RCRA Permit Appeal Fact Sheet **1991**

FACILITY: Chemical Waste Management, Inc. (Chem Waste)
Kettleman City, California
CAT 000 646 117
RCRA Appeal No. 91-17

PETITIONER: El Pueblo pare el Aire y Agua Limpio (El Pueblo)

PETITION FILED: July 12, 1991

STATUS OF PETITION: See Permit Appeal Status Report

ISSUE: Procedural issues

Summary of Petition:

The Kettleman City community group, El Pueblo, is petitioning for review of the hazardous waste permit modification granted by Region 9 to Chem Waste's Kettleman Hills Facility in Kettleman City, California. The petitioner contends that Region 9's permit modification approval violated standard ethical conduct for government employees. Specifically, the petitioner contends that under 18 USC Section 208(a) government employees are prohibited from negotiating financial terms of employment with a company in which he has participated personally and substantially as a government officer through decision, approval and/or disapproval. El Pueblo maintains that Mr. Breitlow, the Region 9 official responsible for Chem Waste's RCRA Part B permit modification application, accepted employment with Chem Waste approximately two weeks after approving the company's permit modification. Therefore, the petitioner argues that Mr. Breitlow's actions demonstrate that he could not have made an unbiased or equitable review of the application since it is clear that he must have been negotiating his salary with Chem Waste at the same time that he was also negotiating the permit modification.

The petitioner maintains that it was impossible for El Pueblo or any other member of the public to raise the conflict of interest objections to Mr. Breitlow's employment negotiations during the formal public hearing process, as Mr. Breitlow's actions were by their very nature secretive. El Pueblo contends that given the clear conflict of interest in Mr. Breitlow's actions, the final decision of the permit modification should be withheld pending full investigation of this matter. If a full investigation results in a conviction for violation of any laws, the petitioner requests that the permit be declared void in accordance with 18 USC Section 218. El Pueblo further requests that EPA reopen all Chem Waste permits and permit modifications granted by Region 9 during the time in which Mr. Breitlow was negotiating with Chen Waste for future employment,

including at a minimum EPA's March 19, 1991, authorization to construct landfill unit B-18. The petitioner maintains that had El Pueblo known of Mr. Breitlow's conflict of interest, the group certainly would have appealed that permit modification.

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication. Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
Chemical Waste Management, Inc.	)	RCRA Appeal No. 91-17
Kettleman Hills Facility	)	
	)	
Permit No. CAT 000 646 117	)	

[Decided June 15, 1991]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

CHEMICAL WASTE MANAGEMENT, INC.
KETTLEMAN HILLS FACILITY

RCRA APPEAL NO. 91-17

ORDER DENYING REVIEW

[Decided June 15, 1992]

Syllabus

Petitioner, El Pueblo para el Aire y Agua Limpio, appeals a June 5, 1991, decision by Region IX issuing a permit modification to Chemical Waste Management, Inc. (CWM). Petitioner contends that the decisionmaking process was tainted because James C. Breitlow, the Chief of the Permits Section for Region IX, was discussing potential employment with CWM at the same time the modification was being considered by the Region. Petitioner suggests that Mr. Breitlow violated the Agency's ethical standards and may be subject to criminal penalties under 18 U.S.C. §208(a), and asks that the permit be delayed or declared void pending a full investigation. Petitioner also asks that certain previously issued permits be reopened.

Held: Although Mr. Breitlow should have recused himself slightly earlier than he did, he did not substantially participate in the decision to approve the June 5, 1991, modification and there is no evidence that his minimal participation in the permit review process in any way benefitted CWM. Moreover, the final decision to approve the modification was made after Mr. Breitlow had left the Agency. In light of the totality of these circumstances, the decisionmaking process was not compromised or prejudiced by Mr. Breitlow's actions. Review is therefore denied.

With regard to reopening other permits, the only other permit determination that was made after Mr. Breitlow's initial contact with CWM was a March 19, 1991, modification. Because that modification became effective thirty days after service of notice (40 C.F.R. §124.15(b)), the Board is without jurisdiction to review it. Accordingly, review of that modification is also denied.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion of the Board by Judge Reich:

This case involves a petition for review of the issuance by U.S. EPA, Region IX, on June 5, 1991, of a permit modification to Chemical Waste Management, Inc.'s (CWM's) Kettleman Hills facility. The petition also asks that a previous modification, approved on March 19, 1991, be reopened. The facility, located in Kings County, California, is a hazardous waste treatment, storage and disposal facility operating under a Resource Conservation and Recovery Act (RCRA) permit first issued in March of 1988. The Kettleman Hills facility has been the site of considerable controversy, with substantial concerns being raised by and on behalf of its primarily Latino community.

Petitioner, El Pueblo para el Aire y Agua Limpio, argues that these permit modification decisions were tainted because James C. Breitlow, former Chief of the Permits Section, Hazardous Waste Management Division for Region IX, was discussing potential employment with CWM at the same time the modifications were being considered. Thus, according to Petitioner, the permit modifications should be stayed pending a full investigation and declared void if any laws were violated. Region IX submitted portions of the administrative record and a response to the petition. Attached to that response were declarations of various persons involved either in Mr. Breitlow's discussions with CWM or with the processing of CWM's permit modifications. The Petitioner provided comments on the Region's response on December 19, 1991.

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. 33412 (May 19, 1980). The preamble to the Federal Register notice in which Section 124.19 was promulgated 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 on the petitioner. For the reasons set forth below, we conclude that Petitioner has failed to show that review of the permit modifications is warranted under 40 C.F.R. §124.19, and therefore review is denied.

I. *Background*

A. *Permit Modifications*

On July 31, 1990, CWM requested a class 2 modification to its existing RCRA operating permit that would allow it to construct a new landfill (known as landfill B-18) at its Kettleman Hills facility. For reasons of administrative efficiency, this request was incorporated into another proposed modification (modification #3) which contained additional changes to the RCRA permit including, among other things, the approval of a closure plan for another eleven landfills and three surface impoundments. Under an agreement with the State of California, [1] the California Department of Health Services (DHS) [2] conducted the primary technical review of the entire modification package, conducted public hearings, reviewed public comments, and prepared the requisite permit decision documents for EPA approval. DHS transmitted the completed modification package to Region IX with a cover letter addressed to Mr. Breitlow on February 20, 1991, and recommended its approval.

On March 19, 1991, the Region issued a part of the modification package addressing only the class 2 modification request (authorizing completion of the B-18 landfill). At the informal request of the United States Fish and Wildlife Service (FWS), the Region delayed final approval of the balance of the permit modification pending the release of an FWS biological opinion addressing potential harm to endangered species. [3] This modification was issued on June 5, 1991, and is the subject of this appeal. Petitioner further requests that EPA reopen all CWM permits and permit modifications granted by the

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[1] California is not an authorized State under RCRA §3006(b), 42 U.S.C. §6926(b), but receives RCRA grant funds to assist EPA in the technical analysis and development of RCRA permits and modifications.

[2] DHS has recently reorganized as the Department of Toxic Substances Control, California Environmental Protection Agency.

[3] FWS's final biological opinion was issued on May 2, 1991.

Region during the time in which Mr. Breitlow was discussing possible employment with CWM.

B. *Mr. Breitlow's Contacts With CWM*

From December 1986 to May 1991, Mr. Breitlow was employed by Region IX as Chief of the Permits Section, Hazardous Waste Management Division. On February 21, 1991, Mr. Breitlow received a telephone call from Corin Hylton, an executive recruiter employed by Northern California Management Recruiters in San Francisco, California. Mr. Hylton asked Mr. Breitlow if he was interested in employment in the private sector. Mr. Breitlow indicated that he might be interested in working for companies engaged in environmental work such as Chevron, Dow, DuPont, or CWM. Declaration of James C. Breitlow at ¶8. Mr. Breitlow agreed to send Mr. Hylton a copy of his resume and gave Mr. Hylton permission to send "blind" copies (without any identifying personal information) to companies such as the ones Mr. Breitlow described.

On either February 25 or 26, 1991, Mr. Hylton contacted CWM on behalf of Mr. Breitlow, although he did not identify his client as Mr. Breitlow at that time. (Mr. Hylton's Declaration is ambiguous as to the precise date of this first contact with CWM.) On March 8, 1991, after receiving expressions of interest from CWM, Mr. Hylton identified Mr. Breitlow as his client and sent CWM a complete copy of Mr. Breitlow's resume. Mr. Breitlow was not aware that he had been identified to CWM until March 15, 1991. Breitlow Declaration at ¶9. On that date, Mr. Hylton informed Mr. Breitlow of CWM's interest and that an interview had been scheduled for March 22, 1991. Mr. Breitlow immediately informed his supervisor, Michael Feeley, that he was recusing himself from all decisions relating to CWM and submitted a signed statement to that effect. Declaration of Michael Feeley in Support of Region IX's Response To Petition for Review at ¶3; Breitlow Declaration at ¶10. Mr. Breitlow also informed Fredrick Moore, an environmental engineer in the Permits Section, who was responsible for matters concerning CWM's Kettleman Hills facility.

Mr. Breitlow interviewed with CWM on March 22 & 26, 1991. On April 23, Mr. Breitlow informed his supervisor that he had accepted

a position with CWM as Environmental Manager for the Western ENRAC Division. Mr. Breitlow's last day with EPA was May 12, 1991. He began working for CWM on May 13, 1991.

II. *Discussion*

A. *June 5, 1991 Modification*

Petitioner contends that Mr. Breitlow violated "codes of ethical conduct for government employees" [4] and suggests that he may be

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[4] EPA's ethical standards of conduct for employees provide, in part:

> Employees may not use their official positions for private gain or act in such a manner that creates the reasonable appearance of doing so.
>
> Employees therefore must not:
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> * * *
>
> (d) Take any action, whether specifically prohibited or not, which would result in or create the reasonable appearance of:
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> (1) Using public office for private gain;
> (2) Giving preferential treatment to any organization or person;
> (3) Impeding Government efficiency or economy;
> (4) Losing independence or impartiality of action;
> (5) Making a Government decision outside of official channels; or
> (6) Adversely affecting public confidence in the integrity of Government or EPA.

40 C.F.R. §3.103.

subject to criminal penalties under 18 U.S.C. §208(a). [5] Today's decision addresses only the alleged ethical violations. [6]

Under the Agency's ethical standards, an employee's duty to refrain from participating in matters affecting a prospective employer arises as soon as the employee, either directly or through an intermediary, makes contact with that employer. *See* EPA Ethics Advisory 87-7 (July 17, 1987) Attachment at 2. (This would not include the mass distribution of resumes without additional communications. *Id.*)

In the present case, Mr. Breitlow specifically mentioned CWM as one of the companies in which he was interested and shortly thereafter Mr. Hylton contacted CWM on Mr. Breitlow's behalf. Given Mr. Breitlow's expressed preferences, it was reasonable for him to assume that CWM would receive a copy of his blind resume. Mr. Breitlow was also well aware that his Section was processing the CWM permit modification. Under a strict reading of the ethical guidelines,

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[5] That section provides, in part:

> [W]hoever, being an officer or employee of the executive branch of the United States Government * * * participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination * * * or other particular matter in which, to his knowledge, he, * * * or any person or organization with which he is negotiating or has any arrangement concerning prospective employment, has a financial interest –
>
> Shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

[6] Because the Agency's ethical standards require an employee to avoid actions which might result in or create the "reasonable appearance" of impropriety, they impose a much broader standard of disqualification than that imposed by 18 U.S.C. §208. As to any alleged violation of §208, we note that the Region's response to the petition for review asserts that the United States Attorney's Office concluded, after investigation, that prosecution was not warranted. We did not attempt to confirm this assertion in light of privacy considerations and since we did rely upon it in reaching our decision. Region IX's Response to Petition for Review at 2.

Mr. Breitlow should have recused himself at the time his resume was sent to CWM (February 25 or 26, 1991) rather than waiting until March 15, 1991. [7] After a thorough review of the record on appeal, however, we conclude that the eighteen or nineteen day delay in recusal, combined with Mr. Breitlow's minimal participation in the matter, does not warrant review of the June 5, 1991, permit modification.

The declarations submitted with the Region's Response to Petitions for Review support a determination that Mr. Breitlow did not substantially participate in the permit review process while it was under consideration by the state. It was DHS that prepared the initial permit modification package, conducted public hearings, and prepared the appropriate documentation. Although there was consultation with EPA, at no time did Mr. Breitlow "review, advise or express any concern at all concerning the technical contents or preparation of the permit modification package." Declaration of Fredrick Moore in Support of Region IX's Response to Petition for Review at ¶5; *see also* Breitlow Declaration at ¶¶7, 15. Rather, it was Fredrick Moore who consulted with DHS on development of the permit modification package. Declaration of William Veile in Support of Region IX's Response to Petition for Review; Declaration of James Pappas in Support of Region IX's Response to Petition for Review. The submission by DHS to Region IX, reflecting the culmination of the state's review, preceded even the first contact between Mr. Breitlow and Mr. Hylton and, as such, could not have been affected by the subsequent course of events.

The documentation submitted by Region IX indicates that the only decision concerning CWM's permit modification in which Mr. Breitlow participated was the decision to delay issuance of modification #3 until the FWS completed its final biological opinion. Mr. Breitlow concurred in that decision on or about February 26, 1991. Moore Declaration at ¶5. This decision was adverse to CWM's interests at the

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[7] This is true even though CWM initially received a copy of Mr. Breitlow's resume which Mr. Hylton characterized as "blind". The ethical guidelines indicate that the obligation of recusal becomes effective when an employee makes contact with a particular person or organization either directly or through an intermediary. This situation occurs once that contact is made on behalf of a specific individual, whether or not the potential employer is initially aware of the applicant's name.

time in that it delayed the ultimate approval of this modification, which had been requested by CWM itself. Mr. Breitlow did not participate in any other substantive decision regarding the modification. [8] *Id.* at ¶¶5-7; Feeley Declaration ¶¶4-5. We therefore reject Petitioner's suggestion that Mr. Breitlow improperly influenced the modification decision. It should also be noted that the final modification decision was issued after Mr. Breitlow's recusal and after he had left the Agency entirely.

We note that in support of its petition, Petitioner also suggests that several other aspects of the modification process were tainted by Mr. Breitlow's alleged conflict of interest. Specifically, Petitioner contends that

> despite repeated requests, both EPA and [DHS] refused to hold a public hearing on this permit modification in Kettleman City, the community closest to -- and most affected by -- the toxic waste dump. EPA has further refused to do a health risk assessment of the permit modification, despite the community's very real fears of toxic air contamination.

Petition at 3. Petitioner also states that "based on a decision by Mr. Breitlow, the EPA *did not even show up* at the sole hearing on this permit modification, instead abdicating responsibility entirely to [DHS]." *Id.* at 4 (emphasis in original). We note, however, that the public

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[8] The record on appeal contains two documents on which Mr. Breitlow's name appears. These are the official file copies of the Final Decision on the March 19, 1991 modification and the letter transmitting the Agency's notice of this decision to CWM. Mr. Breitlow's name appears along with several others on the concurrence line of these documents. Thus, at first glance, it might appear that Mr. Breitlow concurred in the March 19 modification. Upon closer examination, however, it appears that these documents do not show that Mr. Breitlow concurred in these decisions. Rather it was Thomas Kelly, an environmental engineer in the Permits Section, who signed these documents as "Kelly 4 Breitlow." Because of his recusal, Mr. Breitlow had instructed Mr. Kelly to act as the Permits Section Chief when necessary to review decisions relating to CWM. Declaration of Thomas Kelly in Support of Region IX's Response to Petition for Review at ¶4. Although it is unfortunate that Mr. Kelly indicated his concurrence in this manner, the record indicates that he did not consult with or receive any input from Mr. Breitlow. *Id.*

hearing, conducted by DHS, was held on November 27, 1990, well before Mr. Breitlow was contacted regarding employment in the private sector. Thus there is no basis in the record to conclude that any decisions regarding the location of, or the Region's participation in, the public hearing were influenced by Mr. Breitlow's subsequent employment contacts with CWM. Moreover, the record on appeal indicates that Mr. Breitlow did not substantially participate in these decisions. Similarly, the record indicates that any decisions regarding the need for a risk assessment were made prior to February 25 or 26, 1991 (the date Mr. Hylton first contacted CWM on Mr. Breitlow's behalf), and, in any case, were not made by Mr. Breitlow. Therefore, none of these allegations justifies review of the permit modifications.

We therefore conclude that, because of Mr. Breitlow's limited involvement in preparing the modification package, the short period of time between the initial contact with CWM and Mr. Breitlow's recusal, [9] and the fact that the final modification decision was made after Mr. Breitlow had left the Agency, review of the June 5, 1991, permit modification is not warranted and is hereby denied. [10] Had the delay

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[9] We note that there is language in the Agency's ethics guidance indicating that, in certain cases, recusal may not be a sufficient response to avoid ethical concerns. In some cases, Agency employees may be required to refrain from any contacts with a potential employer if that employer has pending business with the Agency. *See* EPA Ethics Advisory 86-10 (November 6, 1986) and attached Department of Justice memorandum dated November 12, 1976. We reach no conclusion as to whether this requirement should have applied to Mr. Breitlow. Under the facts of this case, there is no reason to conclude that Mr. Breitlow's discussions with CWM in any way unduly influenced the permit review process as conducted by the Region or that any action other than Mr. Breitlow's recusal was necessary to avoid such potential influence.

[10] In reaching this conclusion, we recognize that neither Petitioner nor the public in general was given notice of Mr. Breitlow's recusal, nor were they aware of his limited involvement in the development and approval of the permit modification. It is therefore understandable that the timing of Mr. Breitlow's decision to accept a position with CWM could arouse public concern and suspicion. Although we conclude that there was no improper influence in the present case, in the future the Region may wish to consider providing the public with more complete disclosure whenever possible. For example, the Region may have avoided this situation by fully disclosing the circumstances surrounding Mr. Breitlow's recusal at the same time it issued the June 5, 1991, modification. By this

(continued...)

in recusal been greater, or Mr. Breitlow's involvement been more significant, we might well have reached a contrary result.

B. *March 19, 1991 Modification*

Petitioner also requests that we reopen all previous CWM permits and permit modifications "issued by Region IX during the time in which Mr. Breitlow was negotiating with [CWM] for future employment, including at a minimum the EPA's March 19, 1991 authorization to construct landfill B-18." Petition at 4. Because any contacts with CWM could not be viewed as starting any earlier than February 25 or 26, 1991, only the March 19, 1991, permit modification is encompassed by this request. However, the March 19, 1991, permit modification became effective in accordance with 40 C.F.R. §124.15(b), thirty days after service of notice since it was not appealed at that time. The Board has no jurisdiction over that permit modification. Review is therefore denied.

We note that even if we had jurisdiction over the March 19 modification, we would likely have denied review given the facts of this case as discussed in the previous section dealing with the June 5 modification.

So ordered.

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[10](...continued)
time, Mr. Breitlow had already left the Agency and begun work with CWM and full disclosure of Mr. Breitlow's limited role might have clarified and perhaps resolved Petitioner's concerns.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Chemical Waste Management, Inc., Kettleman Hills Facility, RCRA Appeal No. 91-17, were sent to the following persons in the manner indicated:

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Dated: JUN 15 1992

Johnese R. Wilson for
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