

PPC 9524.1984(02)

PERMIT CONDITIONS: THE VELSICOL DECISION

OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE

OCT 11 1984

SUBJECT: Recurring Permit Issues: Extent of Permit Conditions
and the Velsicol Decision

FROM: Bruce Weddle, Director,
Permits and State Programs Division (WH-563)

TO: Hazardous Waste Division Directors,
Regions I-X

Attached to this memo is a copy of the Administrator's Decision in the Velsicol Appeal. Velsicol challenged its RCRA permit on the grounds that EPA lacked the authority to incorporate parts of the permit application into the permit as enforceable conditions and on the ground that this incorporation would lead to an inflexible permit with conditions that exceed RCRA's requirements. Velsicol had submitted a permit application that described both RCRA and non-RCRA activities at a chemical plant. The application led to a permit that was not limited to the RCRA storage facility at this plant.

The Administrator, citing the need for flexibility in writing permit conditions, declared that a permit writer can restate the requirements of the regulations, incorporate parts of the permit application directly into the permit, or write a completely original permit condition. The latter two approaches are permissible as long as "the permit conditions are 'based' on the appropriate substantive provisions of the regulations and are 'necessary to achieve compliance with the Act and regulations.'" This ruling upholds the approach used in the Model Permit.

The Administrator also found that both Velsicol and the Region had failed to take full advantage of the permit process to work together in preparing the permit conditions. As a result, permit conditions were written that, as the Region conceded, were too broad. For this reason, he remanded the permit to Region IV

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for additional public comment and potential revision of the permit after public comment. In the new public comment period, Velsicol can submit the information necessary to limit the permit to the regulations.

In summary, this decision allows permit writers to continue using the Model Permit as the basis for RCRA permits, and to continue to incorporate parts of the permit application in the draft permit or to, when necessary, write completely original permit conditions. Permit writers must also ensure that applicants are aware that parts of the permit application can be put into the permit as enforceable permit conditions. Accordingly, the applicant should be encouraged, through NODs and requests for additional information, to identify and remove information that is not needed to demonstrate compliance with RCRA. The permit writers are also free to exercise extraneous information from those parts of the application that are incorporated into the permit.

This guidance replaces our earlier guidance of January 20, 1984, entitled "Recurring Permit Issues: Extent of Permit Conditions."

Attachment

cc: RCRA Branch Chiefs, Regions I-X
RCRA Permit Section Chiefs, Regions I-X
OSW Permits Branch

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:)
)
Velsicol Chemical Corporation,) RCRA Appeal No. 83-6
)
Applicant)
)
Permit No. TND-061-314-803)
)

REMAND AND PARTIAL DENIAL OF PETITION FOR REVIEW

In a petition filed pursuant to 40 CFR §124.19 (1983),^{1/} Velsicol Chemical Corporation (Applicant) requested review of a Resource Conservation and Recovery Act (RCRA) permit issued to it for operation of a hazardous waste management (HWM) facility at its chemical manufacturing plant in Chattanooga, Tennessee. ^{2/} The contested permit was issued on September 28, 1983, by the Director, Air and Waste Management Division, Region IV, U.S. Environmental Protection Agency. According to the Applicant, the permit is inflexible due to "Region IV's

1/ 40 CFR §124.19 provides in pertinent part:

(a) Within 30 days after a RCRA...final permit decision has been issued..., any person who filed comments on the draft permit...may petition the Administrator to review any condition of the permit decision.

2/ The Applicant is currently operating its facility under the authority of "Interim Status," a provision in RCRA which allows persons who own facilities which were in existence on or before November 19, 1980, to continue to operation until final action is taken on their permit applications.

extensive incorporation of Velsicol's [permit] application

into the permit itself...." The Applicant's specific objections to the permit fall into two broad categories: (1) the Region lacks the authority to incorporate substantial portions of the permit application in the permit as enforceable conditions; and (2) such incorporation led to a permit which is inflexible and contains conditions that are "stricter than required by the RCRA regulations." 3/

As explained below, insofar as the Applicant questions the Regional Administrator's authority to incorporate portions of the permit application in the final permit, the Applicant has not carried its burden of showing, in accordance with §124.19(a) (1) and (2), that the permit determination is clearly erroneous or involves an exercise of discretion or policy which is important and which should be reviewed as a discretionary matter. 4/ Therefore, review of that aspect of the permit is denied.

3/ See "Velsicol Chemical Corporation's Reply to Region IV's Response in Opposition to Velsicol's Petition" dated January 20, 1984. In its petition, the Applicant requests review of eighteen conditions in the permit. In some instances, it is not possible to discern the precise basis for the Applicant's challenge to a specific condition.

4/ The preamble to the regulations containing this standard for accepting review states that "this power of review should be only sparingly exercised [and]...most permit conditions should be finally determined at the Regional level...." 45 Fed. Reg. 33412 (May 19, 1980).

However, with respect to the challenges to specific permit conditions on grounds that they are inflexible and too strict, the permit determination is remanded to the Region for the purposes of reopening the comment period and revising the permit conditions where appropriate.

A.

There is no compelling reason to question the Region's authority to incorporate portions of the permit application in the Applicant's permit. The regulations confer broad discretion on the Regional Administrator to either: (1) restate the requirements of the regulations as permit conditions (which he did in some instances); or (2) to "establish other permit conditions" which meet the regulatory standards. 40 CFR §270.32(b) ("Es-

establishing Permit Conditions"). The text reads as follows:

(b) Each RCRA permit shall include permit conditions necessary to achieve compliance with the Act and regulations, including each of the applicable requirements specified in 40 CFR parts 264, 266, and 267. In satisfying this provision, the Director [Regional Administrator or authorized representative] may incorporate applicable requirements of 40 CFR Parts 264, 266, and 267 directly into the permit or establish other permit conditions that are based on these parts.

When the Regional Administrator elects to "establish other permit conditions," instead of simply restating the requirements of the regulations, he can choose between incorporating parts of the permit application directly in the permit or crafting a completely original permit condition in his own words. No legal significance attaches to his choice, however, for in either instance the sole test of legal sufficiency is whether the requirements of §270.32(b) are satisfied, i.e., whether the permit conditions are "based" on the appropriate substantive provisions of the regulations and are "necessary to achieve compliance with the Act and regulations." Therefore, the contention that the Regional Administrator is without authority to incorporate portions of the application is rejected. 5/

Similarly, there is no basis for contending, as Velsicol does, that restating the requirements of the regulations should be preferred over incorporation of the permit application. The permit issuer needs to have broad discretionary powers in deciding which of the several approaches to writing permit conditions under §270.32(b) is most appropriate: permits are issued for many different kinds of hazardous waste facilities, ranging from those which only store small amounts of hazardous waste on a temporary basis, to those which are in the business of disposing of large quantities of hazardous waste on a contin-

5/ In some cases, the regulations actually direct the Regional Administrator to incorporate approved plans from the application, thus depriving the Regional Administrator of discretion to do otherwise. For example, 40 CFR §264.112 (Closure Plan)

(a) The owner or operator of a hazardous waste

management facility must have a written closure plan. The plan must be submitted within the permit application, in accordance with §270.14(b)(13) of this chapter, and approved by the Regional Administrator as part of the permit issuance proceeding under Part 124 of this chapter. In accordance with §122.29 of this chapter, the approved closure plan will become a condition of any RCRA permit.

uous basis. In some cases, a restatement of the regulation will be sufficient to insure the safe handling of the waste; in others it will not. Similarly, in some cases incorporation of the permit application will be sufficient; in others it will not. Finally in some cases it may be necessary to devise new language that is tailor-made for the specific circumstances. Therefore, any suggestion that any single approach to writing permit conditions is preferable in all circumstances is categorically rejected.

The Applicant argues, however, that even if incorporation is authorized by the regulations, it is bad policy. According to the Applicant, it results in inflexible permits which will have to be modified in the future, thus wasting valuable Agency and applicant resources. This argument also fails to persuade me that the permit should be reviewed. There is no reason to assume, as the Applicant evidently does, that incorporation will inevitably produce an inflexible permit needing modification. On the contrary, the outcome depends in large part on what the Applicant has submitted and on whether the procedures for developing permits are used effectively, so that unnecessary conflicts over the terms and conditions of the permit are minimized. Based on the record before me, I am convinced that the Applicant and the Region have not taken advantage of the permit procedures to avoid the present controversy. 6/

B.

The applicable procedures for permit issuance contemplate that the permit user and the permit applicant will work together in developing a permit. 7/ To that end, the regulations provide that if the permit application does not contain the information required to write a permit, the Regional Administrator may issue a "notice of deficiency," requesting the information necessary to complete the application. 40 CFR §124.3(c). After the application is officially "complete," the Regional Adminis-

trator may still request additional information to clarify what has already been submitted, 40 CFR §124.3(c); and still later, after the draft permit determination is issued for public comment, the Regional Administrator may modify the permit (and reopen the comment period) if the Region receives comments from the Applicant (or the public) that appear to raise substantial new questions concerning the permit, 40 CFR §124.14. Naturally, if the comments indicate that the permit would be contrary to the Act

6/ For much the same reason I do not believe that it is necessary to address the Applicant's contention that incorporation of major proportions of its application leads to the inclusion of permit conditions that, under §270.32(b), allegedly are not "necessary to achieve compliance with the Act and regulations." (Emphasis added.) There is no reason to assume that incorporation inevitably leads to inclusion of unnecessary conditions. In any event, whether or not a particular condition is necessary can be judged on a case-by-case basis and corrected as appropriate.

7/ See generally, 40 CFR Part 124 (1983).

or the regulations, the Regional Administrator can always deny the permit application (after proper notice, including circulation of a revised statement of basis) if the Region lacks the information necessary to make the permit conform to the law, 40 CFR §124.3(d) and 124.6(b). In other words, the regulations provide an opportunity for an exchange of information between the Region, the Applicant, and the public in developing the terms of the permit. In the present case, however, it appears that neither the Region nor the Applicant took full advantage of this opportunity and the result, as the Region concedes, is a permit that contains provisions which are too detailed or that cover portions of the facility which are not directly related to hazardous waste operations. 8/

8/ The Region nevertheless justifies issuing the permit in its present form on the grounds that it is the Applicant's responsibility to provide the permit issuer with the information needed to prepare the permit, and if the resulting permit is too inflexible or embraces matters not properly within the scope of the regulations, the permit applicant is at fault, for the permit merely reflects the information supplied by the Applicant. And if that information produces an inflexible or overly broad permit,

then the permit Applicant has no one to blame other than itself. The Applicant's remedy, according to the Region, is to seek a modification of the permit.

The Applicant, on the other hand, responds by pointing out that it gave the region the information it requested; that the Region is under a duty to prepare an adequate permit; and that, regardless of the over or underabundance of the information supplied by the Applicant, the Region is not authorized to put conditions in the permit that are beyond its authority.

For reasons which are not apparent from the record, the Region did not request clarifying information, 9/ or issue a notice of deficiency, or reopen the public comment period for the purpose of considering modification of the proposed permit or denial of the permit application. The record does show, on the other hand, that the Applicant did raise its concerns about inflexibility and overbroadness in its comments on the draft permit. However, the record also shows that the Applicant's comments were not accompanied by the information which the Region would have needed to change the permit so that it would conform to the regulations. 10/

Since the Region concedes that some of the conditions in the permit are too broad, it is my conclusion that the Region erred when it issued the permit. Given the Region's stated willingness to entertain proposals to amend certain permit conditions, the Applicant should be given an opportunity to submit the information that will enable a permit to be prepared that is narrower and distinguishes between the Applicant's hazardous

9/ The Region did request other information from the Applicant to clarify some of the submitted material, but that request did not address the matters in question here.

10/ See, for example, 40 CFR §124.13 ("Obligation to raise issues and provide information during the public comment period"). Of course, it is a settled principle of law that the party who is in possession of information has the burden of producing it. See McCormick on Evidence (2d ed. 1972) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

and nonhazardous waste operations, and otherwise conforms to the regulations. Therefore, I am remanding the permit to the Region so that the comment period can be reopened under ¶124.14, thus giving the Applicant another opportunity to submit that information.

Conclusion

Accordingly, for the reasons stated above, it is my conclusion that review of the RCRA permit is not warranted at this time. The petition for review is denied insofar as it challenges the Regional Administrator's authority to incorporate portions of the permit application in the final permit. However, regarding Applicant's objection to specific conditions in the permit, the permit determination is remanded for the purposes of reopening the comment period to provide an opportunity to obtain the additional information needed to revise those permit conditions. 11/ If the information is not forthcoming and the Region is, therefore, unable to write a permit that complies with the Act and the regulations, the Region is instructed to issue an appropriate notice of its intent to deny the permit.

11/ Of course, only the permit conditions contested in the Applicant's petition for review will be the subject of the reopened comment period.

Any final permit determination shall reflect the Region's response to all comments. Thereafter, the Region's permit determination may be appealed in accordance with ¶124.19. 12/

So ordered.

Original Document signed

William D. Ruckelshaus
Administrator

Dated: SEP 14 1984

12/ For purposes of judicial review, final Agency action occurs after a final RCRA permit is issued by the Regional Administrator and Agency review procedures are exhausted. See CFR §124.19 (f)(1).