

BEFORE THE BOARD OF ENVIRONMENTAL QUALITY  
STATE OF IDAHO

IN THE MATTER OF THE APPLICATION OF )  
SAFETY-KLEEN, INC. FOR A HWMA )  
PERMIT FOR ITS BOISE, IDAHO SERVICE )  
CENTER, )  
\_\_\_\_\_)  
SAFETY-KLEEN SYSTEMS, INC., )  
Petitioner, )  
v. )  
IDAHO DEPARTMENT OF ENVIRONMENTAL )  
QUALITY, )  
Respondent. )  
\_\_\_\_\_)

Docket No. 0105-03-15

ORDER ON PETITION FOR  
REVIEW OF OCTOBER 27, 2003  
PRELIMINARY ORDER  
DENYING MOTION TO DISMISS  
OR ALTERNATIVELY  
OCTOBER 6, 2003 PRELIMINARY  
ORDER GRANTING REVIEW

This is an appeal by the Idaho Department of Environmental Quality (“Department”), following the denial of its motion to dismiss Safety-Kleen, Inc.’s Hazardous Waste Management Act of 1983 (“HWMA”) permit appeal on the grounds of mootness. Alternatively, the Department requests the Board of Environmental Quality (“Board”) to review a related order granting review of the Safety-Kleen permit.

**I. FACTS AND PROCEDURAL BACKGROUND<sup>1</sup>**

On July 15, 2003, the Department issued an HWMA permit for Safety-Kleen’s Boise, Idaho Service Center facility. The permit authorizes Safety-Kleen to store

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<sup>1</sup> Since the Board is granting the Department’s Motion to Dismiss, we note here only those details necessary to understand the unique procedural posture of this case.

hazardous wastes at its facility. On August 13, 2003, Safety-Kleen filed a petition requesting review of permit condition IV.A.1 which, in part, requires that a dumpster used for the management of solvent collected from Safety-Kleen's Continuous Use Program ("CUP") be included in the permit. Safety-Kleen contends that the dumpster is not subject to permitting and regulation under the HWMA.

The matter was assigned to a hearing officer on August 20, 2003. Following a status conference, the hearing officer issued a preliminary order granting review of Safety-Kleen's petition and establishing a briefing schedule. In the October 6, 2003, Preliminary Order on Petition for Review ("Preliminary Order I"), the hearing officer determined that appeals of HWMA permits under the Rules and Standards for Hazardous Waste in Idaho ("Hazardous Waste Rules") IDAPA 58.01.05 *et seq.*, precludes the offering of further evidence or development of additional facts as provided for in the Idaho Administrative Procedures Act, Idaho Code § 67-5242 through -5254, and the Rules of Administrative Procedure Before the Department of Environmental Quality ("DEQ Rules of Procedure") IDAPA 58.01.23 *et seq.* The Hazardous Waste Rules incorporate by reference the procedures of 40 C.F.R. § 124.19 ("Rule 124"), a procedural rule governing appeals of EPA-issued permits (*i.e.*, permits not issued by state-authorized programs) before the federal Environmental Appeals Board. The hearing officer determined that the interplay of the applicable state and federal procedural rules limits an HWMA permit appeal to a record review and appellate-style briefing.

In Preliminary Order I, the hearing officer stated:

IDAPA 58.01.05.996 does not open the door for an evidentiary hearing as contended by the Department, because 40 CFR 124.19(c) is clear and specific about the nature of the review and that public notice is for a "briefing schedule." Such is consistent with the review being designated as

an appeal. *If the Department desires to augment the record there is provision made under 40 CFR 124.19(d) to withdraw the permit, prepare a new draft permit and submit it for further public comment and hearing.* Furthermore, disposition on the merits of the review of appeal can include a remand, the scope of which is not prescribed. 40 CFR 124 (f)(1)(iii). This presumably could include a reopening of the public comment period pursuant to 40 CFR 124.14(a)(1) if such “could expedite the decision making process.”

Preliminary Order I (Oct. 6, 2003) p. 10 (emphasis added).

On October 20, 2003, prior to Preliminary Order I becoming final, the Department withdrew those portions of the permit challenged by Safety-Kleen. The “Notice of Withdrawal of Permit” stated, in relevant part:

The Idaho Department of Environmental Quality (Department), through the office of the Attorney General hereby gives Notice that conditions IV.A.1 and IV.B.1 of the permit for Safety-Kleen’s Boise, Idaho facility, (EPA No. IDD981770498) issued July 15, 2003, are hereby withdrawn pursuant to IDAPA 58.01.05.013 [40 CFR § 124.19(d)].

These permit conditions are withdrawn for the purpose of reconsidering and developing additional information as related to Safety Kleen’s “Continuous Use Program.” All other terms and conditions of the permit for Safety-Kleen’s Boise, Idaho facility, (EPA No. IDD981770498) issued July 15, 2003 shall remain in effect.

Upon completion of its review of these permit conditions, the Department shall issue a new draft which shall incorporate any necessary terms and conditions related to the facility as determined from the Department’s review.

On October 21, 2003, the Department filed a Motion to Dismiss “for the reason that the appeal of Conditions IV.A.1 and IV.B.1 of the Safety-Kleen permit is MOOT by reason of the Department’s withdrawal of the Permit Conditions pursuant to IDAPA 588.01.05.13 [40 CFR part 124.19(d)].” On October 22, 2003, Safety-Kleen filed an initial response to the Motion to Dismiss asserting that the withdrawal notice was without force

or effect because a withdrawal under Rule 124 must occur before the issuance of an order granting or denying a petition for review.

On October 27, 2003, the hearing officer issued *Preliminary Order Denying Motion to Dismiss* (“Preliminary Order II”). Preliminary Order II denied the Department’s motion as well as Safety-Kleen’s request to file further memoranda. In addition, the hearing officer concluded that “the Department’s Notice of Withdrawal of Permit pursuant to 40 C.F.R. 124.19(d) and publication of the same is defective, and of no effect. A statement rescinding the Notice is to be included in the public notice setting forth the briefing schedule of the appeal.” The Department’s petition to the Board for review of Preliminary Orders I and II followed.

On March 10, 2004, the Board heard oral argument from the Department and Safety-Kleen. Having fully considered the record and the oral and written arguments of the parties, the Board, by unanimous vote, rejected Preliminary Order II and held that the Department’s Motion to Dismiss should be granted on the grounds that the permit conditions challenged by Safety-Kleen had been withdrawn.

## **II. ANALYSIS AND CONCLUSIONS OF LAW**

We have before us a complicated scheme of rules governing the procedures for appeals of hazardous waste permits issued by the Department. The Board has not had occasion to apply this mix of federal and state rules governing such appeals, and to our knowledge, this is the first time the Department, the hearing officer, and Safety-Kleen have attempted to understand and abide by the concurrent application of the Idaho and federal rules. Nor is there any guidance about the interplay of the federal and state processes within the rules themselves. The rules relevant to this case are set forth below.

IDAPA 58.01.23 establishes the rules of administrative procedure for appeals of Department actions. IDAPA 58.01.23.001.03(a) provides, in relevant part:

Applicability of Contested Case Provisions. Section 39-107, Idaho Code, provides the opportunity to initiate a contested case proceeding.... These rules govern such proceedings, except the following:

a. Hazardous Waste Permit Program-Procedures for Decision Making. The procedure for decision making regarding all hazardous waste permits, including all hearings and administrative appeals, shall be governed by Rules of the Idaho Department of Environmental Quality, IDAPA 58.01.05, Section 013, "Rules and Standards for Hazardous Waste".

IDAPA 58.01.05.996 provides:

Except as set forth in Section 013, administrative appeals of agency actions shall be governed by IDAPA 58.01.23. "Rules of Administrative Procedure Before the Board of Environmental Quality".

The Rules and Standards for Hazardous Waste, IDAPA 58.01.05.013, provide, in relevant part:

**PROCEDURES FOR DECISION-MAKING (STATE PROCEDURES FOR RCRA OR HWMA PERMIT APPLICATIONS).**

40 CFR Part 124, Subparts A and B are herein incorporated by reference as provided in 40 CFR, revised as of July 1, 2002, except that the fourth sentence of 40 CFR 124.31(a), the third sentence of 40 CFR 124.32 (a), and the second sentence of 40 CFR 124.33(a) are expressly omitted from the incorporation by reference of each of those subsections. For purposes of 40 CFR 124.6(e), 124.1(b), and 124.1(c)(1)(ii) "EPA" and "Administrator" or "Regional Administrator" shall be defined as the U.S. Environmental Protection Agency and the U.S. Environmental Protection Agency Region 10 Regional Administrator, respectively.

IDAPA 58.01.05.002 provides:

**INCORPORATION BY REFERENCE OF FEDERAL REGULATIONS.**

Any reference in these rules to requirements, procedures, or specific forms contained in the Code of Federal Regulations (CFR), Title 40, Parts 124, 260-266, 268, 270, 273, and 279 shall constitute the full adoption by reference of that part and Subparts as they appear in 40 CFR, revised as of July 1, 2002, including any notes and appendices therein, unless expressly provided otherwise in these rules.

Rule 124 (40 CFR 124.19) provides, in relevant part:

(a) Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 270.29 of this chapter to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. . . .

. . . .

(c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Environmental Appeals Board under paragraph (a) or (b) of this section shall be given as provided in § 124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

(d) The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part. Any portions of the permit which are not withdrawn and which are not stayed under § 124.16(a) continue to apply.

The Department seeks dismissal of this case on the grounds that the agency's withdrawal of the permit terms to which Safety-Kleen objects renders the case moot. The Department argues that the motion to dismiss should have been granted because the agency acted in accordance with options outlined in Preliminary Order I, referencing Rule 124. In the Department's view, the hearing officer's statement "if the Department desires to augment the record, there is a provision made under 40 CFR 124.19(d) to withdraw the permit, prepare a new draft permit and submit it for further public comment and hearing"

essentially advised the agency that it could withdraw the permit. Because the order at issue was a preliminary order, which did not become final until 14 days following its service on the parties, the agency asserts that its withdrawal and motion to dismiss were timely.<sup>2</sup> In contrast, Safety-Kleen argues that withdrawal of HWMA permit conditions under Rule 124 must occur before the issuance of any decision, preliminary or final, granting or denying a petition for review.

In applying and attempting to reconcile the federal and state rules, the hearing officer concluded that, “technically, the remedy outlined under 40 CFR 124.19(d) [withdrawal of permit] was available up until the preliminary order became final on October 22, 2003.” The Department withdrew the permit on October 20, 2003, and filed its Motion to Dismiss on October 21, 2003.

The hearing officer, while acknowledging that the withdrawal and motion to dismiss were timely, nevertheless concluded that allowing parties to withdraw after the issuance of a preliminary order granting or denying review was not intended by the federal rule. In reaching this determination, the hearing officer expressed concern about a party’s ability to “test the waters” and then withdraw if the decision was not to its liking. Other conclusions included a determination that, because there was no appeal of Preliminary Order I, the order became a final order. As a result, the hearing officer concluded that he had no authority to countermand or moot a final order of the Board.

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<sup>2</sup> Idaho Code § 67-5243(1) provides: “If the presiding officer is not the agency head, the presiding officer shall issue either: (a) a recommended order, . . . , or (b) a preliminary order, which becomes a final order unless reviewed in accordance with section 67-5245, Idaho Code.” Idaho Code § 67-5246(3) provides: “If the presiding officer issued a preliminary order, that order becomes a final order unless it is reviewed as required in section 67-5245, Idaho Code.” Idaho Code § 67-5245(3) provides: “A petition for review of a preliminary order must be filed with the agency head, or with any person designated for this purpose by rule of the agency, within fourteen (14) days after the issuance of the preliminary order unless a different time is required by other provision of law.”

The hearing officer also made a finding that the notice of withdrawal was defective because the Department did not issue a draft permit at the time it issued the notice of withdrawal. For the following reasons, we conclude that the case should be dismissed and that the challenged permit conditions have been withdrawn.

**A. The Department's Reliance On The Hearing Officer's Statements Regarding The Opportunity To Withdraw The Permit Conditions Under Rule 124 Was Reasonable.**

The record indicates that the Department reasonably relied on the hearing officer's statements regarding withdrawing the permit pursuant to Rule 124. In Preliminary Order I, the hearing officer advised the Department that the record did not appear to support the permit requirement for the CUP dumpster and that the Department could not add to the record as part of a contested case. The hearing officer also directed the Department to the provisions for permit withdrawals in Rule 124. In light of the hearing officer's earlier decisions interpreting Rule 124 to govern the totality of the proceedings, it was reasonable for the Department to conclude that withdrawing the permit and submitting a motion to dismiss within the required time period was appropriate.

With respect to the permit withdrawal itself, we disagree with the hearing officer's conclusion that the Department was required to simultaneously issue a new draft permit with the issuance of its notice of withdrawal of the contested permit conditions. Under this interpretation, the Department would not have time to seek additional information or conduct necessary analyses for the issuance of a revised draft permit for the Safety-Kleen facility or to support a decision that a permit is not required. Nor would the Department have time to issue a well-considered revised draft permit before the preliminary order became final. This would prevent the Department from addressing the concerns raised by Safety-Kleen and re-evaluating its previous decision with the benefit of additional

information. Any revised permit must be well-considered and grounded in solid evidence and analysis. Granting the Department's motion to dismiss allows further consideration and allows the parties to work together toward a mutually satisfactory resolution, if possible.

**B. Granting The Motion To Dismiss On Grounds Of Mootness Does Not Prejudice The Parties.**

Mootness is a prudential doctrine, which allows a court to determine that a proceeding will be advisory in nature and provide no worthwhile benefit to the parties. "A moot action is one where the legal issues are no longer live or the parties lack a legally cognizable interest in the outcome." Sample v. Johnson, 771 F.2d 1335, 1338 (9<sup>th</sup> Cir. 1985). Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies. Id. The Idaho courts' application of the mootness doctrine parallels that of the federal courts. *See, e.g.,* Comm. for Rational Predator Management v. Dep't of Agriculture, 129 Idaho 670, 931 P.2d 1188 (1997); Great Beginnings Child Care, Inc. v. Office of the Governor, 128 Idaho 158, 911 P.2d 751 (1996) ("Great Beginnings").

Administrative agencies are not necessarily bound by the constitutional requirement of a case or controversy that limits the authority of federal courts to rule on moot issues. *See* Climax Molybdenum Co. v. Secretary of Labor, MSHA, 703 F.2d 447, 451 (10<sup>th</sup> Cir. 1983); Reich v. Occupational Safety & Health Review Comm'n, 102 F.3d 1200, 1201 (11<sup>th</sup> Cir. 1997). Rather, an administrative agency has considerable discretion in determining whether "the resolution of an issue before it is precluded by mootness." Climax, 703 F.2d at 451 (citing Tennessee Gas Pipeline Co. v. Federal Power Comm'n, 606 F.2d 1373, 1379-80 (D.C. Cir.1979)).

Safety-Kleen contends that even if its claim would be otherwise moot, the Board should reach the merits of the initial permit decision under an exception to the mootness doctrine, which permits federal courts to consider cases that are “capable of repetition, yet evading review.” Southern Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). *See also*, Great Beginnings, 128 Idaho at 160, 911 P.2d at 753 (1996).

Safety-Kleen’s concern is that the Department not be allowed to “test the waters” by waiting for a hearing officer’s decision regarding review and then withdrawing the permit condition if the hearing officer’s decision is unfavorable. Safety-Kleen contends that the Department could repeat the process over and over again until it either received a favorable decision or the permit applicant acceded to the Department’s position. The Board recognizes that this kind of conduct would be unfair and will not tolerate or approve of the same. However, in this case the Board believes that the Department acted in good faith when it withdrew the permit for further administrative review.

The exception to the mootness doctrine relied on by Safety-Kleen is inapplicable here because it is employed only where agencies are attempting to “avoid judicial review, whenever they choose, simply by withdrawing the challenged rule.” Doremus v. United States, 793 F. Supp. 942, 946 (D. Idaho 1992) (citations omitted); *See also* Envtl. Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 809-10 (D.C. Cir. 1983). In the instant case, the Department determined to withdraw the permit in order to re-evaluate its conclusions concerning the CUP dumpster and gather further information to assist in its decision-making process. This decision was based, in part, on the hearing officer’s reference to the withdrawal provisions of Rule 124.

There is nothing in the record to suggest that the Department intends to issue and re-issue permits until it receives a favorable decision or until Safety-Kleen concedes that the Department's determination is correct. To the contrary, granting the motion to dismiss allows the Department to address Safety-Kleen's and the hearing officer's criticisms relative to the inadequacy of the record and the alleged failure of the Department to respond to certain evidence and documentation submitted by Safety-Kleen in support of its position. A possible outcome of that endeavor is a Department decision that the CUP dumpster does not require a HWMA permit. Thus, permitting the Department to reconsider the terms of the permit is in accord with a basic principle of administrative case law that agencies be given an opportunity to correct their mistakes so as to avoid costly and inefficient court appeals. *See* Kenneth Culp Davis & Richard J. Pierce, Administrative Law Treatise § 15.2, at 309 (3d ed. 1994) (discussing policies favoring the doctrine of exhaustion in administrative law).

We do not believe that Safety-Kleen is prejudiced by the withdrawal of the permit. As the hearing officer noted, remand for supplementation of the record is a potential remedy in permit appeal cases under Rule 124. In the event that a revised draft permit is issued, Safety-Kleen faces no greater burden than resubmitting documents and additional materials to support its position. On the other hand, the Department may decide not to issue a permit and Safety-Kleen will have been granted the relief sought.

We recognize the uncertainty that exists for the parties regarding the proper interpretation of the hazardous waste rules as applied to the CUP dumpster. It would not, however, be prudent to review or enforce a hearing on the merits of this case before the Department has responded to criticism raised by the hearing officer and Safety-Kleen. The

dismissal of this case allows the Department to conduct a comprehensive and thorough evaluation of the relevant technical and legal issues and document that investigation in the administrative record. Should the Department issue a revised draft permit objectionable to Safety-Kleen, there will be ample time to challenge its issuance, making the public interest exception to the mootness doctrine inapplicable here.

Because we are dismissing this case on grounds of mootness, we do not reach the many other procedural issues raised by the parties. Nevertheless, we recognize the need to clarify how the Idaho Administrative Procedure Act and DEQ Rules of Procedure are applied in future HWMA permit appeals. It is our understanding that the Department has taken steps in this direction by initiating negotiated rulemaking to adopt procedures for HWMA permit appeals that are consistent with the Idaho Administrative Procedure Act and DEQ Rules of Procedure.

### **III. CONCLUSION**

It is important that the Department fully develop the record and articulate a rational basis for any future decision concerning the CUP dumpster. In light of the strong admonition of the hearing officer regarding the strength of the administrative record, his conclusion that the Department could not add to the record as part of the contested case process, and his reference to the provisions for withdrawal in Rule 124, we conclude that the Department reasonably withdrew the permit before Preliminary Order I became a final order. Accordingly, we reject Preliminary Order II. We find that the permit withdrawal was effective and, therefore, grant the Department's Motion to Dismiss on the grounds of mootness.

This is a **FINAL ORDER** of the Board. Pursuant to Idaho Code §§ 67-5270, and 67-5272, any party aggrieved by this final order or orders previously issued in this case

may appeal this final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which (i) a hearing was held; (ii) the final agency action was taken; (iii) the party seeking review of the order resides, or operates its principal place of business in Idaho; or (iv) the real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days of the service date of this final order. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

Dated this \_\_\_\_ day of March 2004.

BOARD OF ENVIRONMENTAL QUALITY

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