RCRA Permit Appeal Fact Sheet **1991**

FACILITY: Ciba-Geigy Corp. (Ciba-Geigy)
Warren County, NY
NYD 002-069-748
RCRA Appeal No. 91-28

PETITIONERS: Ciba-Geigy and Hercules, Inc. (Hercules)

PETITION FILED: November 12, 1991

STATUS OF PETITION: See Permit Appeal Status Report

ISSUE: Joint permitting

Summary of Petition:

Both Ciba-Geigy (as owner) and Hercules (as operator) seek review of the corrective action permit issued by EPA Region 2 to its Glen Falls Site, located in Warren County, New York. The petitioners contend that the permit fails to include a provision that requires EPA's permit to be terminated upon either interim or final authorization of New York State's corrective action program.

The petitioners also note that the permit issued by the New York State Department of Environmental Conservation (NYDEC) to the Glen Falls Site is virtually identical to EPA's permit in terms of corrective action requirements and is more stringent in terms of closure and post-closure requirements. The petitioners maintain that two corrective action permits will be unduly burdensome by requiring a duplication of efforts with no added benefit.

Therefore, the petitioners cited that the Agency should either determine that it was inappropriate for the Region to have issued the corrective action permit, or that the permit should include language requiring termination of the permit upon delegation of the HSWA corrective action program to New York.

J. Michael

(Slip Opinion)

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

In the Matter of:	)	
CIBA-GEIGY Corporation and Hercules, Inc.	)	RCRA Appeal No. 91-28
RCRA Permit No. NYD 002 069 748	)	

[Decided April 7, 1992]

ORDER DENYING REVIEW

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

RCRA Appeal No. 91-28

ORDER DENYING REVIEW

Decided April 7, 1992

Syllabus

The Environmental Protection Agency, Region II, issued a permit to Petitioners, CIBA-GEIGY Corp. and Hercules, Inc., under the 1984 Hazardous and Solid Waste Amendments (HSWA) to the Resource Conservation and Recovery Act of 1976 (RCRA). Petitioners seek review on two grounds. First, Petitioners contend that the HSWA permit is defective because it fails to provide for its automatic termination upon authorization of New York State's HSWA program. Second, Petitioners argue that because the HSWA permit contains similar or identical requirements to those in the State portion of the RCRA permit, the Region abused its discretion in issuing the permit.

Held: First, nothing in RCRA or its implementing regulations requires that a HSWA permit specifically provide for its termination upon State authorization. Matters relating to the administration of federally-issued permits should be handled in a Memorandum of Agreement between the Agency and the State. Second, issuance of the HSWA permit was consistent with RCRA and its implementing regulations, and Petitioners have failed to establish any abuse of discretion. Review is therefore denied on both issues.

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

Opinion by Judge Reich:

CIBA-GEIGY Corporation and Hercules, Inc. (Petitioners) seek review of the federal portion of a permit issued to Petitioners by Region II under the 1984 Hazardous and Solid Waste Amendments (HSWA) to

the Resource Conservation and Recovery Act of 1976 (RCRA). [1] Specifically, Petitioners contend that the Region's failure to include a permit provision providing for the automatic termination of the federal HSWA permit upon authorization of New York State's HSWA program amounts to an error of law and renders the permit defective. Petition for Review at 15-16. Petitioners also argue that because the permit issued by Region II contains many of the same corrective action requirements as those required under the State portion of the RCRA permit, [2] it was an abuse of discretion for the Region to issue a separate corrective action permit. *Id.* at 16. As requested by the Agency's Judicial Officer, [3] Region II submitted relevant portions of the administrative record and a response to the petition. For the reasons set forth below, we conclude that Petitioners have failed to show that review of the permit is warranted under 40 C.F.R. §124.19, and therefore review is denied.

Under the rules governing this proceeding, a RCRA permit determination 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 C.F.R. §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 on the petitioner. *See* 40 C.F.R. §124.19. Petitioners have not met this burden.

Although Petitioners are correct that, upon authorization of the State HSWA program, New York State may administer the State HSWA

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[1] The non-HSWA portion of the permit was issued by New York, an authorized State under RCRA §3006(b), 42 U.S.C. §6926(b). New York State is seeking authorization to operate its HSWA program in lieu of the Federal program.

[2] Although New York State has not been authorized to administer the HSWA program, the State portion of the RCRA permit includes corrective action requirements.

[3] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

program in lieu of the Federal HSWA program, [4] nothing in RCRA or its implementing regulations indicates that the federal permit must provide for its automatic termination upon State authorization. The regulations indicate that matters relating to the administration of federally-issued permits are to be handled by Memorandum of Agreement between the Agency and the State. [5] Review is therefore denied on this issue.

Petitioners' argument that the Region abused its discretion in issuing the HSWA portion of the RCRA permit is also rejected. Petitioners contend that, because the State portion of the permit includes corrective action requirements under State law, the Region should not have issued the federal HSWA portion of the permit, and that issuance of the federal portion will lead to unnecessary duplication. We disagree. Although some duplication between the federal and State portions of a permit may result where, as here, a State chooses to impose corrective action requirements prior to receiving HSWA authorization, the Region does not abuse its discretion by issuing the HSWA portion of the permit. On the contrary, the statutory language indicates that a RCRA permit must contain corrective action requirements, [6] and that the Agency must administer the HSWA

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[4] RCRA §3006(g), 42 U.S.C. §6926(g).

[5] 40 C.F.R. §271.8(b)(6) provides, in part:

> When existing permits are transferred from EPA to the State for administration, the Memorandum of Agreement shall contain provisions specifying a procedure for transferring the administration of these permits. If a State lacks authority to directly administer permits issued by the Federal government, a procedure may be established to transfer responsibility for these permits.
>
> NOTE: For example, EPA and the State and the permittee could agree that the State would issue a permit(s) identical to the outstanding Federal permit which would be simultaneously terminated.

[6] *See* RCRA §3004(u), 42 U.S.C. §6924(u). That section provides, in part:

> a permit issued after November 8, 1984, by the Administrator or a State shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment,

(continued...)

program unless the State program is finally authorized. [7] Thus, the Region cannot waive its statutory obligation to administer the HSWA program prior to State authorization. Because issuance of the HSWA permit was consistent with RCRA and its implementing regulations and because Petitioners have failed to establish any abuse of discretion, review is denied.

So ordered.

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[6](...continued)
storage, or disposal facility seeking a permit under this subchapter * * *.

[7] *See* RCRA §3006(g)(1), 42 U.S.C. §6926(g)(1) ("The Administrator shall carry out [the HSWA] requirement[s] directly in each State unless the State program is finally authorized * * * with respect to such requirement[s].").

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of CIBA-GEIGY Corp. and Hercules, Inc., RCRA Appeal No. 91-28, were sent to the following persons in the manner indicated:

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Dated: APR - 7 1992

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