RCRA Permit Appeal Fact Sheet **1987**

FACILITY: Ecolotech, Inc.
Dayton, Ohio
OHD 980 700 942
RCRA Appeal No. 87-14

PETITIONER: City of Dayton

PETITION FILED: July 30, 1987

STATUS OF PETITION: See Permit Appeal Status Report

ISSUES: Miscellaneous other issues (groundwater monitoring and sampling requirements; facility location)

Summary of Petition:

The petitioner contests permit conditions in two general areas: groundwater monitoring and sampling requirements, and facility location.

- **Groundwater Monitoring and Sampling Requirements.** The City of Dayton contends that the groundwater monitoring requirements established in the permit, which call for complete sampling only once every three months, are inadequate to detect contamination.

- **Facility Location.** The City of Dayton believes that the location of the Ecolotec facility poses an unacceptable risk of contamination to the public water supply for Dayton and the surrounding areas of Montgomery County. This petitioner states that the facility is located in the recharge zone of the aquifer which serves the public water supply, and is close to several of the City's wellheads.

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

In the Matter of:	
Ecolotec, Inc.	RCRA Appeal No. 87-14
RCRA Permit No. OHD 980700942	

REMAND ORDER

The City of Dayton, Ohio, has filed a July 28, 1987 petition (City Petition) under 40 CFR §124.19 requesting review of EPA Region V's decision to issue a permit to Ecolotec, Inc., under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C.A. §§6901-6991i. The permit authorizes continued operation and significant expansion of Ecolotec's hazardous waste treatment and storage facility. After a series of extensions (during which the parties engaged in unsuccessful settlement negotiations), Region V submitted a response to the City Petition on May 3, 1988 (Region Response) as requested by EPA's Chief Judicial Officer.

Under the rules governing this proceeding, there is no appeal as of right from the Region's permit decision. See 40 CFR §124.19. 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. 1/ 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 (May 19, 1980). The burden of demonstrating that review is warranted is on the petitioner.

Discussion

The City recognizes the beneficial services provided by Ecolotec to area businesses, but opposes permit issuance because the facility is located over a buried river aquifer that serves as the public drinking water supply for Dayton and surrounding areas. Region V responds that it has no authority to deny Ecolotec's permit application based on the City's concerns because the facility complies with existing location standards and other RCRA regulations. 2/ This conclusion is clearly erroneous because it conflicts with the Agency's statutory and regulatory omnibus authority. RCRA §3005(c)(3) provides that "[e]ach permit issued under this

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1/ See, e.g., In re Highway 36 Land Dev. Co., RCRA Appeal No. 87-5, at 2 (September 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).

2/ See Response to Comments Regarding the Resource Conservation and Recovery Act (RCRA) Hazardous Waste Management Facility Permit To Be Issued To Ecolotec, Incorporated, at 1-2 (June 29, 1987). In its response to the City Petition, Region V similarly states that "RCRA does not go as far as the City would like it to." Region Response at 9.

section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." When this authority was incorporated into EPA's rules, the Agency made clear that it may be used to deny a permit if necessary to protect human health and the environment:

> Section 3005(c) provides that each RCRA permit issued under section 3005 shall contain such terms as the Administrator deems necessary to protect human health and the environment (emphasis added). The Congressional intent underlying this amendment is to authorize the Agency to impose permit conditions beyond those mandated by the regulations, such as new or better technologies or other new requirements. S. Rep. No. 284, 98th Cong., 1st Sess. 31 (1983). The purpose of this amendment is to upgrade facility requirements in order to protect human health and the environment. The Agency believes that the authority to issue permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to deny permits where necessary to afford such protection. To hold otherwise would deprive this statutory amendment of its intended effect.

50 Fed. Reg. 28,723 (July 15, 1985) (emphasis in original). Thus, mere technical compliance with existing RCRA regulations is insufficient by itself to justify permit issuance where human health and the environment cannot be adequately protected. 3/

3/ I recognize that this conclusion conflicts somewhat with certain statements contained in a 1985 guidance document prepared by EPA's Office of Solid Waste. See, e.g., Permit Writers' Guidance Manual for the Location of Hazardous Waste Land Treatment, Storage, and Disposal Facilities, Phase I: Criteria for Location Acceptability and Existing Regulations for Evaluating Locations, at p. ES-3 (Final Draft, February 1985) (OSWER Policy Directive No. 9472.00-1) ("there is no legal basis for permit denial at a location that satisfies all criteria except the ground-water vulnerability cri-

(continued...)

Region V recognized its discretion under the omnibus provision to impose permit terms beyond those required by the rules. Indeed, it exercised this authority in an effort to address concerns over potential groundwater contamination by requiring Ecolotec to undertake monthly well pumping [4] and to pave and dike all waste management areas. It improperly failed, however, to consider whether permit denial might be necessary to protect human health and the environment.

The existence of specific site criteria for floodplains and fault zones but not hydrogeology (40 CFR §264.18) does not control the issue of whether hydrogeology may be the basis of permit denial in any particular case. The 1984 amendments to RCRA require EPA to issue regulations which "specify criteria for the acceptable location of new and existing treatment, storage, or disposal facilities as

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[3] (...continued)
terion"). That guidance was issued very shortly after the statutory omnibus provision became law and before EPA formally interpreted its omnibus authority to include the power to deny a permit. Today's decision reaffirms the Agency's authority under the omnibus provision to deny a permit based on hydrogeological or other concerns if necessary to protect human health or the environment. This holding is consistent with the basic policy thrust of the same 1985 guidance document, which states that "permitting of existing [RCRA] facilities in vulnerable settings above Class I ground water should be discouraged." Id. at p. 2-61.

[4] In its response to the petition, the Region erroneously states that the permit requires monthly monitoring (Region Response at 2, 6), but it subsequently clarified that Ecolotec would undertake quarterly monitoring and monthly well pumping. See Letter from T. Nelson (U.S. EPA Region V) to T. Dowling (U.S. EPA) (August 22, 1988).

necessary to protect human health and the environment." 42 U.S.C.A. §6924(o)(7). The legislative history to these amendments reflects considerable dissatisfaction with the existing regulations:

> A significant deficiency in the current land disposal regulations is the lack of hydrogeological locational standards. Existing standards are limited to provisions dealing with flood plains and fault zones. Studies recently conducted by the Agency have emphasized the importance of locational factors in determining the environmental performance of hazardous waste facilities. The broadened criteria should address such factors as proximity to groundwater or surface waters and, in particular, potential drinking water supplies (including sole source aquifers), wetlands, and population concentrations. These criteria are to establish whether locations are acceptable for existing facilities, as well as for new facilities.

S. Rep. No. 284, 98th Cong. 1st Sess., at 30 (1983). The Region mistakenly identifies the existing site criteria in 40 CFR §264.18 as the Agency's response to this statutory mandate. Region Response at 4. In fact, the current location standards were issued in 1981 (46 Fed. Reg. 2802 (January 12, 1981)), and are the very rules later deemed deficient by Congress. Additional criteria in response to the 1984 amendments have not yet been proposed for public comment. See 53 Fed. Reg. 14,375 (April 25, 1988). 5/ In the meantime, the Agency is at liberty to address issues of

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5/ The 1985 rule regarding placement of wastes in salt dome formations, salt bed formations, underground mines, and caves was added in response to RCRA §3004(b), not the mandate to issue site criteria set forth in RCRA §3004(o)(7). See 50 Fed. Reg. 28,746 (July 15, 1985).

hydrogeological vulnerability on a case-by-case basis under the authority conferred by the omnibus provision.

The Region correctly notes that a greater range of hydrogeological characteristics may be tolerated where (as here) a RCRA facility is used for waste treatment and storage, but not disposal. It also relies on a 1986 guidance document that says a vulnerable site may sometimes be addressed through engineered structures or other additional permit conditions. 6/ Although the permit at issue requires monthly well pumping as well as paving and diking, it is unclear from the record whether the Regional Administrator affirmatively determined that these terms adequately protect the City water supply or, on the other hand, whether they were imposed as a second-best alternative once permit denial was (erroneously) ruled out as legally inappropriate. Indeed, a supplement to the City Petition has called into question the adequacy of the hydrogeological data in the Region's hands at the time of permit issuance, thereby possibly undermining the entire factual predicate of the permit decision on this issue. See Letter from K. Winters to L. Thomas (December 31, 1987).

Although the Region (Response at 7-8) subsequently considered additional hydrogeological data presented by the

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6/ See Region Response at 5-7 (citing Guidance Criteria for Identifying Areas of Vulnerable Hydrogeology under the Resource Conservation and Recovery Act: RCRA Statutory Interpretive Guidance (Interim Final, July 1986)).

City (data not yet part of the formal record), it remains unclear whether the Region would have denied the permit had it recognized its authority to do so. The omnibus provision provides not only the authority, but the obligation, to ensure that every RCRA permit adequately protects human health and the environment regardless of the specific requirements set forth in the Agency's regulations. Given the proximity of the facility to the drinking water supply for more than 400,000 people, permit issuance here should take place only after a thorough examination of all relevant data and all legally appropriate alternatives.

Rather than receiving additional briefs on appeal, I am remanding the case for further consideration to ensure that the record contains the Region's views on whether human health and the environment can be adequately protected under continued operations and the proposed expansion. This remand should not be viewed as prejudging the issue. The Region is simply directed to reconsider the facility and the permit under the proper legal perspective, i.e., one that includes denial of the permit and denial of authorization to expand if necessary to protect human health and the environment under RCRA §3005(c)(3). If, after a full review of all relevant data, the Region determines that the permit adequately protects human health and the environment, it may reissue the permit as written. It may, of course, impose any additional terms under the omnibus provision, such as enhanced inspec-

tion requirements, more frequent monitoring, or a more stringent contingency plan, if it deems necessary. Mere technical compliance with the existing location, design, and operational standards is not, however, sufficient to justify permit issuance if human health and the environment cannot be adequately protected. The parties are strongly encouraged to resume settlement negotiations to determine whether relocation of the facility is feasible and appropriate.

The Region is directed to reopen the public comment period to receive any supplemental written comments from the City, Ecolotec, and any other interested persons. Its decision on remand should include a statement of the rationale for the determination under RCRA §3005(c)(3), including conclusions on whether the diking and paving requirements are adequately protective and whether the monthly pumping and quarterly monitoring would adequately protect the City's water supply in the event of a release. The Region's determination on remand will be subject to review under 40 CFR §124.19, and appeal of the remand decision will be required to exhaust administrative remedies under Section 124.19(f)(1)(iii). The Region shall give public notice of this remand under Section 124.10(a)(1)(iv).

So ordered.

Dated: Dec 14, 1988

Lee M. Thomas
Administrator