

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

In the Matter of:)
)
Amoco Oil Company,) RCRA Appeal No. 84-5
(Whiting, Indiana))
)
Applicant)
)
Permit No. IND074375585)
_____)

ORDER DENYING PETITION FOR REVIEW

In a petition filed pursuant to 40 CFR §124.19 (1984), ^{1/}
Amoco Oil Company (Amoco) requested review of a Resource Con-
servation and Recovery Act (RCRA) permit issued to it by the
Director, Waste Management Division, Region V, U.S. Environ-
mental Protection Agency, for operation of a hazardous waste
management (HWM) facility at its Whiting, Indiana refinery. ^{2/}
The only condition in the permit contested by Amoco is condition
I.D.8(d), which provides that "the Regional Administrator, or
an authorized representative, . . . [may] sample or monitor at
reasonable times, for purposes of assuring permit compliance or

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 conditions of the permit
decision.

2/ Pending review of their permit applications, owners or opera-
tors of facilities in existence on or before November 19, 1980,
are allowed to continue operating their facilities under "In-
terim Status" if they have complied with certain requirements.
RCRA §3005(e). Amoco is currently operating its facility under
this authority.

as otherwise authorized by RCRA, any substances or parameters at any location." (Emphasis added.) Amoco expresses concern that this condition authorizes sampling and monitoring in locations that may fall outside EPA's jurisdiction, and argues that the condition "appears . . . to be subject to an interpretation far broader than is allowed by RCRA Section 3007" In its reply to the petition, the Region did not address the substance of the issue raised for review, but argues that the petition should be denied because it was not timely filed and because Amoco did not raise this issue during the public comment period on the draft permit, before the final permit decision had been made by the Director of the Region's Waste Management Division.

As explained below, I agree with the Region that the petition for review was untimely and that Amoco has failed to justify why it did not raise this issue during the public comment period. However, even if these grounds for denying the petition were ignored, I would still deny the petition because Amoco 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 should be reviewed. ^{3/}

Concerning timeliness, persons who want the Administrator to review a final permit decision have 30 days from service

^{3/} 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).

of the decision to file their petitions. 40 CFR §124.19(a). The Region and Amoco disagree as to what event starts the running of the filing period. The Region argues that the petitioner has 30 days from the date the permit is "issued" -- referring to the date the permit is signed -- to petition the Administrator. See note 1, supra. Amoco, on the other hand, argues that the filing period runs from receipt of the final decision. Both are wrong. The regulations state that "[t]he 30-day period within which a person may request review . . . begins with service of notice of the Regional Administrator's action" 40 CFR §124.19(a) (emphasis added). Service ordinarily refers to the date a decision is mailed, which in this case was September 27, 1984.^{4/} Since the regulations also allow three days to be added to the normal 30 day filing period when a decision is served by mail, 40 CFR §124.20(d), Amoco had a total of thirty-three days from the mailing date to file its petition, that is, until October 30, 1984.^{5/} Amoco's petition was not filed, however, until November 2, 1984. Therefore, it was untimely.

Amoco's failure to raise its objection to the permit condition during the public comment period is likewise fatal to its

^{4/} See *In re Agland Inc.*, IF&R Appeal No. 83-2 (Final Decision dated April 18, 1985) (construing 40 CFR Part 22); Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing.").

^{5/} Under the Region's interpretation, Amoco had until October 29, to file its petition for review; according to Amoco, it had until November 5. Although I disagree with the Region's reasoning that the filing period begins to run when the permit decision is signed, this does not change the conclusion that the petition was not timely.

petition. Every petition for review must include "a demonstration that any issues being raised were raised during the public comment period [on the draft permit] (including any public hearing) to the extent required by these regulations" 40 CFR §124.19(a). The duty to raise issues during the public comment period only extends, however, to "reasonably ascertainable issues." 40 CFR §124.13. Therefore, in its petition for review Amoco could have shown either that it raised the issue during the public comment period or that the issue was not reasonably ascertainable. It has shown neither. It concedes that it did not raise the issue during the public comment period, but it argues that the issue was not reasonably ascertainable. In that regard Amoco claims that not until "[r]ecently, . . . [did it] become aware that EPA is attempting to expand its jurisdiction beyond the hazardous waste management facilities, which are lawfully subject to RCRA, to other areas of a facility." Petition at 2. Amoco provides no support for this statement, nor any further explanation of its significance; therefore, without more, I conclude that Amoco has not established any grounds for disregarding the clear dictates of the regulations. Having failed to raise its objections during the public comment period, Amoco can not now raise its objections on appeal.

Finally, even if Amoco's petition was timely and the issue had been properly raised, Amoco has failed to show that the Regional Administrator's decision was erroneous or that it should otherwise be reviewed on discretionary grounds. The condition in question allows for inspection of an establishment to assure

permit compliance or as otherwise authorized by RCRA. ^{6/} The condition was adopted verbatim from the regulations, 40 CFR §270.30(i)(4), ^{7/} and is one of the conditions included in all RCRA permits. If Amoco had any objection to the regulations, it should have raised that concern at the appropriate place and time, that is, in the United States Court of Appeals for the District of Columbia within ninety days of promulgation of the regulations. RCRA §7006(a)(1). I will not entertain that challenge now. ^{8/}

6/ RCRA §3007 provides, in relevant part, that:

For the purpose[] of . . . enforcing the provisions of this chapter, such officers, employees, or representatives [duly designated by the Administrator] are authorized -

- (1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
- (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling of such wastes.

7/ 40 CFR §270.30 provides, in relevant part, that:

- (i) Inspection and entry. The permittee shall allow . . . an authorized representative . . . to :

* * *


- (4) Sample or monitor at reasonable times, for the purposes of assuring permit compliance, or as otherwise authorized by RCRA, any substances or parameters at any location.

8/ Attacks on the validity of regulations are not ordinarily entertained in non-rulemaking administrative proceedings. See

(next page)

For the above stated reasons, the petition for review is denied. In accordance with 40 CFR §§124.15(b) and 124.19(f), the final permit decision of the Regional Administrator is effective upon service of this order and this order is final agency action for the purpose of judicial review.

So ordered.



Lee M. Thomas
Administrator

Dated: 5/17/85

(Footnote No. 8 cont'd)

In the Matter of Georgia-Pacific Corporation, NPDES Appeal No. 84-2 at 3, n.3 and the cases cited therein (Order Remanding Proceedings, dated April 29, 1985) (validity of NPDES regulations may not be raised in an evidentiary hearing). Although Amoco's general attack on the permit condition comes too late, the manner in which a specific inspection is conducted might be cause for objection if it were conducted in a manner inconsistent with RCRA. Of course, Amoco has not alleged that any such inspection has been conducted and that issue is not ripe for review at this time. See e.g., Toilet Goods Association v. Gardner, 387 U.S. 158, 165 (1967) (concerning ripeness for review of regulations authorizing inspections promulgated by the Commissioner of Food and Drugs; "[w]e believe that judicial appraisal of these factors [factors justifying inspections] is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here."). (Footnotes omitted.)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of Amoco Oil Company, (Whiting, Indiana), RCRA Appeal No. 84-5, were sent to the following persons in the manner indicated:


By 1st class mail,
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M. Gail Wingo
Secretary to the Chief
Judicial Officer

Dated:

MAY 20 1985