



RCRA Permit Appeal Fact Sheet

1991

FACILITY: U.S. Pollution Control Inc. (USPCI)
Lone Mountain, Oklahoma
OKD 065 438 376
RCRA Appeal No. 91-11

PETITIONERS: - Glenn English, U.S. House of Representatives; Don Nickles and David L. Boren, U.S. Senate
- Save the Cimarron, Inc.
- Marcus Castro

PETITIONS FILED: - April 4, 1991
- May 13, 1991
- May 14, 1991

STATUS OF PETITIONS: See Permit Appeal Status Report

ISSUES: Miscellaneous other issues (RCRA compliance history; requirements for environmental impact statement)

Summary of Petitions:

The petitioners are requesting a review of the permit modification issued to USPCI on March 22, 1991; this modification allows the facility to expand four new cells. The petitioners argue that EPA should more carefully consider USPCI's past noncompliance history in determining the terms of the permit modification, and that an environmental impact study (EIS) should be performed prior to final issuance of the permit.

- **RCRA Compliance History.** The petitioners contend that past USPCI violations should be considered in the permit review process. The petitioners noted a number of violations:
 - USPCI recently failed to sample groundwater in all monitoring wells immediately after detecting contamination caused by a leak in an existing storage cell;
 - In addition, USPCI has had four formal administrative actions filed against it by the Oklahoma State Department of Health (OSDH) since 1978; and
 - OSDH sought to revoke USPCI's license to operate as a result of an incident that occurred in 1984.



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- **Environmental Impact Statement.** The petitioners state that an EIS should be performed before the USPCI permit is approved. The petitioners argue that a recent incident involving leakage of dry cleaning fluid and the company's continued failure to comply with EPA guidelines provide sufficient cause for conducting an EIS. The petitioners contend that an EIS should be conducted even though USPCI's Lone Mountain facility is an "existing" facility.

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

In the Matter of:

U.S. Pollution Control, Inc.
Lone Mountain Facility
Waynoka, Oklahoma

EPA I.D. No. OKD 065 438 376

RCRA Appeal No. 91-11

ORDER DENYING REVIEW

Before me are three Petitions filed under 40 CFR §124.19 requesting review of a modification of a permit issued to U.S. Pollution Control, Inc. ("USPCI") under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§6901-6992k. The Petitions were filed by Save the Cimarron, Inc. ("STCI"); U.S. Congressman Glenn English (together with U.S. Senators Don Nickles and David L. Boren); and Marcus Castro.^{1/} The permit modification was jointly issued by U.S. EPA Region VI and the Oklahoma State Department of Health, and it authorizes USPCI to expand its commercial hazardous waste management facility known as the Lone Mountain facility, which is near Waynoka, Oklahoma. As requested by EPA's Judicial Officer, Region VI submitted a

^{1/} By letter dated April 23, 1991, USPCI requested "intervenor status" in this appeal. Although the rules do not provide for intervenor status, Section 124.19(c) provides that, upon a grant of review, an interested person may file an amicus brief. Because today's order denies review, USPCI's request has been rendered moot.

response to the Petitions dated July 12, 1991.^{2/} STCI thereafter filed a reply dated July 17, 1991.^{3/}

Under the rules that govern this proceeding, a RCRA permit 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 CFR §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to §124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is thus on Petitioners.

The Petitions raise three issues. First, Petitioners argue that an Environmental Impact Statement ("EIS") should have been prepared prior to the issuance of the permit modification. It is well settled, however, that an EIS is not required prior to the issuance of a RCRA permit determination because the permit proceeding itself serves as the functional equivalent of an EIS. See 40 CFR §124.9(b)(6); State of Alabama v. EPA, 911 F.2d 499, 504-05 (11th Cir. 1990).

^{2/} In its response to the Petitions, Region VI argued that the STCI and Castro Petitions should be denied as untimely. See Region Response at 3-4. It subsequently withdrew this procedural challenge, stating that Petitioners had complied with filing instructions, including those governing timeliness, provided orally by the Regional program office. See Letter from T. Sykes to T. Dowling (July 17, 1991).

^{3/} Although STCI's reply was neither authorized by rule nor submitted pursuant to leave, it was considered to ensure a full airing of the issues.

Second, Petitioners assert that USPCI's past history of noncompliance with RCRA warrants denial of the modification request. The Region responds that while serious past noncompliance might, in some cases, justify a denial of authority to build or expand a facility under the RCRA omnibus provision,^{4/} the permit here contains additional conditions to ensure compliance. The Region further asserts that Petitioners have failed to show that the permit modification is insufficient to protect human health and the environment. USPCI's past noncompliance as described in the Petitions is a source of serious concern, but it does not rise to a level that suggests that future noncompliance is inevitable. Without deciding whether the omnibus provision could ever be used to deny a RCRA permit or a request for authority to expand due to a history of noncompliance, I agree with Region VI that Petitioners have failed to show that the permit here is inadequate. I do, however, share Petitioners' concerns regarding the necessity for strict permit compliance at this facility, and I therefore direct the Region, in conjunction with the State, to maintain vigilant

^{4/} The omnibus authority is set forth in RCRA §3005(c)(3), which requires that every RCRA permit "contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C. §6925(c)(3). The Region submits that this provision might justify a permit denial where the applicant's past noncompliance is so serious as to suggest that future noncompliance is inevitable, and that the Agency could not draft sufficient conditions to ensure adequate protection of human health and the environment.

oversight and to initiate prompt enforcement action where appropriate to compel such compliance.

Finally, STCI contends that geological and other technical factors at the site have not been adequately characterized. It relies in part on a 1987 Consent Agreement entered into by USPCI and the Oklahoma State Department of Health, which states that USPCI had failed to describe adequately the uppermost aquifer and interconnected aquifers, including groundwater flow direction and rate. STCI also relies on the Region's comments on USPCI's workplan to address existing contamination at the site. While further characterization is evidently necessary to address the existing contamination, Petitioners have failed to show that groundwater conditions are inadequately characterized for purposes of authorizing use of the new cells. The Region expressly determined that USPCI has now fulfilled the federal regulatory requirements for the permit modification, including those that govern groundwater monitoring for the new cells. The Petitions fail to show that this determination is clearly erroneous or otherwise warrants review.

For the reasons set forth above and in the Region's Response to the Petitions, review is denied. ^{2/}

So ordered.

Dated: 2-8-91



William K. Reilly
Acting Administrator

^{2/} In addition to the reasons set forth above, the Castro Petition warrants denial due to Castro's failure to comment on the draft permit. See Region Response at 5; 40 CFR §124.19(a).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of U.S. Pollution Control, Inc., Lone Mountain Facility, RCRA Appeal No. 91-11, were sent to the following persons in the manner indicated:

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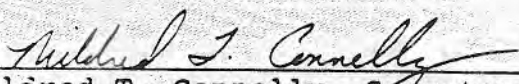
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Dated: FEB 10 1992


Mildred T. Connelly, Secretary
to the Judicial Officer