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 deteriora- tion (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 author- ity 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 NOx limitation achievable with thermal de-NOx 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 NOx 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 NOx 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. 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 NOx limitation. Under the circumstances, no clear error is apparent from Ecology's decision not to hold a public hearing.

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 NOx 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 NOx 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 NOx limita- tion based on use of thermal de-NOx 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 NOx emissions. As stated in the Remand Order:

> All that remains to be done now is for Ecology to set numerical emission limitations for the NOx emissions using the agreed-to technology [thermal de-NOx or equivalent], and to prescribe monitoring requirements and operating restric- tions 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 NOx limitation. Any such appeal shall be strictly limited to the scope of the revisions in the NOx 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 implementation of these practices would have the effect of reducing NOx 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 NOx limitation was premised on recognition of thermal de-NOx or an equivalent technology as the "best available control technology" (BACT) for NOx 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 NOx 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.

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 inciner- ator in accordance with 40 CFR 124.19. Her appeal did not, 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 NOx 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-NOx 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.

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 NOx determination might be deemed within the scope of review, they are made in passing and do not persuade me that review is justi- fied. (The comments do not specify whether they are in reference to the original or the revised Ecology NOx 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.

Dated:

William K. Reilly
Administrator

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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to the Chief Judicial Officer