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

In the Matter of:	
Spokane Regional Waste-to-Energy Project	PSD Appeal No. 89-4
Permit Applicant	

ORDER DENYING REVIEW OF REVISED PERMIT DETERMINATION

This order addresses individual appeals filed by Lisa J. Kilian and Joan Honican and a joint appeal filed by Citizens for Clean Air and the Council for Land Care and Planning.

On December 13, 1988, the Washington State Department of Ecology (Ecology) issued a prevention of significant deterioration (PSD) permit to the Spokane Regional Waste To Energy Project (Spokane) for construction of an 800-ton-per-day municipal waste incinerator at an existing landfill west of the City of Spokane. The landfill is located on property leased from the Spokane International Airport.

On December 22, 1988, Citizens for Clean Air and the Council for Land Care and Planning jointly requested EPA to review the permit determination pursuant to 40 CFR §124.19. Federal review of the state-issued permit was appropriate because Ecology had made the permit determination pursuant to a delegation of authority from EPA Region X, Seattle, Washington. Any permit issued by a delegated state becomes an EPA-issued permit for purposes of federal law. 40 CFR §124.41; 45 Fed. Reg. 33,413 (May 19, 1980).

On June 9, 1989, following the filing of responses to the petition by Ecology and Spokane, I issued an order which denied review of all issues, including the predominant recycling issue, but which also remanded the permit determination to Ecology so it could determine the appropriate NO_x limitation achievable with thermal de-NO_x or an equivalent technology. See Spokane Regional Waste-to-Energy, PSD Appeal No. 88-12 (EPA June 9, 1989) (the "Remand Order").

Ecology revised the NO_x provisions of the permit in response to the Remand Order and prepared a draft revised permit for public comment. Public comment was accepted from June 28, 1989

to July 29, 1989, and Ecology held a public meeting during that same period, on July 19, 1989. Although public interest in the permit was evident, Ecology nevertheless decided not to convene an official public hearing because it found there was little expression of interest in the specific issue raised by the remand. Thereafter, Ecology prepared a response to the public comments and issued its revised final permit determination on September 1, 1989. The instant appeals followed.

Under the rules governing this proceeding, there is no appeal as of right from the permit decision. 40 CFR §124.19(a). Ordinarily, a petition for review of a PSD permit determination is not granted 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. The preamble to the regulation states, "this power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the Regional [State] level * * * ." 45 Fed. Reg. 33,412 (May 19, 1980). The burden of demonstrating that the permit conditions should be reviewed is therefore on petitioners. Petitioners have not met their burden in this instance.

Petition by Council for Land Care and Planning and Citizens for Clean Air

These petitioners assert that Ecology erred (i) by not holding a public hearing, (ii) by not preparing a supplemental environmental impact statement under state law, and (iii) by setting the NO_x emission limitation too high. The first alleged error has no merit because the decision to hold a public hearing (which is more formal than the "public meeting" held by Ecology) is largely discretionary. [1/] Under 40 CFR 124.12(a) the permit issuer is directed to hold a public hearing whenever the permit issuer finds that there is a "significant degree of public interest in a draft permit." Ecology elected not to hold a public hearing in this instance because the scope of the permit revision was narrow and it found no significant public interest in the revised NO_x limitation. Under the circumstances, no clear

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[1/] 40 CFR §124.12 specifies the criteria for a public hearing, which include giving prior notice in accordance with §124.10, allowing written and oral comment from any person, and making a tape recording or transcript of the proceedings. Although the specifics are not set forth in the record of this appeal, the "public meeting" Ecology held during the public comment period evidently did not meet one or more of these requirements.

error is apparent from Ecology's decision not to hold a public hearing. [2/]

The second alleged error is also without merit insofar as federal law is concerned. Questions relating solely to whether or not Ecology has satisfied a state requirement (respecting preparation of a state supplemental environmental impact statement) are beyond the purview of this proceeding under 40 CFR 124.19, the purpose of which is to determine Ecology's compliance with the federal Clean Air Act and applicable regulations.

The third alleged error is also not a sufficient reason to grant review. In sole support of this allegation, petitioners state that the NO_x limitation was based on current projections for the incinerator's solid waste stream, but that implementation of a more vigorous waste reduction and recycling program would decrease the size of the waste stream and thus automatically reduce NO_x emissions. Petition at 5. In other words, petitioners are again raising the recycling issue. That issue was rejected, however, as a subject for review for the reasons stated in the June 9 Remand Order, which remanded the permit to Ecology for the sole purpose of revising the permit's NO_x limitation based on use of thermal de-NO_x or an equivalent technology. The scope of review of the instant permit determination is therefore restricted by the Remand Order and does not include waste separation and recycling for control of NO_x emissions. As stated in the Remand Order:

> All that remains to be done now is for Ecology to set numerical emission limitations for the NO_x emissions using the agreed-to technology [thermal de-NO_x or equivalent], and to prescribe monitoring requirements and operating restrictions as deemed necessary or appropriate.

Remand Order at 11 (footnote omitted).

> Accordingly, I am remanding the permit to Ecology to revise the permit along these lines. Following reissuance of the revised permit, Petitioners shall be given the opportunity, in accordance with 40 CFR §124.19, to appeal any determination Ecology makes with respect to the revised NO_x limitation. Any such appeal shall be strictly limited to the scope of the revisions in the NO_x limitation.

Remand Order at 23-24 (emphasis added).

Petitioners nevertheless contend that waste separation and recycling should fit within the proper ambit of this appeal since

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[2/] Ecology held two public hearings before issuing its December 13, 1988 permit determination.

implementation of these practices would have the effect of reducing NO_x emissions. Petition at 5, n.2. I disagree. When the Remand Order is read in its entirety, it is clear that the decision to remand the permit for revision of the NO_x limitation was premised on recognition of thermal de-NO_x or an equivalent technology as the "best available control technology" (BACT) for NO_x emissions from this proposed facility. There was no intent to reopen the waste separation and recycling issue that had just been addressed at length for this specific permit. Therefore, since petitioners' grounds for reviewing the NO_x limitation would only reopen that issue, the petition for review must be denied in the interest of repose. Further consideration of the recycling issue is beyond the scope of the instant permit determination. [3/]

[3/] On November 30, 1989, I approved a proposal under Section 111(b) of the Clean Air Act to issue standards of performance that contain, among other things, a materials separation requirement and a NO_x emission limit for new municipal waste combustors. In broad outline, the proposal will require municipal waste combustors to separate for recovery (i.e., for "recycling") 25% of the municipal solid waste by weight. The eligible wastes are paper and paperboard; ferrous metals; nonferrous metals; glass; plastics; and yard waste (up to 10% credit allowed). In addition, there will be a prohibition on incinerating lead-acid vehicle batteries and a program to remove household batteries. The NO_x limit will be set at 120 to 200 ppmv (@ 7 percent oxygen) for large plants based on selective noncatalytic reduction techniques such as thermal de-NO_x and urea injection. If adopted in final form, the proposal will be applicable to new municipal waste combustors that "commence construction" within the meaning of 40 CFR §60.2 following publication of the proposal in the Federal Register. The proposal appears at 54 Fed. Reg. 52251 (December 20, 1989).

On November 30, 1989, I also approved proposed emission guidelines and compliance schedules under section 111(d) of the Act for existing municipal waste combustors. These guidelines, which will initiate state action to develop regulations controlling emissions from existing facilities, contain the same source separation provisions as the regulations proposed under section 111(b), except that the dates for compliance are farther in the future. The existing source guidelines are applicable to facilities that have "commenced construction" prior to the date of Federal Register publication. The proposed guidelines appear at 54 Fed. Reg. 52209 (December 20, 1989).

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Kilian Petition

On October 2, 1989, Lisa J. Kilian of Spokane, Washington, filed a one-page letter, stating that she was appealing this agency's decision to issue a PSD permit for the Spokane incinerator in accordance with 40 CFR §124.19. [4/] Her appeal did not,

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[3/](...continued)
In the section 111(b) proposal, EPA outlined the reasons why that proposal is consistent with the Remand Order in this case and the decision in Huntington Mass-Burn Incinerator, PSD Appeal No. 89-2 (August 2, 1989). I reaffirm those reasons today in declining to revisit the recycling issue. Of particular importance are the facts that much of the relevant data underlying the proposal was not contained in the record of this case, and that EPA had not made even tentative judgments regarding such data until the time of the proposal. Moreover, it is also important to emphasize that the section 111(b) proposal represents only the provisional views of the Agency regarding the current body of knowledge regarding municipal waste combustor emissions, and EPA is continuing to gather new data. The public will now have an opportunity to present comments on EPA's proposal, and the Agency will make a final decision only at the conclusion of that rulemaking. Thus, EPA's proposals under section 111 do not call into question the propriety of the earlier Remand Order in this case, which was a decision based on a record created several months prior to EPA's recent proposals. Also, should EPA ultimately promulgate its proposed regulations and guidelines under sections 111(b) and (d), the Spokane (and Huntington) facilities will eventually be required to comply with those applicable source separation and recycling requirements in addition to PSD permit requirements. For that reason, as well as in the interest of repose, I find that it would be inappropriate at this very late stage to hold the Spokane permit hostage to a potentially lengthy reconsideration process on top of the delays that have been incurred to date by revisiting the recycling issue in light of new information not contained in the record of this case.

[4/] Except to recite that the appeal is being filed pursuant to 40 CFR Part 124, petitioner Kilian does not make even a token effort to demonstrate compliance with the requirements for perfecting an appeal. The rules provide that "any person who filed comments on th[e] draft permit * * * may petition the Administrator to review any condition of the permit decision," whereas those who "failed to file comments * * * on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision." 40 CFR §124.19(a). Petitioner has not demonstrated that she meets

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however, identify the decision with any specificity. This omission is problematic because the agency has issued only one decision involving this facility -- the June 9 Remand Order -- and no administrative review of that decision is available under 40 CFR Part 124. If any appeal were to lie from that decision, it would be to the federal court of appeals, 42 USCA §7607(b), but not until the PSD permit for the incinerator became final, 40 CFR §124.19(f). It seems more likely that the decision petitioner is appealing is Ecology's September 2, 1989 revised permit determination. That decision, as stated previously, was issued in response to this agency's earlier decision and is appealable under 40 CFR §124.19 -- but, as provided in the earlier decision, only to the extent the appeal has a direct bearing on Ecology's NO_x determination.

It is readily apparent from the letter's brevity and lack of detail that petitioner has not satisfied any of the criteria for having Ecology's permit determination reviewed. Petitioner briefly expressed concern about emissions that will result from use of thermal de-NO_x technology at the incinerator, and about the state environmental impact statement that purportedly does not address these concerns; however, petitioner does not allege once that issuance of a permit calling for use of this technology will in any way render Ecology's PSD permit determination invalid or deficient under federal law. Accordingly, the petition for review must be denied. [5/]

Honican Petition

Joan Honican of Pullman, Washington, filed a letter, dated September 27, 1989 (received September 28, 1989), which says that it is a "formal appeal of your recent decision." (Emphasis added.) As noted above, however, no administrative review of this agency's June 9, 1989 decision is available. To the extent the letter can be construed as referring to Ecology's September 2, 1989 decision, the appeal must still be denied because it falls outside the scope of review prescribed by the earlier decision; and to the extent the letter's few comments about Ecology's NO_x determination might be deemed within the scope of review, they are made in passing and do not persuade me that review is justi-

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[4/](...continued)
any of these requirements for standing to file a petition or that they are otherwise inapplicable to her appeal.

[5/] By letter dated November 28, 1989, Petitioner has sought, without permission, to expand or substantially modify her original petition. This communication is not eligible for consideration because of the 30-day limitation for filing petitions for review. See 40 CFR §124.19(a).

fied. (The comments do not specify whether they are in reference to the original or the revised Ecology NO_x determination.)

Conclusion

Accordingly, I am denying petitioners' appeals. The Regional Administrator or his delegatee shall publish notice of this final action in the Federal Register in accordance with 40 CFR §124.19(f)(2).

So ordered. [6/]

Dated: JAN 2 1990

~~William K. Reilly~~ F Henry Habicht
Acting Administrator

[6/] The Air Transport Association of America (ATA) submitted a letter dated September 29, 1989 (received October 2, 1989), stating its opposition to issuance of the permit until completion of an environmental analysis. The ATA letter discussed matters that arguably fall within the proper scope of review -- for example, referring to the effects of NO_x control technology on aircraft safety and operations near the airport -- but ATA made no showing that it had standing to appeal on these grounds, nor did it specifically state that it was seeking review of the permit. Moreover, ATA ties its comments to an alleged need for a revision to a state environmental impact statement and thus does not raise any legitimate issue of federal law. I conclude therefore that the ATA letter does not meet the burden of persuasion necessary to warrant review of Ecology's permit determination. Furthermore, I note that because the incinerator will be located on airport property, the Federal Aviation Administration and the airport authorities have jurisdiction to address safety related issues stemming from the incinerator's operation.

Several letters from Spokane residents who opposed construction of the incinerator were received after the time for filing appeals under 40 CFR §124.19 had expired. These letters are not eligible for consideration because of the 30-day limitation on filing appeals.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review of Revised Permit Determination, PSD appeal No. 89-4, were mailed to the following by First class mail, postage prepaid.

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Dated: JAN - 3 1990

Brenda H. Selden, Secretary
to the Chief Judicial Officer