that final operating conditions have already been approved by Region V. Accordingly, we cannot conclude that the portion of condition B.2 suggesting that final operating conditions have not yet been approved is misleading, and WTI's request for review of condition B.2 must be rejected.

3. *Compliance With Limitations In April 12 Letter*

WTI objects to condition B.3 of Attachment XII, which provides:

> The Permittee shall operate the incineration system in compliance with all other limitations previously imposed by the Regional Administrator which remain in effect, including limitations imposed by letter dated April 12, 1993, unless otherwise directed by the Regional Administrator.

The April 12, 1993 letter cited in this condition was issued by the Regional Administrator in response to trial burn data, submitted by WTI on or about April 2, indicating that the incinerator had failed to achieve the required 99.99% destruction and removal efficiency for carbon tetrachloride under a test condition involving the incineration of aqueous waste. The letter stated that, based on the trial burn data and "pursuant to Condition C.13(d) of the effective RCRA permit," WTI must cease feeding aqueous waste into the incinerator, and must also cease feeding non-aqueous waste into the incinerator at any rate in excess of 20,375 lb/hr.

In *In re Waste Technologies Industries*, RCRA Appeal Nos. 93-7 & 93-9 (EAB, June 21, 1993), we concluded that the Region's April 12 letter did not constitute an appealable "modification" of WTI's permit because condition C.13(d)—which was present in the original permit—specifically contemplated the imposition of waste feed restrictions such as those in the April 12 letter following the completion of the facility's trial burn. *Id.* at 13.[16] Based on that

[16] Condition C.13(d) authorized the Regional Administrator, upon learning that the WTI facility had failed to satisfy any applicable performance standard during the trial burn, to order the cessation of all hazardous waste incineration at the facility. We concluded, in effect, that the authority (expressly conferred by condition C.13(d)) to prohibit all hazardous waste incineration in response to a trial burn failure necessarily included the lesser authority to limit or prohibit any specific portion of the waste feed that was associated with the test failure. Thus we concluded that the limitations set forth in the April 12 letter "are not modifications":

Continued

holding, WTI now seeks to eliminate any reference to the April 12 letter from Attachment XII.

WTI argues, first, that because the Regional Administrator's April 12, 1993 letter did not constitute a permit modification, the limitations described in the letter do not have the same status as the provisions that actually appear in the text of the permit. WTI next argues that, in order to elevate the April 12 limitations to the same status as actual permit provisions, EPA should be required to follow the permit modification procedures set forth in 40 C.F.R. § 270.41. Instead, WTI's argument concludes, EPA is attempting to circumvent section 270.41 by incorporating the April 12 letter into condition B.3 of the present modification by reference, even though the contents of the April 12 letter are not related to the subject matter of the present modification.

In response, Region V acknowledges that the April 12 letter did not represent a "formal modification of the permit." Nor, according to the Region, is there any intention to rely on condition B.3 of the present permit modification for the purpose of transforming "the statement in the letter into a formal permit condition." The challenged language in condition B.3 is, according to the Region, "only noting the letter's existence and reiterating [EPA's] view that the letter establishes obligations of WTI." Response to Petition for Review, at 12.

We believe that the reference to the April 12, 1993 letter is entirely permissible, because we reject WTI's assumption that the limitations set forth in the letter are any less enforceable than limitations that are explicitly enumerated in the text of its permit. Although the limitations are temporary—consistent with 40 C.F.R. § 270.62(c),[17] they will be superseded if and when final operating conditions are established for

> The WTI permit specifically contemplated, in Condition C.13(d), that additional restrictions on the waste feed might be imposed based on the results of the test burn. That is precisely what happened [in the letter of April 12]. It is true that the April 12 letter added specificity to the permit in this respect but that does not make it a modification.

In re Waste Technologies Industries, RCRA Appeal Nos. 93-7 & 93-9, at 13. Our conclusion regarding the April 12 letter was recently upheld by the U.S. Court of Appeals for the District of Columbia Circuit. *See Greenpeace, Inc. v. EPA*, Nos. 93-1458, 93-1682, and 93-1683, 1995 U.S. App. Lexis 545, at *14 (D.C. Cir. Jan. 13, 1995) (the limitations in the April 12 letter merely "implement[ed] a preexisting condition of WTI's permit").

[17] Section 270.62(c) allows the Regional Administrator to establish interim permit conditions to govern the operation of a new hazardous waste incinerator during the period "following completion of the trial burn and prior to final modification of the permit conditions to reflect the trial burn results." Such conditions are to be effective only "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."

this facility through a formal permit modification—they are nonetheless fully enforceable. Irrespective of any language appearing in the new Attachment XII, violation of either of the waste feed restrictions set forth in the April 12 letter constitutes a violation of condition C.13(d) of the original permit, which states that if there is any failure to meet a performance standard during the trial burn then "[u]pon request of the Regional Administrator the Permittee shall cease feeding hazardous waste to the incinerator." Accordingly, we conclude that the inclusion of a reference to the April 12 letter in condition B.3 of Attachment XII serves only to restate WTI's preexisting obligations under condition C.13(d) of the original permit. Condition B.3 does not make the requirements of the April 12 letter any more (or less) enforceable than they would be in the absence of condition B.3, and we therefore deny the amended petition for review insofar as it requests the deletion of condition B.3.

4. *Prior Approval For "Additional" Testing*

Under condition B.7,[18] WTI would be required to obtain prior Regional office approval before conducting any "additional performance testing to further evaluate the potential of the ECIS to reduce emissions of any regulated stack gas constituents, or to otherwise optimize the system." WTI contends that there is no valid legal basis for requiring such prior approval.

The "additional" testing addressed by this provision is testing other than that which was described in the test plan submitted with WTI's modification request. The test plan included in WTI's modification request has already been approved by the Region in condition A.2 of Attachment XII,[19] but no other testing has been similarly preapproved; indeed, so far as we can determine, no "additional" ECIS performance testing has thus far been proposed. Accordingly, by challenging condition B.7 of the permit modification WTI is, in effect, proposing that it be allowed to perform tests of its own choosing without any prior review by any regulatory authority. That proposal must be rejected.

Region V justifies the prior approval requirement in terms of the Region's stated intention to send EPA personnel to observe all tests

[18] The condition states: "Upon prior approval of the Regional Administrator, the Permittee may perform additional performance testing to further evaluate the potential of the ECIS to reduce emissions of any regulated stack gas constituents, or to otherwise optimize the system."

[19] Condition A.2, discussed earlier in this opinion, states in part that WTI "shall test the incineration system according to the performance test plan included with its June 25, 1993 Class 2 permit modification request * * * ."

regulated or required under the WTI permit.[20] Prior review of hitherto unapproved test procedures will, the Region explains, provide some assurance that the EPA inspectors' time will not be wasted and that the procedures they are sent to observe will generate "useful" knowledge. Response to Petition for Review, at 13. We agree that prior approval can reasonably be required for that reason, and we therefore conclude that condition B.7 is not clearly erroneous or otherwise worthy of review.

5. *Future Regulatory Action Not Precluded*

In condition B.8,[21] Region V reserves the right, notwithstanding its approval of ECIS installation and operation, to order any appropriate action in response to future problems with the ECIS or with the incinerator's emissions generally. The condition states that Region V may require WTI to undertake "additional measures" to ensure future compliance with applicable State and federal standards, "and/or to ensure the protection of human health and the environment." Those "additional measures," the condition states, "may include the installation of additional equipment, including equipment designed to remove a portion of the suspended solid material from the scrubber blowdown or spray dryer feed liquid."

WTI is concerned that this condition would authorize the Regional Administrator to dictate the installation of specific equipment at some future time, rather than allowing WTI to decide how best to achieve compliance with applicable regulations and permit conditions. "The Regional Administrator," WTI objects, "simply has no authority to dictate the equipment used by a permittee." Amended Petition for Review, at 13.

In response, the Region claims that WTI has simply misread condition B.8. The reference to specific types of equipment is not intended to, and does not, "create an obligation on the part of WTI to

---

[20] As we have previously observed, *see supra* note 9 and accompanying text, the Region's authority to observe all such testing is not disputed by WTI and is, in any event, established pursuant to the provisions of 40 C.F.R. § 270.30(i).

[21] The condition states: "If new information becomes available which indicates that operation of the ECIS may interfere with the ability of the incineration system to comply with any U.S. EPA or Ohio Environmental Protection Agency standards, or that emissions are increasing as a function of time, the Regional Administrator reserves the right to require the Permittee to perform additional testing, or to take additional measures deemed necessary to ensure that all standards are continually met and/or to ensure protection of human health and the environment. Such measures may include the installation of additional equipment, including equipment designed to remove a portion of the suspended solid material from the scrubber blowdown or spray dryer feed liquid."

install particular equipment." Response to Petition for Review, at 14. The reference to specific equipment is "for illustrative purposes only," and condition B.8, rather than creating any additional testing or equipment-installation requirements, simply "clarifies that installation of the ECIS under the terms of this modification does not absolve WTI of its obligations to meet all standards and [to] ensure protection of human health and the environment." *Id.*

We agree with the Region's contention that condition B.8 is properly regarded as a "clarifying statement." The condition does not impose any immediate obligations, nor does it indicate an intention to impose future obligations that the Region would otherwise not be authorized to impose. It simply makes clear that the Region's present decision authorizing installation of the ECIS does not necessarily represent the Region's final word regarding the system's adequacy. That is, if the Region should learn that (in the language of condition B.8) "operation of the ECIS may interfere with the ability of the incineration system to comply" with State or federal standards, then the Region is not precluded by its present modification decision from taking whatever action may be appropriate: The Region may require WTI to perform additional testing and, to whatever extent WTI is unable to comply with applicable standards, the Region may require WTI to take any measures necessary to achieve such compliance. Condition B.8 reflects no error of fact or law, and review of the condition is therefore denied.

III. *CONCLUSION*

For the reasons stated herein, WTI's amended petition for review is denied in all respects.

So ordered.