



RCRA Permit Appeal Fact Sheet

1987

FACILITY:

Chemical Waste Management, Inc. (CWM)
Emelle, Alabama
ALD 000 622 464
RCRA Appeal No. 87-12

PETITIONERS:

- The State of Alabama
- The Alabama Chapter of the Sierra Club and the Alabama Conservancy
- The Alabamians for a Clean Environment (ACE), the Sierra Club (Alabama Chapter), the Alabama Conservancy, and Greenpeace U.S.A., Inc.
- Chemical Waste Management, Inc.
(At the request of counsel, petitions #1 and #2 were treated as a single petition.)

PETITIONS FILED:

July 10, 1987

STATUS OF PETITIONS:

See Permit Appeal Status Report

ISSUES:

- Procedural issues
- Level of detail
- Miscellaneous other issues (compliance with RCRA and the National Environmental Policy Act; specific unit design and operating standards; standard conditions; general facility conditions; storage and management of containers; hazardous waste landfill; short term incinerator permit; rotary kiln incinerator; groundwater protection; waste analysis plan)

Summary of Issues Contested by the State of Alabama, the Alabama Chapter of the Sierra Club, the Alabama Conservancy, the Alabamians for a Clean Environment, and Greenpeace U.S.A., Inc.:

Each of these petitioners specify areas in which it believes EPA's decision to issue the permit was based on inadequate, insufficient, or inappropriate information. The petitioners contend that the terms of the permit are erroneous. Their arguments are presented below.

- **Compliance with RCRA and the National Environmental Policy Act.** The petitioners claim that EPA failed to comply with NEPA by deciding not to prepare an Environmental



Impact Statement (EIS). The petitioners further argue that the RCRA permitting process is not functionally equivalent an EIS. In addition, the petitioners contend that the contingency plan does not satisfy the requirements of RCRA and that the groundwater monitoring and protection provisions in the permit do not comply with RCRA.

- **Specific Unit Design and Operating Standards.** The petitioners argue that the landfill design is inadequate to protect groundwater and that the Exposure Information Report is inadequate to support a permit decision for the landfill. In addition, the petitioners contend that the decision to prolong the operation of an unlined surface impoundment at the facility and to allow significant concentrations of volatile organics in the impoundment was erroneous. Third, the petitioners argue that the decision not to require complete and sufficient monitoring for the proposed incinerator was an erroneous finding of fact.
- **Procedural Issues.** The petitioners contend that the designated permit period of seven years is too long. The petitioners also assert that EPA's conclusion that the issuance of the permit would have no effect on cultural resources is erroneous. The petitioners believe that EPA ignored CWM's track record of illegalities and violations in issuing the permit and issued the permit despite current violations at the facility. Moreover, the petitioners believe that EPA failed to take important consent decree studies into account in the permit review.
- **Due Process.** The petitioners state that the public participation was inadequate and that due process violations occurred in the issuance of the permit.

Summary of Issues Contested by Chemical Waste Management, Inc.:

CWM argues against the granting of the above three petitions submitted to EPA in a document entitled, *Opposition to Petitions for Review*. This opposition states, among other reasons, that these petitions should be denied because they lack specificity, they do not make the requisite "threshold showing" required in the RCRA permitting process to obtain review, and that some of the petitioners lack standing for their requests for review (i.e., the petitioner did not comment, during the public comment period, on the condition for which it now petitions for review).

CWM contests three general areas of the permit: (1) the permit conditions for the incinerator; (2) the shallow well network requirements; and (3) the permit's incorporation of descriptive information, including designs and drawings, provided by CWM in the permit application process. A synopsis of the petitioner's contentions are presented below. A more detailed discussion of the specific conditions for which this petitioner seeks review follows.

CWM requests review of a number of the permit conditions for the rotary kiln incinerator. In each case, the petitioner contests that the conditions are either inappropriate for the incinerator,



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arbitrarily required by EPA, or unnecessary procedural requirements. The petitioner argues that the most significantly flawed conditions are the two which impose a combustion air feed requirement in the event that the incinerator's thermal relief vent opens. Other conditions which the petitioner would like reviewed are:

- The limitation of CWM's operations in the period following the trial burn to a specific mix of waste feeds;
- Six conditions which deal with viscosity limitations and atomizing steam pressure;
- Two conditions prohibiting wastefeed to the incinerator before performing analyses of metals in each batch of waste;
- The specific condition that CWM must meet in designing a new trial burn plan;
- Two conditions which specify the number of waste containers CWM must inspect to minimize;
- The introduction to the incinerator of free standing liquid in containers;
- Two conditions which identify the types of wastes that may be fed into the incinerator through the ram-feeder device; and
- Two conditions which specify requirements for submitting design engineering details for Agency approval and for incorporating "as-built" drawings of the incineration system into the permit after completion of construction.

The petitioner does not believe that there is any justification for automatically triggering a full-scale assessment, including an evaluation plan, if hazardous constituents are detected in the shallow well network. CWM believes that such a requirement in the permit reflects a preconceived notion of what an evaluation plan should include and does not contain sufficient flexibility to allow for a mere investigation of laboratory procedures where that might be all that is appropriate. The petitioner suggests that the permit should instead require CWM to share with EPA any migration rate data from the shallow well network and to determine on a case-by-case basis over the course of time if additional studies are necessary. In addition, it is the opinion of the petitioner that the condition which requires the facility to analyze for three metals and to measure for total metals creates an inconsistency in the final permit by requiring CWM to analyze for total metals while elsewhere in the permit establishing further regulatory obligations contingent on the measurement of dissolved metals.



The petitioner argues that EPA introduced an undesirable level of detail into the permit by adopting, as permit attachments, “plans,” including drawings, designs and specifications, that CWM furnished in its application to describe how it intends to develop and operate the facility and comply with Part 264. CWM further contests that the condition which specifies the records that CWM must retain at the facility is burdensome.

- **Standard Conditions.** The petitioner objects to the condition which specifies the records that CWM must retain at the facility, especially the particularly burdensome requirement that CWM retain “records of all data used to prepare documents required by this permit.”
 - The petitioner objects to the condition which provides that CWM may not commence treatment, storage or disposal of hazardous waste in a new unit or a modification of an existing unit until the Regional Administrator has either inspected the unit or waived inspection by failing to notify CWM within 15 days of EPA's intent to inspect. If, however, EPA notifies CWM of its intent to inspect a new or modified unit, the Agency has an indefinite time in which to conduct the actual inspection. CWM, concerned over the procedural aspects of the permit, requested in its comments on the draft permit that EPA set a reasonable schedule for its inspection.
 - The petitioner objects to the condition which requires CWM, at the time it submits monitoring reports to report to the Regional Administrator any noncompliance with the permit that is not otherwise reported. The petitioner argues that to encourage, rather than discourage, internal compliance monitoring, EPA should place reasonable limits on the use to which it will put such reports. The petitioner believes that this condition would be triggered by subjective determinations of “compliance” and “noncompliance.” Moreover, the petitioner claims that this condition conflicts with the express terms of an EPA Consent Agreement and Order applicable to this facility and, in contravention of EPA's policy on environmental audits, will discourage candid internal monitoring of the facility's compliance status.
- **General Facility Conditions.** The petitioner objects to the condition which was amended in the final rule to require CWM to obtain EPA's prior written authorization for changes concerning the use of equipment or materials equivalent to those identified in the approved specifications for any unit.
 - The petitioner objects to the condition which was amended in the final permit to require that “as-built” drawings must be made available to EPA for review at the time of any inspection conducted pursuant to another specific permit condition which prohibits CWM from commencing treatment, storage, or disposal of hazardous waste in a new or modified unit until EPA has either inspected the unit or waived inspection.



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- The petitioner requests an additional permit condition. The petitioner claims that a number of permit conditions require CWM to obtain EPA's written approval. The petitioner, however, is concerned that there is no provision in the permit outlining the schedule to be followed by EPA in reviewing such requests, the standard against which those requests will be judged, or the status of CWM's requests and submittal if EPA disapproves them. To provide the certainty that should accompany a final permit, the petitioner requests that these provisions be spelled out in a general condition.
- **Storage and Management of Containers.** The petitioner challenges EPA's failure to include certain wastes among those CWM is authorized to store at the facility. The petitioner claims that no facility exists that is authorized to treat, store, or dispose of a particular waste that CWM is storing at its facility under interim status. The petitioner argues that unless the permit allows for storage of these wastes at the facility, CWM will immediately be in violation of the permit once the permit becomes effective.
- **Hazardous Waste Landfill.** The petitioner objects to the condition which established limits on cyanide and sulfide bearing wastes that may be landfilled at the facility. The petitioner argues that these limitations are not appropriate for landfill operations and that they should be modified.

The petitioner objects to the incorporation of four specific attachments into the permit. The petitioner believes that these attachments add unnecessary bulk and undesirable detail to the permit. The attachments, according to the petitioner, are also inconsistent with the permit conditions, in places, and thus cause confusion.

- **Short Term Incinerator Permit.** The petitioner objects to the condition which subjects CWM unnecessarily to a potential permit violation if the company inspects the number of containers required by the permit, finds no free standing liquids, but subsequently discovers that an uninspected container holds free liquids. The petitioner wants the "Catch-22" effect of this condition eliminated.

The petitioner objects to the conditions which improperly (according to the petitioner) exclude containerized waste from that which may be handled through the facility's ram-feeder.

The petitioner objects to the conditions which require the automatic cut off of wastefeed to the incinerator when the wastefeed rates exceed limits specified for the various burning periods (e.g., "shakedown," trial burn, and post-trial burn).



The petitioner objects to the conditions which require that if the thermal relief vent (TRV) is opened, the kiln damper must be operated to admit 5922 scfm of air to the kiln. The petitioner believes that the requirements of this condition are without technical basis or justification. The petitioner further claims that EPA arbitrarily raised the combustion air requirement to 5922 scfm, even though State calculations demonstrated that 1921 scfm of combustion air will supply more oxygen than is required for complete thermal destruction of organic constituents in the kiln when the TRV opens.

The petitioner objects to the condition which requires CWM to prepare and submit a new trial burn plan for EPA's approval. This condition also specifies the conditions that must be demonstrated in the trial burn scenarios. The petitioner challenges the requirement in this condition to demonstrate in each test the maximum thermal load to the incinerator and the minimum resistance time. This requirement is an error because these two conditions simply cannot both be demonstrated in each test.

The petitioner objects to the conditions which require that each batch of waste be analyzed for 11 metals before it is fed to the incinerator, even if there is no limitation on the metals content of wastes fed into the incinerator. The petitioner argues that there is no regulatory requirement for these metal analyses and, more important, the information gathered from the metal analyses serves no purpose relevant to deciding whether wastes are acceptable for the incinerator. The petitioner believes that this method of gathering data on metals fed to the incinerator unnecessarily and unreasonably interferes with CWM's operations.

- **Rotary Kiln Incinerator.** The petitioner objects to the condition which prohibits the feed of hazardous waste to the incinerator until another particular condition, which provides for notice to and inspection by EPA, has been complied with. The petitioner states that EPA, in writing the final permit, apparently decided that the condition which provides for notice and inspection is insufficient for the incinerator, and therefore, CWM must not only submit as-built drawings for the incinerator, but must also receive EPA's written approval of those drawings before feeding waste to the incinerator. The petitioner claims that the incinerator as-built drawings should be treated in the same manner as all others under the permit.

The petitioner objects to the condition which requires that CWM go through a permit modification to incorporate its approved as-built drawings for the incinerator into the permit. The petitioner believes that the inclusion of detailed drawings in the permit is unnecessary and modifying the permit to accomplish this would be a waste of both CWM's and EPA's resources.



The petitioner objects to the condition which contains inspection requirements for containers to ensure that the containers do not contain free standing liquids. The petitioner objects to this condition for the same "Catch-22" reasons as explained above under "Short Term Incinerator Permit."

The petitioner objects to the condition in which the Agency retained the viscosity limits instead of relying on manufacturers' specifications. The petitioner suggested a similar change to another condition (which sets out wastefeed limitations) in its comments on the draft permit, and claims that those comments applied equally to this condition and that the changes which were made to the other condition should also be made to this one.

The petitioner objects to the condition for the rotary kiln incinerator that is similar to the condition above under "Short Term Incinerator" concerning the exclusion of containerized waste, and contests this permit condition on the same grounds as it did the earlier condition.

The petitioner objects to the condition for the rotary kiln incinerator that is similar to the item above under "Short Term Incinerator" concerning analyzing each batch of waste for metals, and contests this permit condition on the same grounds as it did the earlier condition.

The petitioner objects to the conditions which mandate automatic waste feed cutoff when atomizing steam pressure to the secondary combustor or to the kiln falls below 90 psig. The petitioner suggests that the valve for a burner be described in the permit as "the lower limit of the optimal operating range recommended by the manufacturer," rather than specifying a particular psig limit.

The petitioner objects to the condition which requires that the kiln damper admit 5922 scfm of combustion air into the kiln when the thermal relief valve is open. The petitioner believes this condition to be improper and contests the condition on the same grounds as it did the similar condition discussed above under "Short Term Incinerator."

- **Groundwater Protection.** The petitioner objects to the condition which requires CWM to analyze three metals and to measure for total metals. The petitioner claims that this condition creates an inconsistency in the final permit by requiring CWM to analyze for total metals while elsewhere in the permit establishing further regulatory obligations contingent on the measurement of dissolved metals.

The petitioner challenges the Agency's decision not to include in conditions under this section the language suggested by CWM in its comments on the draft permit to assure that a permit modification proceeding would not be necessary if CWM, or a laboratory with which it deals, decides it must change the Field Parameter Form or Chain of Custody Form. The



petitioner believes that these conditions, without the suggested language, provide another example of the excessive detail included in the permit. The petitioner further argues that as long as the permit ensures that proper procedures are followed to protect the integrity of the sample, the form used to do so is irrelevant.

The petitioner objects to the condition which requires that an evaluation plan be submitted if a retest confirms the presence of hazardous constituents in a sample from a shallow well. The petitioner claims that, contrary to what EPA says in its response to the comments on the draft permit, this condition reflects a definite preconceived notion of what an evaluation plan should include and, furthermore, does not contain sufficient flexibility to allow for a mere investigation of laboratory procedures where that might be all that is appropriate.

The petitioner objects to the condition which requires CWM to submit both a report and an application for a permit modification within 30 days of completing an evaluation program, and to the condition which states that CWM need not submit the application for a permit modification if the Regional Administrator finds that the presence of hazardous constituents in ground water was not due to a release from a landfill unit or surface impoundment. The petitioner questions how CWM could possibly know what the Regional Administrator will find before CWM has submitted its report. The petitioners believes that these conditions are confusing and unnecessary, and that the manner in which the two conditions interact is unclear. The petitioner suggests either deleting these requirements or, at the very least, amending the requirements so that the application for a permit modification would not be required until after EPA has reviewed the report.

- **Waste Analysis Plan.** The petitioner objects to EPA's deletion from the Waste Analysis Plan of six exceptions to CWM's pre-acceptance procedures. The petitioner claims that this change will substantially impair its ability to respond promptly to hazardous waste cleanup and disposal problems throughout the Region. The petitioner states that the Agency apparently incorrectly assumed that CWM accepts these wastes without obtaining a detailed chemical and physical analysis of the wastes as required by 40 CFR Section 264.13(a)(1). The petitioner further argues that the RCRA regulations require the facility accepting hazardous wastes to "obtain" such an analysis at some point, but not necessarily to "perform" such an analysis itself or have that analysis in hand before waste is received at the facility. Finally, the petitioner argues that this change would preclude CWM from receiving an unscheduled load of waste at the facility.

The petitioner objects to the conditions concerning the Waste Analysis Plan which are in need of changes to maintain conformity with the change to the conditions requested in item 1 above under "Hazardous Waste Landfill."

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

In the Matter of:)
)
Chemical Waste Management, Inc.) RCRA Appeal No. 87-12
(Emelle, AL))
)
RCRA Permit No. ALD 000622464)
_____)

ORDER GRANTING IN PART AND DENYING IN PART
PETITIONS FOR REVIEW

On May 27, 1987, U.S. EPA Region IV issued a permit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C.A. §§6901-6991i, authorizing Chemical Waste Management, Inc. ("CWM") to operate a hazardous waste treatment, storage, and disposal facility near Emelle, Alabama. CWM, the State of Alabama, and various public-interest organizations now seek review of that permit determination under 40 CFR §124.19.^{1/}

The Emelle facility is the largest hazardous waste management facility in the country. It is located in a rural, sparsely

1/ One petition for review was filed July 10, 1987, by Alabamians for a Clean Environment, the Alabama Conservancy, the Alabama Chapter of the Sierra Club, and Greenpeace U.S.A., Inc. A separate petition was filed by the Alabama Chapter of the Sierra Club and the Alabama Conservancy. Counsel for these organizations (referred to collectively as "ACE") subsequently asked that these two petitions be treated as a single request for review. See Letter from Gary A. Davis to EPA Chief Judicial Officer Ronald L. McCallum (Sept. 23, 1987).

(Footnote continued)

populated area, and receives and manages a wide variety of hazardous waste. Current operations include landfill disposal, stabilization, solvent and fuel recovery, containerized waste storage, drum decanting, tank storage, and surface impoundment storage. The final permit would also authorize CWM to build and operate a rotary kiln incinerator.

Under the rules governing this proceeding, there is no appeal as of right from the Region's permit decision. Ordinarily, a RCRA permit determination 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.^{2/} The preamble to the regulations states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." 45 Fed. Reg. 33,412 (1980). The burden of demonstrating that review is warranted is on the petitioners.

(Footnote 1 continued)

On September 11, 1987, Region IV submitted a response to the petitions for review ("Region Response") as requested by the Chief Judicial Officer. Also before me is CWM's "Opposition to Petitions for Review" (Sept. 2, 1987), "Reply of Chemical Waste Management, Inc. to Region IV Response to Petitions for Review" (Oct. 14, 1987), and the State of Alabama's "Reply to Region IV Response to Petition for Review and to Opposition to Petitions for Review" (Oct. 1, 1987). ACE was invited to submit a reply to the Region's response and to CWM's opposition, and it did so on November 30, 1987.

2/ See 40 CFR §124.19(a); In re Highway 36 Land Dev. Co., RCRA Appeal No. 87-5, at 2 (Sept. 2, 1987); In re Bryant Waste Management, Inc., RCRA Appeal No. 85-2, at 2 (June 23, 1986); In re Earth Indus. Waste Management, Inc., RCRA Appeal No. 84-3(a), at 2 (March 12, 1985).

For the reasons set forth below, I conclude that the petitions for review should be granted to the extent they request the Region to consider adding specific controls for products of incomplete combustion ("PICs") and metal emissions from the incinerator. In all other respects, the petitions are denied. Because certain issues raised here might arise in future permit proceedings, the reasons for denying review are discussed briefly below. The other issues do not warrant review essentially for the reasons set forth in Region IV's response to the petitions and its response to comments on the draft permit.^{3/}

DISCUSSION

I. PICs And Metal Emissions

ACE requests that the permit include specific terms and conditions addressing PICs and metal emissions from the incinerator. The Region responds that existing RCRA regulations do not

^{3/} Region IV challenges the standing of the State of Alabama to petition for review under 40 CFR §124.19, alleging that the State's authorized legal representative did not participate in the permit proceeding below. Although the State's current Attorney General, Don Siegelman, participated below, he did so as Alabama's Secretary of State and Attorney General-elect. Because the matters raised by the State's petition have been raised by other petitioners, I need not determine whether the State has standing.

CWM's challenges to permit conditions IX.B.2.d and IX.B.4.c and Attachment K-5 are rejected based on Region IV's representation that certain errors in these terms will be corrected to eliminate internal conflicts and other minor inaccuracies. See Region Response at 103, 119, 120. The Region should also ensure that its current interpretation of the permit (see, e.g., Region Response at 121) is maintained consistently throughout the life of the permit unless its terms are modified.

require such standards. ACE recognizes the absence of specific regulations for PICs and metals, but contends that appropriate permit conditions should be added under the Agency's "omnibus authority" established by RCRA §3005(c)(3).^{4/}

The omnibus provision vests the Administrator with a large measure of discretion in imposing permit terms and conditions beyond those required by the regulations if necessary to protect human health and the environment. See Section IV below. Region IV is correct that not every term suggested by commenters need be added under this authority. In this case, however, I believe that the Region should consider adding specific standards for PICs and metals. The Agency expects to propose regulations in the near future to address these emissions. When the regulations are proposed, the Agency will issue contemporaneous guidance to all RCRA permit writers to consider including controls for these emissions immediately under EPA's omnibus authority. Some permit writers in other EPA offices have already anticipated the proposed rules and are addressing these emissions under the omnibus provision. To protect human health and the environment, and for the sake of uniformity throughout the RCRA program, Region IV should reevaluate CWM's permit in light of this forthcoming guidance.

^{4/} RCRA §3005(c)(3) states that "[e]ach permit * * * shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." 42 U.S.C.A. §6925(c)(3). Comparable language appears in the Agency's regulations. See 40 CFR §270.32(b)(2).

Of course, permit writers are not required to incorporate all proposed regulations into every permit under the omnibus provision. Reconsideration is warranted here, however, because (1) the Agency recognizes the potential risks posed by PICs and metal emissions; (2) the forthcoming guidance will recommend that permit writers consider including controls for these emissions immediately under EPA's omnibus authority; and (3) the Region's primary reason for refusing to consider imposing the requested standards was the absence of existing regulations (rather than the absence of any risk to public health or the environment). ^{5/}

Ordinarily, the grant of a petition for review results in further briefing to facilitate full review of the contested provision. Here, it is unlikely that additional briefing would alter the ultimate disposition of this issue, and therefore no briefing schedule will be set at this time. After the Region decides whether to modify the permit in light of the forthcoming guidance, the parties may petition for review of that decision under 40 CFR §124.19.

II. Compliance with NEPA

Under Section 102 of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C.A. §4332, federal agencies are required to prepare an Environmental Impact Statement ("EIS") for

^{5/} See EPA Response to Comments at 82, 89 (AR 360). The administrative record is cited as "AR [#]." The number corresponds to the number of the document as listed in the index to the record prepared by the Region.

major federal actions significantly affecting the quality of the human environment. The State of Alabama and ACE contend that NEPA requires EPA to prepare an EIS before issuing a RCRA permit. Region IV responds that the RCRA permitting process is functionally equivalent to an EIS and therefore fulfills NEPA's requirements.

The Region's position is fully consistent with Agency policy as reflected in the Rules ^{6/} and prior practice. ^{7/} It is also supported by the long-standing case law recognizing the doctrine of functional equivalency under NEPA, ^{8/} including one recent case that specifically applies that doctrine to the RCRA permit at issue in this proceeding. ^{9/}

ACE argues that the functional equivalency doctrine does not apply unless all five "core issues" set forth in NEPA have been considered. ^{10/} Most courts, however, have not been so rigid. The

6/ See, 40 CFR §124.9(b)(6); 44 Fed. Reg. 34,247 (June 14, 1979).

7/ See In re IT Corp., RCRA Appeal No. 83-2 (July 11, 1983).

8/ See, e.g., Amoco Oil Co. v. EPA, 501 F.2d 722, 749-50 (D.C. Cir. 1974); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 384-87 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1306 (10th Cir. 1973); Warren County v. North Carolina, 528 F. Supp. 276, 286-87 (E.D.N.C. 1981); Maryland v. Train, 415 F. Supp. 116, 121-22 (D. Md. 1976).

9/ See *Alabamians for a Clean Env't v. EPA*, 26 Env't Rep. Cas. (BNA) 2116, 2121-22 (N.D. Ala. Dec. 8, 1987).

10/ NEPA's five core issues include (1) the environmental impact of the proposed action; (2) any unavoidable adverse environmental effects (3) alternatives to the proposed action; (4) the relationship between local short-term uses of the environment and long-time productivity; and (5) any irreversible and irretrievable commitments of resources entailed by the proposed action. See 42 U.S.C.A. 4332(2)(C).

better view is that NEPA is fulfilled where the federal action has been taken by an agency with recognized environmental expertise and whose procedures ensure extensive consideration of environmental concerns, public participation, and judicial review.^{11/}

The RCRA permitting process plainly meets these criteria. Moreover, the regulations on which the permit is based are themselves the product of a process that ensures examination of environmental concerns, public participation, and judicial review.

III. The Permit Term

ACE and the State of Alabama summarily assert that the seven-year permit period is too long and that the Region's decision not to impose a shorter term is a clearly erroneous finding of fact. Establishing a permit term, however, is not a factual finding but an exercise of discretion appropriately made in the first instance by the Region.

The RCRA regulations provide for permit terms of up to ten years. 40 CFR §270.50(a). Region IV originally proposed a ten-year permit term for the Emelle facility, but reduced the period to seven years in response to comments on the draft permit. In

^{11/} See Pacific Legal Foundation v. Andrus, 657 F.2d 829, 834 n.4 (6th Cir. 1981) (rejecting contention that functional equivalency doctrine requires consideration of all five core issues under NEPA); Amoco Oil, 501 F.2d at 750 (functional equivalency doctrine applies where EPA procedures require "orderly consideration of diverse environmental factors and * * * 'strike a workable balance between some of the advantages and disadvantages of full application of NEPA'") (quoting Portland Cement Ass'n, 486 F.2d at 386); Anaconda Co., 482 F.2d at 1305-06; Maryland v. Train, 415 F. Supp at 122.

so doing, Region IV carefully weighed two competing concerns. It recognized that the Emelle facility "should operate under permit conditions based on regulations that reflect new or better technologies or new requirements * * *." EPA Response to Comments at 16 (AR 360). On the other hand, it acknowledged the need to provide the permittee with some measure of stability and certainty in the regulatory environment. Id. The record shows that the seven-year term reflects the Region's considered judgment regarding the efficacy of current permitting standards, the likelihood of technological advances in the near future, the need to use EPA resources efficiently, and the amount of time needed to build, test, and evaluate the incinerator. Petitioners have failed to demonstrate that this judgment warrants review. ^{12/}

IV. The Omnibus Provision

ACE contends that Region IV refused to go beyond the regulations to protect human health and the environment as required by the omnibus provision. As noted above, this provision imparts a large measure of discretion to EPA. Although it requires the imposition of any permit term deemed necessary to protect human health or the environment, the determination whether any particular

^{12/} The State of Alabama argues that a five-year term is more appropriate because the permit is subject to a mandatory review after five years under RCRA §3005(c)(3). In its response to comments on the draft permit, however, Region IV explained that it opted for a seven-year term because it expects the final permitting decision after the five-year review to take 18 to 24 months. EPA Response to Comments at 17 (AR 360).

term is necessary is left to the Administrator's discretion. On the other hand, a blanket refusal or consistent failure to consider certain proposed terms simply because they go beyond the regulations would contravene the omnibus provision. As stated in the preamble to the regulatory codification, Congress intended "to authorize the Agency to impose permit conditions beyond those mandated by the regulations, such as new or better technologies or other new requirements." 50 Fed. Reg. 28,723 (1985) (citing S. Rep. No. 284, 98th Cong., 1st Sess. 31 (1983)).

In addition to the plain meaning of the statutory and regulatory omnibus provisions, their overall contexts guide the interpretation of EPA's omnibus authority. First, the placement of the statutory omnibus provision in RCRA §3005 makes clear that it relates specifically to permit standards for owners and operators of hazardous waste facilities. The provision does not justify terms and conditions unrelated to the permit applicant, the facility at issue, or the treatment, storage and disposal of hazardous waste.

Second, RCRA §3004(a) requires EPA to promulgate regulations establishing performance standards for hazardous waste facilities "as may be necessary to protect human health and the environment." 42 U.S.C.A. §6924(a). In other words, the regulations themselves are generally sufficient to protect human health and the environment. It is reasonable to presume that they do so in any given case unless there have been material changes (e.g., in technology) after the regulations were promulgated or unless other special circumstances exist. Otherwise, the omnibus provision could be

used to force a complete reconsideration of the entire regulatory scheme in every permit proceeding, thereby undermining the finality of the regulations and jeopardizing the entire permitting process. The omnibus provision requires no such relitigation where a commenter on a draft permit summarily attacks the adequacy of existing regulations, and as a matter of policy I refuse to entertain such conclusory challenges contained in petitions for review.

Third, the omnibus provision must be viewed in light of the considerable deference the regulations afford the Regional Administrator in writing RCRA permits. 40 CFR §124.19. Where the Regional Administrator declines to exercise the omnibus authority, a petition for review must show that the failure to add the requested term is clearly erroneous or significant as a matter of policy. The same test also applies to a petition for review where the Regional Administrator exercises the omnibus authority, i.e., the petition for review must show that the decision to go beyond the regulations is clearly erroneous or significant as a matter of policy.

As discussed above, as a matter of policy I am today directing the Region to consider regulating PICs and metal emissions under the omnibus provision to protect human health and the environment and to promote uniformity throughout the RCRA program. ACE also requests that the permit address alleged transportation hazards associated with the Emelle facility. It fails to show, however, that the RCRA regulations applicable to transporters (40 CFR Part 263) and the parallel regulations of the U.S. Department of Transportation are inadequate to protect public health and

the environment. Moreover, an entirely separate statutory provision, RCRA §3003, requires regulations establishing standards for transporters of hazardous wastes; there is some question whether transportation hazards are sufficiently related to the treatment, storage and disposal of hazardous waste so as to fall within the omnibus authority established by RCRA §3005.

ACE also summarily attacks the Agency's landfill design regulations, stating that the required plastic liners are inadequate to protect groundwater throughout the time the waste remains hazardous. Absolute prevention of migration forever, or even for the long term, is beyond the current technical state of the art. See 51 Fed. Reg. 10,708 (1986); 47 Fed. Reg. 32,314 (1982). Long-term migration of waste is minimized through the use of post-closure caps. Id. The Region reasonably determined that the existing regulations provide sufficient protection, and ACE has failed to show that this decision is clearly erroneous or otherwise warrants review.^{13/} As noted above, conclusory challenges to the adequacy of the regulations will not be entertained in RCRA permit appeals.

V. Procedural Allegations

ACE argues that public participation in the permitting process was inadequate. The record shows, however, that Region IV exceeded the requirements for public participation in several respects. For

^{13/} Contrary to ACE's assertions, the Region did not refuse altogether to acknowledge its omnibus authority. In fact, it exercised this authority to retain an existing shallow well monitoring system, and to require waste feed analysis for metals. EPA Response to Comments at 33, 54 (AR 360). Region IV was aware of and used its omnibus power as it deemed necessary to protect public health and the environment.

example, the Region doubled the required 45-day comment period (40 CFR 124.10(b)) to 90 days, held a public informational meeting not called for by the rules, ^{14/} and had extra copies of key documents available at two locations in addition to the official document repository. ^{15/} Region Response at 17-23. Moreover, the rules themselves ensure that the draft permit is explained and summarized in a Fact Sheet so the public can comment meaningfully at the public hearing. 40 CFR §124.8. ^{16/} The Region's efforts in this proceeding resulted in extensive public participation both through written comments and testimony at the hearing. ^{17/} Although some parties will inevitably desire additional opportunities for comment, the Regional Administrators are closest to the process and should be afforded maximum flexibility in deciding whether

^{14/} ACE complains that information obtained at the public meeting could not be used in developing comments on the permit because the public meeting was held the same day as the public hearing. At the hearing, however, counsel for ACE requested that the public comment period be extended (AR 350, Tr. 154), which is precisely what Region IV did. The Region accepted written comments well after the public meeting, and presumably any comments based on information obtained at that meeting were submitted during this time.

^{15/} Although some persons or groups wanted personal copies of these voluminous materials, costs precluded this alternative. The Region reasonably concluded that existing copies should be placed in the community most directly affected by the facilities, Sumter County. Region Response at 22; EPA Response to Comments at 14 (AR 360).

^{16/} ACE criticizes Region IV for not summarizing the permit application (as opposed to the draft permit). The rules, however, contemplate that public comment be directed to the draft permit so that it is focused on the tentative views of the decisionmaker rather than those of the applicant. 45 Fed. Reg. 33,408 (1980).

^{17/} The Region received approximately 145 written comments on the draft permit, and 78 persons made statements at the public hearing. Region Response at 3, 23.

and how to go beyond the notice and comment requirements described in the rules.

ACE also contends that the permitting process was procedurally defective because Region IV officials failed to remain objective. It argues that EPA was improperly biased because (1) the Emelle facility accepts Superfund cleanup waste from EPA contractors; (2) CWM employs former EPA officials; and (3) statements made by EPA officials reflected a predisposition to issue the permit. ACE raised the same issues in a complaint filed in U.S. District Court. That Court recently dismissed the complaint, specifically rejecting ACE's argument regarding impermissible bias. Alabamians for a Clean Environment, 26 Env't. Rep. Cas. (BNA) at 2123-24. I agree that this argument is baseless. There has been no specific showing of bias or undue influence, and the interests cited by ACE are too remote to suggest such bias. Furthermore, public statements on policy issues by decisionmakers standing alone are not grounds for disqualification. Id. at 2124.

CONCLUSION

The petitions are granted to the extent they request the Region to consider controls for PICs and metal emissions from the incinerator. Relevant portions of the permit relating to the incinerator (to be specifically identified by the Regional Administrator) shall remain stayed. The Region is directed to consider adding permit conditions addressing PICs and metals in light of the forthcoming guidance on these emissions. In all other respects,

the petitions for review are denied. The Region shall give public notice of this decision under 40 CFR §124.10. ^{18/}

So ordered.

Dated: May 27, 1988



Lee M. Thomas
Administrator

^{18/} Ordinarily, all conditions unrelated to the incinerator would become immediately effective. CWM requests 30-days notice before these conditions become effective to facilitate the transition from interim status to permitted operations. I believe this request should be addressed in the first instance by the Regional Administrator.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting in Part and Denying in Part Petitions for Review in the Matter of Chemical Waste Management, Inc. (Emelle, AL) RCRA Appeal No. 87-12 were served upon the following persons.

By first class mail,
postage prepaid:

Gary A. Davis
Attorney at Law
707 South Gay Street
Knoxville, TN 37902

J. Brian Molloy
Mary G. Edgar
Piper & Marbury
888 Sixteenth Street, NW
Washington, DC 20006

R. Craig Kneisel
Ray Vaughn
Assistant Attorneys General
Office of the Attorney General
Alabama State House
11 South Union Street
Montgomery, AL 36130

Elizabeth Osheim
Assistant Regional Counsel
Solid Waste & Emergency Response
Law Branch
U.S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

Sandra Beck
Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland Street, NE
Atlanta, GA 30365

By hand delivery:

Bessie Hammiel
Headquarters Hearing Clerk
Room 3806 A-110

Dated: 5/31/88


Brenda H. Selden, Secretary
to the Chief Judicial Officer