RCRA Permit Appeal Fact Sheet **1987**

FACILITY: Shell Oil Company (Shell), Deer Park Manufacturing Complex
Deer Park, Texas
TXD 067 285 973
Permit Appeal No. 87-19

PETITIONER: Shell

PETITION FILED: December 16, 1987

STATUS OF PETITION: See Permit Appeal Status Report

ISSUE: Miscellaneous other issues (surface impoundment retrofitting variance)

Summary of Petition:

Shell is petitioning the Administrator to review a decision to deny its application for an interim status surface impoundment retrofitting variance under Section 3005(j)(3) for three surface impoundments identified as activated sludge biotreater basins. Prior to EPA's decision, the petitioner filed with the Texas Water Commission a Part B permit application that requests the continued operation of the biotreaters beyond November 8, 1988, without retrofitting the units, which the petitioner believes are entitled to the statutory exemption of Section 3005(j)(3). The petitioner claims that EPA's decision to deny the application for the statutory exemption effectively denies Shell's permit application. Therefore, the petitioner argues that EPA's decision is subject to the procedures set forth in 40 CFR Part 124.

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

IN THE MATTER OF:	)	
	)	
SHELL OIL COMPANY	)	RCRA Appeal No. 87-19
DEER PARK MANUFACTURING	)	
COMPLEX	)	
	)	
	)	

ORDER DENYING PETITION FOR REVIEW

By petition dated December 14, 1987, and submitted under 40 CFR §124.19, Shell Oil Company (Shell) requests review of a decision by EPA Region VI denying Shell's application for an exemption from the retrofitting requirements of Section 3005(j)(1) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §6925(j)(1). For the reasons set forth below, Shell's petition is denied. 1/

Background

RCRA §3005(j)(1) requires owners and operators of "interim status" 2/ surface impoundments to retrofit these impoundments, on or before November 8, 1988, to meet the minimum technical requirements of Section 3004(o)(1)(A). These requirements

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1/ Shell's motion for leave to reply (Motion for Leave to Reply and Request for Oral Argument, March 4, 1988) is granted. The reply was considered in reaching the decision to deny the petition. Shell's request for oral argument is denied.

2/ See RCRA §3005(e), 42 U.S.C.A. §6925(e)(under "interim status," owners and operators of hazardous waste facilities in existence on November 19, 1980, may continue to operate without a RCRA permit provided the owner or operator filed a Notification of Hazardous Waste Activity and a Part A permit application by the statutory deadlines).

include the installation of a double liner and a leachate collection system between liners, and groundwater monitoring. Section 3005(j)(3) provides an exemption to the retrofitting requirements. To qualify for this exemption, the applicant must show, among other things, that the surface impoundment contains treated waste water during the secondary or subsequent phases of an aggressive biological treatment system subject to a permit issued under Section 402 of the Clean Water Act (33 U.S.C.A. §1342), and meets the groundwater monitoring requirements for facilities with a final RCRA permit.

Shell operates three interim status activated sludge biotreater basins at its Deer Park Manufacturing Complex. On December 11, 1985, Shell filed an application under RCRA §3005(j)(3) for an exemption from the RCRA retrofitting requirements. After several requests for additional information, [3/] Region VI determined on November 6, 1987, that Shell's surface impoundments failed to meet the statutory requirements for an exemption. [4/] Specifically, Region VI determined that the impoundments were "not in compliance with generally applicable groundwater monitoring requirements for facilities with permits." [5/] The letter denying the exemption stated that the

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3/ See Response of Region VI to Petition for Review on the Denial of an Interim Status Surface Impoundment Retrofitting Variance, at 8-9 (February 19, 1988) (Region Response).

4/ See Letter from Allyn M. Davis, Director, Hazardous Waste Management Division, to H.J. Bettencourt, Manager, Deer Park Manufacturing Complex (November 6, 1987)(denying request for retrofitting variance).

5/ Id.

decision was "an order and final agency action" under 5 U.S.C.A. §§551(6) & 704. 6/

Shell's petition for review followed. Region VI opposes the petition on the grounds that 40 CFR §124.19 authorizes an appeal to the Administrator of "final permit decision[s]" only; therefore, it argues, because the denial of a Section 3005(j)(3) exemption is not a "final permit decision," its decision to deny the exemption is not reviewable under Section 124.19. I agree.

Discussion

Part 124 of Title 40 of the Code of Federal Regulations contains EPA procedures for "issuing, modifying, revoking and reissuing, or terminating * * * 'permits' * * *." 40 CFR §124.1(a). Section 124.19 authorizes an appeal to the Administrator of a "final permit decision." The denial of a retrofitting exemption does not constitute the issuing, modifying, revoking and reissuing, or terminating of a permit. Shell asserts, however, that the exemption denial is entitled to administrative review because it is functionally similar to a permit decision. Shell makes several arguments to support this assertion. 7/ I reject all of these arguments for the reasons

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6/ Id.

7/ For example, Shell asserts that the Texas Water Commission, which EPA has authorized to operate the RCRA permitting program, is treating the denial as a condition for incorporation into Shell's RCRA permit. Shell argues that the practical effect of denial is that of a final permit decision. Shell also argues that Region VI's denial of the exemption constitutes a termination of interim status, for which administrative review is available.

stated in Region VI's reply brief.[8] Although I agree with the analysis in the reply brief, there is one point that needs amplification.

Interim status is not a permit.[9] Thus, decisions involving interim status operating requirements are not ordinarily treated as permit decisions.[10] However, EPA regulations

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8/ See Region Response, supra note 3, at 11-13 & 18-19.

In its reply brief, Shell also argues that the Region's position is based on the unsupported premise that §3005(j) gives EPA the authority to grant or deny this exemption. See Reply to Response of Region VI to Petition for Review, March 4, 1988. According to Shell, the exemption is self-implementing. I disagree. Section 3005(j)(5) clearly states that applicants for these exemptions must "apply to the Administrator" and that "the Administrator shall advise" the applicant on the applicability of the retrofitting requirements. See 42 U.S.C.A. §6925(j)(5).

9/ See 40 CFR §124.2. This section defines a permit as:

> [A]n authorization, license, or equivalent control document issued by EPA or an "approved State" to implement the requirements of this part * * * . Permit does not include RCRA interim status * * *.

40 CFR §124.2 (emphasis added).

10/ On February 3, 1988, Shell filed a petition for review of this same exemption denial in the U.S. Court of Appeals for the Fifth Circuit. The court granted EPA's motion to dismiss for lack of subject matter jurisdiction. EPA argued that an exemption denial is not a permit decision or tantamount to a permit decision, and thus is not reviewable in a federal circuit court under RCRA §7006(b). Section 7006(b) grants jurisdiction to federal circuit courts to review the Administrator's action in "issuing, denying, modifying, or revoking any permit * * * ." The court accepted EPA's argument and transferred the case to the United States District Court of the Southern District of Texas. See Shell Oil Company v. EPA, No. 88-4085 (5th Cir. June 20, 1988); see also Sanders Lead Company v. Thomas, 813 F.2d 1190 (11th Cir. 1987)(denying review of an interim status variance because it was not "issuing, denying, modifying, or revoking any permit * * *"); cf. Hempstead County and Nevada County Project v. EPA, 700 F.2d 459, 462 (8th Cir. 1983)(denying review of EPA action granting interim status because interim status is not a permit requiring direct review by a federal court of appeals).

make certain exceptions. For example, 40 CFR §270.10(e)(5) expressly states that Part 124 procedures apply when interim status is terminated for failure to submit a Part B application. Similarly, 40 CFR §265.147(c) provides that the informal appeal procedure of Section 124.5 applies to variances from interim status financial requirements. Significantly, there is no regulation that provides for a Part 124 appeal, either formal or informal, for interim status retrofitting denials. In fact, as explained below, when RCRA and a separate EPA guidance document are read together, it is clear that retrofitting exemption denials are not to be treated as permit decisions subject to review by the Administrator.

Section 3005(j)(5) sets out the administrative procedures required in the retrofitting exemption decision-making process. These procedures are limited to "notice and an opportunity to comment." The statute does not require the Agency to follow any other procedures, either before or after the Agency makes its final decision. In this instance, the Regional Administrator made the final Agency decision after providing notice and opportunity to comment. 11/ Although EPA does not have any regulations that expand upon the specific notice and comment procedures under Section 3005(j), EPA has addressed these

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11/ The Regional Administrator made this decision pursuant to a delegation from the Administrator. See Delegation 8-35 (October 5, 1987)(delegating authority to EPA Regional Administrators to decide requests for RCRA §3005(j) variances).

procedures in a guidance document. See Interim Status Surface Impoundment Retrofitting Variances, No. 9484.50-1A (July 8, 1986)(Guidance). The Guidance states that, when possible, the processing of exemption requests will be completed in conjunction with the processing of the facility's Part B permit application. Id. at p. 1-5. If the two are processed together, the full Part 124 procedures that apply to the permit application, including procedures governing notice and comment and review by the Administrator, apply to the joint permit/exemption request. Id. at p. 1-7. The Guidance recognizes, however, that because of the November 8, 1988 deadline for complying with the Section 3005(j)(1) retrofitting requirement, the exemption request will have to be decided separately in some cases to ensure a timely decision, which would not be feasible in many instances if the exemption request were processed along with the more time-consuming permit application. Id. at p. 1-6.

Shell quotes from the Guidance to support its contention that review by the Administrator is available for denial of exemption requests:

> In those instances where the exemption application is being processed separately from the Part B application [as in Shell's case], the full 40 CFR Part 124 public participation procedures would be required for the exemption application. (emphasis added).

See Shell's "Memorandum Brief in Support of Petition for Review," at p. 73 (December 14, 1987). When read in context, however, it is clear that only notice and comment requirements of Part 124, and not the administrative review procedures,

apply to separately-processed exemption requests. The paragraph from which the above quotation was taken states:

> Section 3005(j)(5) requires that applications for exemptions 1, 2, and 3 receive public notice and opportunity to comment. * * * Normally, the public process for any of the four exemptions will take place in concert with the public notice of the applicant's draft permit. The process includes 45 days for receipt of written comments. * * * A public hearing may also be held. In those instances where the exemption application is being processed separately from the Part B application, the full 40 CFR Part 124 public participation procedures would be required for the exemption application.

Guidance at p. 1-6. (emphasis added). This paragraph does not mention the administrative review procedures in Part 124; instead, it refers only to the public participation procedures in Part 124, such as the 45-day period for receiving written comments under Section 124.10 ("Public notice of permit actions and public comment period") and the public hearing provisions of Sections 124.11 ("Public comments and requests for public hearings") and 124.12 ("Public hearings"). The Guidance does not mention the administrative review procedures until the next paragraph, where it clearly states that review under Section 124.19 ("Appeal of RCRA * * * permits") may not be appropriate for the exemption decision process:

> Because of the short deadlines for decisions under Section 3005(j), some Part 124 procedures, including the provision for administrative review under Section 124.19, may not be appropriate for the exemption decision process.

Id. (emphasis added). Thus, neither RCRA §3005(j), 40 CFR §124.19, nor the Guidance provides for administrative review of a denial of a Section 3005(j) retrofitting exemption.

Conclusion

The denial of a retrofitting exemption is not a proper matter for review under 40 CFR §124.19 because it is not a "final permit decision." Thus, Shell's petition for review is denied.

So ordered.

Lee M. Thomas
Administrator

Dated: 9/8/88

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of Shell Oil Company, Deer Park Manufacturing Complex, RCRA Appeal No. 87-19, were sent to the following persons in the manner indicated:

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Dated: Sept 9, 1988

Brenda H. Selden
Brenda H. Selden, Secretary
to the Chief Judicial Officer