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RCRA Permit Appeal Fact Sheet

1988

FACILITY: Olin Corporation (Olin), Badger Army Ammunition Plant (BAAP)
Baraboo, Wisconsin
WI9 210 020 054
RCRA Appeal No. 88-18

PETITIONER: Olin

PETITION FILED: October 21, 1988

STATUS OF PETITION: See Permit Appeal Status Report

ISSUE: - Miscellaneous other issues (permitting of government-owned, contractor-operated facility operators)

Summary of Petition:

Olin is petitioning for a review of Region 5's decision to issue the Federal portion of BAAP's RCRA permit jointly to the U.S. Army and Olin as owner and operator, respectively. The petitioner argues that the Region should have issued this permit to the U.S. Army as both owner and operator of the facility, because Olin is legally incapable of fulfilling the legal obligations as co-permittee.

The petitioner claims that although it has been contracted by the U.S. Army to operate hazardous waste management units at BAAP, a government-owned, contractor-operated facility, Olin does not, in fact, have "operational control" of the facility. Olin is basing its claim on the legal limitation presented by the Anti-Deficiency Act, 31 USC Sections 1341-1342, under which Olin is prohibited from taking any action at the facility (including any corrective action) without direct concurrence, direction, and funding by the U.S. Army. Consequently, Olin states that it does not meet the definition of "operator" provided in 40 CFR Section 260.10, since Olin is not "... responsible for the overall operation of (the) facility."

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

In the Matter of:

Olin Corporation, Badger Army
Ammunition Plant

RCRA Permit No. W19 210020054

RCRA Appeal No. 88-18

ORDER DENYING REVIEW

By petition dated October 27, 1988, Olin Corporation seeks review of the federal portion of a permit issued by EPA Region V under the Resource Conservation and Recovery Act of 1976 ("RCRA"), as amended, 42 U.S.C.A. §§6901-6991i (1983 and West Supp. 1989). The permit was issued to the U.S. Army and Olin as owner and operator, respectively, of the Badger Army Ammunition Plant ("BAAP") near Baraboo, Wisconsin. The federal permit conditions impose corrective action requirements, land disposal restrictions, and other duties under the Hazardous and Solid Waste Amendments of 1984 ("HSWA").^{1/} As requested by the Agency's Chief Judicial Officer, Region V responded to the petition on January 12, 1989 ("Region Response"). Olin then submitted a reply dated February 3, 1989.

^{1/} The balance of the RCRA requirements are being imposed through a permit issued by the State of Wisconsin, which has received final authorization under RCRA §3006 and 40 CFR Part 271 to administer the pre-HSWA RCRA program in lieu of the federal program.

Olin's petition raises a single issue: whether Region V properly named Olin as co-permittee for this government-owned contractor-operated ("GOCO") facility. Olin argues that it does not exercise actual operational control over the facility due to statutory and regulatory provisions that prohibit Olin from altering the facility or taking other actions (e.g., undertaking corrective action) without direct concurrence and funding by the Army. Specifically, Olin contends that the Anti-Deficiency Act, 31 U.S.C. §§1341-42, and the Federal Acquisition Regulation provisions (48 CFR Parts 1-6399) subject GOCO contractors to stringent cost controls and restrictions on facility alteration, thereby undermining their ability to comply with a RCRA permit. See Petition at 3. In Olin's view, GOCO contractors are "legally incapable" of meeting the obligations of a RCRA permittee. Petition at 1.

Analysis

Under the rules governing this proceeding, there is no automatic administrative appeal 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. See 40 CFR §124.19; 45 Fed. Reg. 33,412 (May 19, 1980). The preamble to Section 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 thus on the petitioner.

RCRA §3005(a) directs the Agency to issue rules "requiring each person owning or operating [a hazardous waste facility] * * * to have a permit issued pursuant to this section." ^{2/} This provision prohibits all hazardous waste management after such rules become effective "except in accordance with such a permit," ^{3/} and reflects a bedrock principle of the RCRA program, namely, that owners and operators of RCRA facilities are jointly and severally responsible for ensuring compliance. ^{4/}

The Act does not define the term "operator," but the rules that implement the statute provide that an "operator" is "the person responsible for the overall operation of a facility." 40 CFR §260.10. Olin does not contend that the facts unique to this case make it inappropriate to name it as a co-permittee; rather, it argues that no contractor at a GOCO facility should ever be named as a co-permittee because GOCO contractors do not have sufficient operational control. See Petition at 3.

^{2/} 42 U.S.C.A. §6925(a); see also id. §6924(a) (requiring Agency to promulgate performance standards applicable to "owners and operators" of hazardous waste facilities).

^{3/} 42 U.S.C.A. §6925(a).

^{4/} See, e.g., H.R. Rep. No. 1491, 94th Cong., 2d Sess. 28 (1976); 45 Fed. Reg. 33,169 (May 19, 1980); In re Hawaiian Western Steel Limited, Inc., RCRA (3008) Appeal No. 88-2 (EPA Nov. 17, 1988) (on petition for reconsideration); In re Arrcom, Inc., RCRA (3008) Appeal 86-6 (CJO May 19, 1986).

This sweeping contention contravenes firmly established, Agency-wide practice. The Agency has consistently read the statutory term "operator" to include GOCO contractors, and it will continue to hold GOCO contractors responsible for complying with RCRA where appropriate. ^{5/} Because RCRA requirements are applied to any particular facility through a permit, GOCO contractors are necessarily subject to being named as co-permittees where they have responsibility for the operation of hazardous waste facilities. ^{6/} Here, Region V correctly determined on the facts of this case that Olin has such responsibility at BAAP under its contract with the Army. ^{7/}

^{5/} See, e.g., Memorandum from J. Porter, Assistant Administrator, Office of Solid Waste and Emergency Response, to Regional Administrators, re "Enforcement Actions Under RCRA and CERCLA at Federal Facilities," at 4 (Jan. 25, 1988); Memorandum from B. Diamond, Office of Waste Programs Enforcement, to Hazardous Waste Management Division Directors and Regional Counsels, re "Enforcement Actions at Government-Owned Contractor-Operated Facilities" (Sept. 8, 1988); Memorandum from G. Lucero, Office of Waste Programs Enforcement, and M. Williams, Office of Solid Waste, to Waste Management Division Directors, re "Determination of Operator at Government-Owned Contractor-Operated (GOCO) Facilities" (June 24, 1987); see also Hearings on Federal Facility Compliance with Environmental Laws Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 95th Cong., 1st Sess. (1987) (Statement of F. Henry Habicht II, Assistant Attorney General, at 13-14).

^{6/} Id.

^{7/} On appeal, Olin does not deny its status as de facto operator of BAAP. Indeed, in its comments on the draft permit, Olin asserted that it "maintains the facility under contract with the U.S. Army." See Letter from J. Mattei, BAAP Plant Manager, to B. Egan, EPA Region V (June 24, 1988). In its response to the Petition, the Region notes that BAAP's Part A permit application, whose accuracy Olin certified, identifies Olin as the facility operator. See Region Response at 5 & Exh. B. A December 1986 operations report, prepared and submitted by Olin in lieu of a
(continued...)

Olin's petition does not persuade me to reconsider the Agency's position concerning GOCO contractors. Its argument conflicts with the plain meaning of the word "operate," which suggests that identification of a facility operator should be based on the performance of certain critical functions, not on whether the facility owner retains authority to approve particular activities.^{8/} Olin points to nothing in the statute or regulations to suggest that the term "operator" excludes GOCO contractors simply because their actions are subject to certain restrictions regarding funding and authorization.

Olin's primary concern appears to be that the Army might refuse to authorize the actions needed to meet the requirements of the permit and that Olin might thus be precluded from carrying out its permit responsibilities. There is nothing in the record, however, to suggest that such a conflict will ever occur, and Olin's concerns are thus purely speculative. Moreover, if Olin were legally precluded from meeting its obligations under the permit due to the absence of authorization, the issue would be best addressed through the exercise of enforcement discretion, or as a defense in an enforcement action. Olin's proposal -- to free it from any duty under the permit, regardless of whether any

^{7/} (...continued)

Part B application, reflects other indicia of operational control. *Id.* at 5-7 and Exh. C.

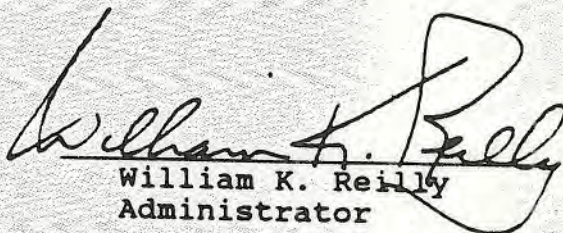
^{8/} See The American Heritage Dictionary, at 871 (1982) ("operate" as a transitive verb means "[t]o run or control the functioning of" or "[t]o conduct the affairs of; manage: operate a business").

dispute with the Army actually occurs -- would defeat the statutory mandate that owners and operators of RCRA facilities remain responsible for compliance with the hazardous waste laws. ^{9/}

Olin has failed to show that the Region's permit determination is based on a clear error of law or fact or otherwise warrants review. For the reasons set forth above and in the Region Response, the petition is denied. ^{10/}

So ordered.

Dated: NOV 22 1989


William K. Reilly
Administrator

^{9/} Region V has stated that Olin may request modification of the permit to reflect any contractual agreements between Olin and the Army regarding their respective responsibilities under the permit. See Region Response to Comments on the Draft Permit at 2 (Region Response at Exh. E).

^{10/} Olin also requests that a copy of its contract with the Army be added to the record in this case. See Feb. 3, 1989 Reply at 2-4. Olin itself states, however, that the relevant portions of the contract consist of federal statutory and regulatory provisions, official notice of which may be taken by the Agency. Id. at 3. Olin has failed to show that supplementation of the record at this late date would be appropriate.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Olin Corporation, Badger Army Ammunition Plant, RCRA Appeal No. 88-18, were sent to the following persons in the manner indicated.

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Dated: NOV 27 1989


Brenda H. Selden, Secretary to
the Chief Judicial Officer