

Rachel's Environment & Health News

#328 - An Update On Two Key Incinerator Battles

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Two high-visibility incinerator battles illustrate some of the DEFINING ISSUES as President Clinton establishes environmental policies and an environmental agency to implement them. For that reason, we interrupt our PCB series, begun last week, to bring you updates on both fights. We'll continue with PCBs next week.

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They're once again burning dioxin-contaminated chemicals in a residential neighborhood of Jacksonville, Arkansas. A 3-judge panel from the 8th Circuit Court of Appeals in St. Louis overturned the temporary shutdown order issued February 12 by federal district judge Stephen Reasoner in Little Rock (see RHWN #325). Judge Reasoner had ordered the burning stopped after federal and state environmental officials admitted in court that the Vertac incinerator in Jacksonville could not achieve the 99.9999% destruction efficiency required by regulations. (SEE RHWN #325.) The 3-judge appeals panel said Judge Reasoner's order lacked findings of fact and conclusions of law, and was therefore invalid on procedural grounds. The private incinerator operator ("Vertac Site Contractors") and U.S. EPA together appealed Judge Reasoner's order and won.[1]

The 8th Circuit judges will decide March 17 whether to permanently overturn Judge Reasoner's temporary order, or whether to let Judge Reasoner shut down the Jacksonville incinerator. Meanwhile, Judge Reasoner heard additional testimony in the case March 4 and 5 and will issue a permanent order soon--most likely before the March 17 meeting of the appeals panel. In court March 4, Judge Reasoner said he hadn't changed his mind about his February 12 decision.[2] As we go to press Judge Reasoner is still hearing testimony.

At issue is EPA's own regulations governing hazardous waste incinerators. The regulations begin with a "preamble," which says, "Although the DRE [destruction and removal] performance standard APPLIES TO EACH WASTE FEED BURNED, this does not mean that a separate trial burn for each waste or each different mixture of wastes is required. If the owner or operator established (through a trial burn) operating conditions for those wastes THAT ARE MORE DIFFICULT TO DESTROY, this could provide the alternative documentation for the permitting official to allow certain other wastes to be burned at the same conditions." [3]

The regulations then go on to say that a DRE of 99.99% must be achieved for all hazardous wastes[4] except for a few particularly hazardous ones like dioxins, for which the required efficiency of destruction (DRE) is 99.9999%.[5]

EPA officials argued March 4 before Judge Reasoner that the Jacksonville incinerator doesn't really have to destroy 99.9999% of the dioxin fed into it. They argued that their regulations say a "surrogate" chemical may be burned instead of dioxin, which is true (see the preamble just quoted above). However the regulations say that the surrogate must be "more difficult to destroy" than dioxin. During a 1991 "trial burn" hexachlorobenzene was burned as a surrogate for dioxin, but, by mistake, actual dioxin was also burned. The hexachlorobenzene was burned with 99.9999% efficiency but the actual dioxin was burned with only 99.96% efficiency. It seems clear, therefore that hexachlorobenzene is not "more difficult to destroy" than dioxin but is in fact easier to destroy. The data don't lie. It therefore seems unlikely that Judge Reasoner will become convinced that EPA is complying with its own regulations when it gives a green light to an incinerator operator who (a) admits his machine can't achieve 99.9999% destruction of dioxin, and who (b) has offered no data showing that his machine can destroy with 99.9999% efficiency a chemical "more difficult to destroy" than dioxin.

Importantly, when Jacksonville citizens asked EPA chemist Dr. Cate Jenkins to testify on their behalf, EPA headquarters prevented Jenkins from testifying. Dr. Jenkins helped write EPA's dioxin incinerator regulations in 1985 and she therefore had first-hand

knowledge of the INTENT of the regulations. Furthermore, Jenkins received a written reprimand for writing down what she knew about the history of the dioxin incinerator regulations, on EPA letterhead, and sending it to a lawyer representing citizens in Jacksonville.[6] This incident offers some insight into the new administration's response to whistle blowers inside the agency.

The Jacksonville fight is being watched closely by the incineration industry. There are roughly 100 sites in the country contaminated with dioxins, and incineration is planned at many of them. In the state of Missouri, for example, the International Technology Corporation ("IT Corp") in January won a contract to burn dioxin-contaminated soil at Times Beach, but the Missouri Department of Natural Resources has said it will require IT Corp to achieve 99.9999% destruction of dioxin. IT Corp says it has achieved only 99.97% destruction at another incinerator it built.[7]

The Jacksonville legal fight may also impact the outcome of the nation's other high-visibility incinerator fight--that of Waste Technologies Industries (WTI) in East Liverpool, Ohio. According to an affidavit from EPA chemist Dr. Cate Jenkins, WTI is seeking to burn dioxin-containing wastes.[8]

Local citizens have been fighting the WTI incinerator proposal for 13 years. During 1991 and 1992 the incinerator was constructed, and it is now seeking a permit to begin burning. The Bush administration's EPA issued permission for a "trial burn" January 15. Usually when a "trial burn" is conducted, the incinerator begins commercial operation immediately while EPA reviews the "trial burn" data and decides whether to issue an operating permit. Analyzing the trial burn data ordinarily takes up to a year. In response to EPA's green light for a WTI "trial burn," citizens filed a last-ditch lawsuit. Citizens claimed the trial burn and the year-or-so of subsequent commercial burning would harm their health. In court, WTI and EPA claimed there would be no "unacceptable" health risks. The WTI incinerator sits on the edge of the Ohio River, 400 feet from the nearest home, 1100 feet from the nearest school, in a valley known for its stagnant and contaminated air.

Federal District Judge Ann Aldrich in Cleveland ruled March 5 that WTI can conduct the 8-day test burn but cannot then begin commercial operation because "the approximately one-year post trial burn period of operation may cause imminent and substantial endangerment to health and the environment." The judge ruled that WTI must cease operation until EPA analyzes the trial burn data.[9] As we go to press, WTI is conducting the trial burn and has appealed the judge's ban on commercial operation. According to Robin Woods in EPA's press office in Washington, EPA has not decided yet whether to join WTI in its appeal.

At the trial EPA officials admitted they had conducted two risk assessments to assess the dangers to local residents posed by the WTI incinerator. EPA released to the public only one of the two risk assessments, the one showing no substantial danger to residents, but did not release the second risk assessment, which indicated dangers 1000 times greater. William Sanjour, a policy analyst in EPA headquarters in Washington, on March 4 sent a memo to EPA's Inspector General asking for an official investigation. His letter said, in part, "High level EPA officials, whose salaries are paid by the taxpayers, who are sworn to protect human health and the environment, tried to suppress this study for the financial benefit of the owners of WTI.... This behavior is consistent with other actions by EPA officials in unethically and illegally promoting the interests of hazardous waste incinerator operators as I have previously pointed out to you in my memoranda and letters of May 15, 1992, December 22, 1992, January 14, 1993, and February 12, 1993." [10]

Where does the Clinton administration stand on incineration in general? In an interview with C&EN [Chemical & Engineering News] March 1, EPA administrator Carol Browner remained noncommittal about hazardous waste incineration. She said "much

can be done to reduce the amount of hazardous waste generated," and the remaining wastes must be handled in the safest possible manner, she said, but she did not take a stand for or against any particular technology. She did say that "the nation has to be careful not to 'overbuild hazardous waste disposal facilities of any type' to prevent creating an incentive for generating more hazardous waste."

"However, Browner has a different take on incinerating municipal solid waste," C&EN reports. "If properly constructed and managed, 'incineration is going to be part of a comprehensive system for dealing with garbage,'" Ms. Browner told C&EN.[11]

--Peter Montague

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[1] Sandy Davis, "Vertac incinerator fired up after judge lifts order banning burn," ARKANSAS DEMOCRAT-GAZETTE February 27, 1993, pgs. 1A, 10A.

[2] Julie Stewart, "Lawyer dismisses risk in burning Vertac wastes," ARKANSAS DEMOCRAT-GAZETTE March 5, 1993, pgs. 1B, 3B.

[3] FEDERAL REGISTER January 23, 1981, pg. 7675. Emphasis added.

[4] Chapter 40 CODE OF FEDERAL REGULATIONS Part 263.343(a)(1).

[5] Chapter 40 CODE OF FEDERAL REGULATIONS Part 263.343(a)(2).

[6] Memo from Gerald H. Yamada, Office of [EPA's] General Counsel, to Catherine L. Jenkins, dated February 26, 1993.

[7] Tom Uhlenbrock, "Court Ruling on Dioxin Clouds Times beach Incinerator Project," ST. LOUIS POST-DISPATCH February 14, 1993, pg. 6C. And Tom Uhlenbrock, "State Firm on Rule for Incinerator 99.9999% of Dioxin Must be Destroyed," ST. LOUIS POST-DISPATCH January 24, 1993, pg. 1D.

[8] Cate Jenkins, "Affidavit of Cate Jenkins, Ph.D., Contamination of RCRA Hazardous Waste Nos. D037, D041 and F032 With Dioxins," dated March 5, 1993.

[9] Greenwire staff, "Incinerator: Judge OKs 8-day trial burn in E. Liverpool," GREENWIRE [The daily executive briefing on the environment; phone (703) 237-5130] March 8, 1993, story #3.

[10] Memo ("High Level EPA Officials Involved in Suppression of Health Risk Data in WTI Case") from William Sanjour to John Martin, dated March 4, 1993.

[11] Lois Ember, "EPA's Browner to Take Holistic Approach to Environmental Protection," C&EN [Chemical & Engineering News] March 1, 1993, pgs. 19-20.

Descriptor terms: william sanjour; cate jenkins; epa; incineration; wti; oh; ar; jacksonville, ar; vertac chemical co; carol browner; risk assessment; misfeasance; malfeasance; stephen reasoner; ann aldredge; trials; appeals; regulation; regulations; rcra;